Shadow Report to the List of Issues for the Seventh periodic report of Ukraine on the implementation of the International Covenant on Civil and Political Rights (CCPR/C/UKR/Q/7)

2013

By the Kharkiv Human Rights Protection Group
This report is prepared by the Kharkiv Human Rights Protection Group (KHPG). KHPG is one of the oldest and most active Ukrainian human rights organizations. As an independent legal entity it was registered in November 1992, although it has been known as Kharkiv “Memorial” human rights group since as early as 1988, and its individual members were active in human rights protection movements of the 60-ies — 80-ies. KHPG operates in three main areas: rendering assistance to persons, whose rights have been violated, investigating facts of human rights violations; legal education and promotion of human rights culture through public events and publishing activity; analysis of the human rights situation in Ukraine (first of all, with respect to political rights and civil freedoms).

Contact person: Mr. Gennadiy Tokarev, Kharkiv Human Rights Group, phone + 38 (057) 700 67 72, e-mail: gtoukr@gmail.com
On Paragraph 11

It’s worth noting that the prosecutor office initiated criminal proceedings against indefinite number of officers of the internal affairs bodies regarding the incident of beating to death a 36-years old man in pretrial detention facility in Zhytomyr in 2005. The criminal proceedings were transferred to the district court. The information on further investigation of the case is absent.

As for the case of beating to death Armen Melkonian in Kharkiv SIZO in 2005 the prosecutor’s office initiated criminal proceedings in connection with this incident after critical articles in the press and insistence of human rights protection organizations and relatives of the deceased. It is noted in the medical report that the reason of death was not established. On the other hand, it is written in the same document by the hand of the forensic expert that the death occurred due to asphyxia, i.e. Melkonian choked. The information on the progress in investigation of this case is absent.

As for the death of Mykola Zakhadkhevskyi in SIZO in 2004 it should be noted that the department of monitoring of the enforcement of judgments of Kharkiv SIZO does not have any records regarding this person. In addition, no fatal case happened in the facility in 2004.

The essential problem is numerous violations of the right to life in prisons and facilities of temporary detention (ITT, SIZO, penitentiaries etc.). Terrible conditions and often practically unavailable or inadequate medical care result in death of people. The statistics of 2006 – 2012 is presented below.

<table>
<thead>
<tr>
<th>Mortality in SIZO and Penitentiaries</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indicators</td>
</tr>
<tr>
<td>Number of Persons in the Detention Facilities</td>
</tr>
<tr>
<td>Number of Deaths</td>
</tr>
<tr>
<td>Cases of Suicide</td>
</tr>
</tbody>
</table>

The total amount of deaths in the detention facilities from 2006 up to the beginning of 2013 is: 5994 persons, among them the cases of suicide: 350.

Special attention should be paid to the investigation of the deaths in detention facilities. In the cases mentioned the initial investigation in majority of the cases is conducted by the authority involved (administration of the detention facility where the person died) which collects evidence of the guilt and innocence of its staffers, and only after this it transfers mentioned materials to the prosecutor’s office. In fact there is a situation when the prosecutor’s office makes a decision to initiate criminal proceedings or refuses to initiate them solely on the basis of evidence collected by the authority involved which doesn’t meet the requirement of independence.

There is a common situation when investigation authority refuses to initiate criminal proceedings in order not to conduct investigation. Particularly often the refusals to initiate criminal proceedings take place in the cases of deprivation of liberty by a staffer of law enforcement authority and deaths in the detention facilities. Later such refusals can be cancelled by the courts, but more often it doesn’t affect the efficiency of the investigation since the evidence wasn’t recorded at the initial stage.

The investigation of already initiated criminal proceedings very often is conducted slowly and with poor quality, especially in those cases when the representatives of state authorities are suspected of committing a crime.

The reasons of often deaths in detention facilities are in particular improper organization of medical care, insufficient funding of the healthcare system, as well as refusals to provide the
opportunity to be treated in the establishments of the Ministry of Health of Ukraine which leads to numerous violations of the right to life.

As for the investigation of cases of deaths of Ihor Indylo and Tamaz Kardava the police officers in the first case for the death of the student were accused only in minor negligence. One of them, Serhii Prykhodko, was sentenced to 5 years of suspended imprisonment, and the second one, Serhii Kovalenko, was pardoned by the court. As for the death of Tamaz Kardava, the prosecutor’s office refused to initiate criminal proceedings. The lawyers of Kharkiv Human Rights Protection Group present this case before the European Court of Human Rights which is currently assigned to communication with the Government of Ukraine.

**Recommendations:**

1. To introduce effective mechanisms of investigation of the deaths, especially of those ones which were caused by the representatives of law enforcement authorities, in particular:
   - To develop detailed guidelines where a minimum list of investigative actions should be fixed which have to be conducted in each case of death in order for the investigation authority to be able to make questions regarding termination of criminal proceedings. In case of unmotivated refusal of the investigators to follow the mentioned guidelines they should be suspended from their work and brought to disciplinary responsibility;
   - To hold regular training (retraining) of the investigation authorities staff for improvement of the quality of investigative actions performed by them;
   - To conduct structural reform of the law enforcement authorities during which to minimize the functions and tasks which would be duplicated in different departments and authorities, lessen the workload on particular law enforcement officers by reducing the number of their minor roles and responsibilities (it’s important to make this happen in practice), stop the practice of involvement of law enforcement officers to work after hours without providing additional output, introduce an effective system of remuneration;
   - To improve the material and technical equipment of the law enforcement departments;
   - To improve the quality of conduction of expert research;
   - To create independent authority of investigation of the deaths of the persons in the detention facilities.

2. To create effective system of crime prevention. In this regard among other things it is necessary to raise the efficiency of cooperation between district police officers and population.

3. To create in practice a system of inevitable responsibility for all the cases of use of unjustified violence by law enforcement officers;

4. To create an effective system of control over the use and possession of weapons by law enforcement officers. To make decisions on permission to use weapons on the basis of comprehensive analysis of the personality of a law enforcement officer. To create effective system of responsibility of the heads of law enforcement departments for permitting the subordinates to use weapons without analyzing their personality or in case of formal approach to such an analysis.

5. To create an effective system of control over the psychological condition of the law enforcement officers and on the basis of a psychologist decision to suspend them from work.

6. To create a new SIZO system outside the cities. To improve material and technical conditions of the facilities of confinement according to the recommendations of the European Committee for the Prevention of Torture.

7. To create an effective system of providing medical care in the detentions of confinement.

8. To legislatively oblige investigation authority to inform the victims and their relatives with reasonable intervals on the progress in investigation of the case.

9. To legislate the possibility of conduction of forensic examination for evaluation of the causes of death.

10. To conduct systematic training and instruction of the law enforcement officers involved in special operations to detain persons suspected of crimes.
11. To conduct reforms in the sphere of health protection to prevent the growth of the mortality rates.

On Paragraph 12
On ensuring non-discrimination, torture and other cruel treatment of people who use drugs

Persons suffering from drug addiction, have a stable psychophysiological need for acceptance of psychoactive drugs. This means that because of his disease condition of them, regardless of the threat of sanctions, regularly take drugs or psychotropic substances to prevent abstinence syndrome that cause them suffering physical and psychological problems, at least the minimum required amount for them. Accordance with Ukrainian legislation, the WHO document, drug addiction is an illness - and therefore the use of criminal sanctions, the more such a strict, as the deprivation of liberty, whether due to illness, has all the signs of discrimination based on health status. The European Convention, the Covenant on Civil and Political Rights, on Economic, Social and Cultural Rights obliges States Parties, one of which Ukraine is, to ensure that in their rights without discrimination. At the same time, Ukraine has the old, repressive approaches to doing so-called war on drugs. The current policy of the state, the provisions of criminal law, criminal procedure and administrative law in the chain of "criminal addiction" no preference is given to the fight against drug addiction (addiction) is a disease, and prosecution of drug addicted disease people, instead of the fight against drug trafficking. High criminalization in the Ukrainian legislation actions of the drug addicts ill people is one of the most compelling reasons for the brutal discrimination against people of this social group by law enforcement authorities, particularly the police. This discrimination is accompanied with several types of violations of the rights of drug addicts who have symptoms of consistency. At the same time, because of their vulnerable situation, people of this social group are practically unable to achieve the restoration of their violated rights and to bring to justice those responsible for this. The police impunity generates a relapse.

Monitoring the daily activities of police showed that a significant part of the statistical indicators of operational and service activities against drug trafficking carried out by falsification and other abuses, which are accompanied by systemic violations of fundamental human rights of drug addicts, who due to their physiological characteristics may not adequately protect their rights. The basic typical violations of the rights of drug-dependent people in the activities of the police include: - conducting the proceedings in the absence of relevant legal documents; - conducting the proceedings in the absence of understood; - use the influence of drugs during the proceedings and drafting legal documents; - use of abstinence state ("break") during the investigative and operational action forcing to confess to the crime, to incriminate himself, to carry out slander another person, and another; forced to testify against himself in violation of Art. 63 of the Constitution of Ukraine; - unexplained rights in accordance with the requirements of procedural law; - deprivation of the right to defense, in particular, the failure to provide legal services, failing to inform the right to have an defender or a message about it too late; - the unlawful use of physical force and special means during an inquiry or investigation; - the creation of conditions for extortion of the bribes; - the use of torture, illegal detention deliberately, knowingly unlawful criminal proceedings and the implementation of other malfeasance against drug-dependent persons.

In Ukraine, a rather common problem is the police brutality to drug-dependent persons and their torture, which is a flagrant violation not only of international legal instruments such as the Universal Declaration of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and other international instruments, but also the internal legislation of Ukraine. Marginal position of this category of people makes them easy prey for the police officers in the formation of statistical indicators of the operational activity. Police use drug
addiction as a tool to force the drug-dependent people give testimony: the perspective of pain from the "break-up" makes these people particularly vulnerable and more prone to the pressure from the police. The high level of stigmatization of this social group of the society, in turn, causes, usually police impunity in the commission of such illegal actions. However, there are few cases involving police officers criminally liable for mockery of the drug addicts. This is evidenced by the condemnation of three workers Bakhichsaray police department to prison terms for torture addicts to get the recognition\(^1\).

Another common form of ill-treatment of drug addicted people is the refusal to provide medical assistance in the detention facilities.

The harm caused by these actions still exists in the detention facilities despite the fact that the by-laws stipulate the obligation of the detention facilities administration to provide medical assistance to this category of people.

### On Paragraph 13

**Regarding the investigation of torture**

Response of the Government (paragraph 106) that the sentence of art. 365 of the Criminal Code of Ukraine consumes under Art. 127 is not quite accurate, because if the person commits a crime of torture different protected values are involved. Crimes under Art. 364 and 365 of the Criminal Code apply to crimes in service activity, while Art. 127 of the Criminal Code - a crime against life and health. This absorption which provides a link to the government, shows the ineffectiveness of the investigation, since absorbed punishment, the same objective parts can not be absorbed by the hand, this is a gross violation of the criminal law "for each crime should be punished." One of the reasons that allows the police to avoid criminal responsibility under Article 127 of the Criminal Code of Ukraine "torture" is the imperfection of formulation of this article. The reform of 05.11.2009, from the text of the article disappeared special subject of the crime - the official, and with it the essence of the qualification of "torture" within the meaning of Article 1 of the UN Convention against Torture. Thus, the current version of the article does not meet the requirements of Sections 1-4 of the UN Convention against Torture\(^2\).

In response to information requests from the Kharkiv Human Rights Group, the bodies of the General Prosecutor's Office provided the following statistics for 2012 with regards criminal cases under Art. 127 and Art. Art. 364 and 365 of the Criminal Code of Ukraine. So, as of 19 November 2012 concerning the police officers for crimes containing the signs of torture and other ill-treatment was initiated 41 criminal cases, while those under Art. 127 of the Criminal Code - 7 cases, under Article 364 of the Criminal Code of Ukraine - 2 cases, under Article 365 of the Criminal Code of Ukraine - 32 cases. In addition, during the period from 20 November to 31 December 2012 for crimes of this category initiated 401 criminal proceedings in relation to employees of internal affairs, of which Article 127 of the Criminal Code of Ukraine - 9 counts, under Article 364 of the Criminal Code of Ukraine - 41, according to article 365 of the Criminal Code Ukraine - 307 cases.

It’s possible to speak about the high level of latency of these crimes, as evidenced by the data received public reception of non-governmental organizations. Thus, in 2012 only a network of public receptions of the UUHRU has registered 159 complaints of torture and other ill-treatment (on November 20, 2012)\(^3\).

The monitoring of illegal violence in the police conducted Kharkiv Institute of Social Studies in recent years, lead us to a disappointing conclusion - roll back to the figures of 2004, when the

---

\(^1\) http://www.ark.gp.gov.ua/index.php?section=n&newsid=2812
\(^2\) http://helsinki.org.ua/index.php?id=1362641025
\(^3\) http://helsinki.org.ua/index.php?id=1362641025
estimated number of victims of ill-treatment by police officers made more than 1 million people⁴.

Torture in police are characterized by a high level of latency also because the level of nihilism in the country is very large, the victims do not see the point of contact to the police because the police have made it a primary crime.

In addition, the systemic problem is the close relationship informal system of law enforcement and forensics. Due to the fact that the cases of complaints of torture, the police are trying to "traces" of torture in the early stages. Immediately upon receipt of the victims’ confessions or achievement of a goal, police officers take receipts from the battered that they have no complaints, and conduct examinations with familiar experts, consolidating the fact that the person was not beaten. For example, in the production of the Kharkiv Human Rights Protection Group is the case to represent the interests of the victim M. in which the police acted in this way. Being frightened and trying to confirm the false information set out in this note, the victim M. deliberately did not put a date on it and misspelled his middle name, as later claimed in court. Unfortunately, such cases are systematic.

**Regarding the right of prisoners to complaints of torture**

The positive aspect of the monitoring of prisoners' rights, including freedom from torture, as well as the opportunity to complain in case of violation of their rights is the creation of nationally-based Office of the Ombudsman of the new system "Ombudsman+", which provides for close cooperation with non-governmental public organizations. The practical point in implementation of this program is the quick response by the staff of the Ombudsman's statement of citizens and non-governmental organizations about the illegal actions by employees of the places of detention, which is reflected in an immediate visit to the places of detention without prior warning administration, together with representatives of NGOs.

By the December 31, 2012 the staff of relevant departments of the Secretariat of the Ombudsman were carried out monitoring visits to 169 facilities under the jurisdiction of the Ministry of Internal Affairs - 82 agencies, Security Services - 1 institution, the State Penitentiary Service - 31 institutions, State Border Service - 5 institutions, the Ministry of defense - 2 institutions, the Ministry of Health - 16 institutions, the Ministry of Social Policy - 26 institutions and the Ministry of Education, Science, Youth and Sport - 6 institutions.

Typical violations of human rights and freedoms that are inherent in the opinion of the Ombudsman, in all of these types of places of detention, include the improper and ineffective investigation into the obtaining detainees and prisoners of injuries⁵.

**On Paragraph 14**

**Relatively independent mechanism to deal with complaints against law enforcement officers and prosecutors reform**

According to Ukrainian legislation bodies empowered to investigate complaints of ill-treatment by staff Ministry of Internal Affairs, are the bodies of Prosecution of Ukraine.

Much of the failure of the prosecution to conduct an effective investigation into a complaint of torture associated with conflicting functions that it performs in accordance with national legislation. So, on the one hand prosecutors are responsible for checking the legality of the police, and on the other - support the prosecution in court. Consequently, prosecutors have close professional relationships with police officers. This conflict of interests is detrimental to the effective investigation of complaints of torture. As a result, in Ukraine impunity encourages the

---

⁴ http://www.khisr.kharkov.ua/index.php?id=1324389395
policemen to use ill-treatment in their daily work. This climate of impunity is one of the main reasons for the spread of torture in Ukraine. Thus, Ukraine needs an independent body to investigate allegations of ill-treatment by law enforcement officials. This body should meet five principles established practice of the European Court of Human Rights, namely independence, adequacy, timeliness, public oversight and participation of victims in production. This body should have no hierarchical or institutional connection with the police or the government.

Another problem is the lack of an authority to investigate allegations of torture in such a body as the Office of the Domestic Security of Internal Affairs of Ukraine. Among their main functions - detection, prevention and suppression of crime, corruption and other illegal acts planned or committed by members of bodies and offices of the Ministry of the Internal Affairs, and the protection of officials of the Internal Affairs of preventing them in the performance of official duties.

Despite adequate procedural isolation, this control is still part of the structure of the Interior, which does not ensure an adequate level of objectivity in the investigation of allegations of torture and other ill-treatment.

The Court also stated that the ineffective investigation of complaints of torture is a systemic problem in Ukraine (see the case Kaverzin v. Ukraine (application number 23893/03, judgment of 15 May 2012).

Regarding videotaping of interrogations
We would like to draw the Committee's attention to the fact that par. 111 of the Replies of the Government makes reference to Art. 107 of the new Code of Criminal Procedure, however, this provision establishes the possibility of record interrogations, and not the duty of law enforcement agencies to carry out such recording. The recording can be applied at the request of members of the investigative action, however, the people who are interrogated, may be unaware of their right. Therefore it would be appropriate to securing a peremptory norm of fixing all interrogations through audio and video recordings by making appropriate amendments to the Criminal Procedure Code.

On Paragraph 15

Public monitoring of the detention facilities
National Preventive Mechanism
In 2006 Ukraine ratified Facultative Protocol to the Convention against Torture, having committed itself to setting up the national preventive mechanism (NPM) within one-year period. This commitment has not been fulfilled over the next five years.

According to the priorities formulated by Valeriy Lutkovska, setting up of NPM in Ukraine immediately became one of the key areas in the new Supreme Rada Ombudsman’s activity. Department for NPM realization was formed within the Ombudsman’s Secretariat structure.

Over the summer the Department was staffed by experts by way of open competition. The specialists have experience of work within the institutions which are to be monitored or in the correctional facilities. The Department still needs to be staffed to full strength (as of October, 20, 21 positions were filled, while total number of positions amounts to 34).

From the very beginning the Department has been closely and fruitfully collaborating with non-governmental organizations. Together with human rights activists it elaborated the algorithm for NPM functioning on the basis of the “Ombudsman+” model. Under this algorithm regional Ombudsman’s representatives, regional PR coordinators, NPM expert council, all-Ukrainian non-governmental “Association of independent monitors” (on the basis of the contract signed
with the Ombudsman for one year) and other HR organizations get actively involved in the NPM realization.

Currently the NPM strategic planning till the end of 2013 in Ukraine has been completed with the participation of leading NPM experts-members of HR organizations and financial support of “Renaissance” International fund.

In 6 month the Department staff and public representatives participated in monitoring visits to penitentiary institutions in the AR of Crimea, Dnipropetrovsk, Kyiv, Lviv, Odessa, Ternopil, Kharkiv, Khmelnitsky and Chernihiv oblast’s. As of November 1, 2012 136 institutions under the Ministry of Interior (62), Security Service (1), State Penitentiary and Border Control Services (23), Ministry of Defense (2), Ministry of Health (16), Ministry of Social Policy (25) and Ministry of Education, Science, Young People and Sports (4) have been visited. 24 visits were organized together with local activists in Volyn’, Cherkasy and Kherson oblast’s within the framework of a project, supported by “Renaissance” International Foundation. Every visit was followed by a report containing recommendations on eliminations of breaches of human rights discovered in the course of the visit. The reports were sent to the relevant ministries and agencies. While this report was prepared the processing of ministries’ and agencies’ responses to the Department recommendations still continued. The Department closely follows up the fulfillment of recommendations and uses additional measures if need arises.

For example, on July 19, 2012 a visit to Obolon’ district department of Ministry of Interior in Kyiv took place. The conditions, in which the detainees are kept, interrogation rooms, system of admittance, registration logs, staff familiarity with respective legal and normative acts regulating observance of rights and freedoms, were monitored. A whole range of faults was uncovered and respective recommendations were offered to the Department management. Ministry of Interior responded that Ombudsman’s recommendations were taken into consideration only partially. The Department in charge of NPM implementation filed a new appeal with the Ministry of Interior and warned about administrative liability in case of non-compliance with Ombudsman’s recommendations.

Several surprise visits to the closed facilities were also organized with the goal of verifying the information concerning torture and cruel treatment. Specifically, the information on mass beating of the convicts in Kopychynsyt correctional facility №11, the beating of the attorney O.Veremeenko by the officers of Dniprovsky district militia department in Kyiv, beating of a UNHCR mandate refugee in Lukyanivka pre-trial detention center was verified. After every visit a letter was sent to the prosecutor’s office requesting thorough investigation.

However, no results of either 136 scheduled visits between June and October, or several surprise visits have been made public by the Department. At best, one could find on the Department’s site the information to the effect that some systemic violations were uncovered in the course of the visit and respective letter was sent to the agency in charge. Lack of information concerning visits’ results causes skepticism of public at large, towards the Department’s operation with respect to NPM implementation, and to the Ombudsman’s Office as a whole. This attitude is obvious in social networks, especially, on Facebook. Under p. 2 Article 21 of the Facultative Protocol to UN Convention against Torture only confidential information collected within NPM framework cannot be publicized. First interim Department’s reports were published as late as November.

Analysis of the Department operation with regards to NPM implementation, activities of other structural units in the Ombudsman Secretariat leads us to the conclusion that a uniform algorithm of response to the instances of human rights violations is established. The Secretariat checks up received information, then submits it to the bodies in charge with Ombudsman’s recommendations and request to report on the measures taken. In case of non-compliance or partial compliance with the recommendations Ombudsman continues the dialogue with the head of the respective agency. Only in cases of deliberate and persistent non-compliance Ombudsman makes the information public or uses the administrative levers of influence.
The machinery, described above, has a number of positive aspects. First, the appeal to respective bodies is accompanied by Ombudsman’s recommendations. Second - Ombudsman supervises the fulfillment of recommendations and uses additional levers to ensure that fulfillment.

Unfortunately, no statistical data are available to confirm this statement, due to shortness of monitoring period and lack of well-organized system for data collection in the Secretariat.

Monitoring revealed that lack of funds is one of the major hindrances to the NPM implementation. On the one hand, the former Ombudsman left her office having practically exhausted the next year’s budget. On the other hand, the NPM funding is not envisaged by the budget due to the absence of such area in the Ombudsman operation in the past. Successful fundraising became most instrumental in resolving this issue. Thus, office equipment needed for the full-fledged operation was granted as charitable donation by UNDP Office in Ukraine. The Department staff participates in the specialized trainings due to the grants, obtained by the respective NGOs.

The NPM funding situation can change as soon as 2013. The Law “On Amending the Law of Ukraine “On Supreme Rada of Ukraine Ombudsman” with regards to national preventive mechanism” stipulates state budget expenses for NPM. However, procedural barriers, related to state bodies operation, are still in place. Ombudsman cannot finance public monitoring visits. That is why the issue of adequate material support for regular monitoring activity within the NPM framework so far remains unresolved.

Another cause of concern is lack of public awareness or interest towards NPM in Ukraine despite its efficiency in preventing torture and cruel treatment in penitentiary institutions. Obviously, more comprehensive information policy in covering the issues of NPM and penitentiary system is needed.

Public control for the observance of the prisoner’s rights

Herein we present our considerations regarding activity of the Observing Commissions in Ukraine.

Despite the efforts of the civil society to move forward the Observing Commissions’ (OC) operation by training future members for these bodies, compiling information and analytical materials, the activities of the said commissions still remain a mockery of the motion of the public control.

In August-December, 2012 we conducted monitoring of the activity of the OC of the Kharkiv region. Questionnaires were sent to 9 out of 42 Kharkiv region’s OC. The addresses of the OC and the names of their heads were obtained from the official cite of the State Penitentiary Service of Ukraine for the Kharkiv region, which by now ceased to exist and was re-opened under the new address. The questionnaires contained questions concerning the names and personal data of the rayon OC head, his deputies, members and secretary; its operation plan for six months (a year); scheduled OC meetings, including the meetings in the penitentiary institutions, planned activities with respect to parole release; substitution of sentence with a milder one in the penitentiary institution under commission’s supervision (including the meetings of branch commissions).

Not a single commission managed to provide exhaustive answers to all the questions. The letters to the Commissions in Dzerzhynsky and Kharkivsky districts were returned with the stamp “the addressee not found”, or “no addressee at this address”. It can be explained by the fact that the former head of the commission was dismissed and replaced by a new person, while the letter was still addressed to him. But we also included the names provided at Kharkiv SPSU Department site. Interestingly, only the heads of three commissions out of nine remained the same. Anyway, as opposed to Dzerzhynsky and Kharkivsky districts’ commissions, other OC managed to respond, even, though “the addressee was not found at this address”.

The OC of Balakliysky district failed to respond, although the letter was received by the addressee. The other responses were delayed. It becomes clear why the prisoners find it pointless
to address the commissions complaining of the human rights violations. Apparently they can hardly expect any response at all, let alone adequate reaction to the complaint.

Among other things we were surprised to find out that the OC are very hard to reach by phone. Sometimes we had to dial 5 different numbers before getting any response at all. Then we were either redirected to another number or asked to call later etc. It is a very vivid example of how difficult it would be to reach an OC from any penitentiary institution, where phone calls are limited. Only one OC was willing to exercise control over adherence to the election rights of the convicts by direct observation of the voting process in Kholodnohirsk CF №18. All the rest never gave it a second thought.

The majority of the penitentiary institutions in the region lack available information on the OC members or even on the OC address. As a result the convicts do not know much about the OC. The prevalent number of the convicts responded they have never heard about the OC. E.g. some inmates of Temniv CF №100 mentioned that they themselves prepared and displayed the information board with the OC data a year ago, just before the commission visit. This visit, by the way, was just a single occasion, according to the inmates. The verification of the OC meetings with the agenda of observance of the prisoners’ rights (in 9 OC) was also conducted on the eve of the parliamentary elections or on the very Election Day.

The statistical data reflection the region OC operation over the year are unsatisfactory as well. E.g. not a single convict has approached 20 out of 42 oblast’ OC! 32 out of 42 OC failed to assist the convicts in seeking employment. And the 10 OC which did help, provided assistance to 27 individuals only. The number of violations committed by the commission over the first 6 months of 2012 is another cause for concern.

On Paragraph 16
The problem of the overcrowding in the prisons and pre-trial detention facilities

According to the information provided in §§ 121-126 of the Government’s Reply number of persons held in the institutions under the State Penitentiary Service has been decreased during the 2012 year. Despite of this, conditions of detention in prisons and pre-trial detention facilities still arouse our big concern.

On November 14, 2012 the report of the European Committee for the Prevention of torture and inhuman or degrading treatment or punishment, based on the results of the visit to Ukraine between November 26 and December 6, 2011 was published.

The Committee representatives visited the pre-trial detention centers in Kyiv and Kharkiv. In the report that the Committee appreciated the affords of the Ukrainian authorities to reduce the number of people kept in the pre-trial detention centers, but pointed out certain serious problems. Despite the fact that Kharkiv pretrial detention center recently reduced the number of its inmates by 1000 persons that were transferred to other facilities, the situation still remains complicated. The Committee delegation uncovered a horrifying fact – 44 adult inmates were held in the cell 45 sq m big. It means that one person had about 1 sq m of space for himself. Moreover, the cell had only 28 beds, so that the inmates had to take turns to sleep.

The information that boxes with total size of only 0.8 sq m were used for the inmates of this temporary detention facility is also overwhelming. The penitentiary institutions’ administration explained that they were used for temporary stay of the inmates and for their interrogations by the security staff. The Committee pointed out that such premises cannot be used even for short periods of time. (p.44 of the Report).

The delegation also stated that iron grates on the windows are also inadmissible and the administration had to assure the Committee members that the grates would be removed in the nearest future. Later, commenting on the Report, Ukrainian authorities advised that they had been removed. It is noteworthy that during every visit the Committee brings the inadmissibility of the grates to the attention of the administration and every time this latter promises that they
would be removed. Nevertheless, the reluctance of Ukrainian officials to comply with the Committee recommendation is evident, as even today, under p. 17 of the Internal Regulations for the penitentiary institutions (Order №275) the windows in the cells and disciplinary isolation wards of the penitentiary institutions have metal welded bars. By the way, despite of numerous NGOs’ protests against this normative act, the Order №275 has not been changed since 2007.

In the light of the above mentioned we recommend the Ukrainian authorities revising the provisions of Internal Regulations for the penitentiary institutions and other normative acts with the goal of harmonizing them with the European Court on Human Rights’ decisions and European Committee reports with respect to torture prevention and cruel and humiliating treatment or punishment as well as taking practical measures directed at the improvement of the actual conditions of detention in the pre-trial facilities and correctional colonies of Ukraine. We further recommend revising the conditions in which the prisoners are kept in the disciplinary isolation cells, bringing them into compliance with the European Committee recommendations to Ukrainian government with respect to torture prevention and cruel and humiliating treatment or punishment.

**On paragraph 18**

One of the main concerns that still remain with regard to the judiciary is non-compliance of the Law on High Council of Justice with the recommendations of the Venice Commission. The Venice Commission recommendations\(^6\) prescribes that the High Council of Justice should not be responsible for appointing judges at administrative positions within the court system (chairperson of a court, deputy chairperson of a court) because of the fact that exhaustive list of the HCJ powers is provided in the Constitution (article 131), whereas the article 20 of the Law on Judiciary and status of Judges grants this power to the HCJ. The Ukrainian authorities often plead the need of amendment of the Constitution as the factor impending them from adoption of the Venice Commission Recommendations. However, meeting this recommendation does not require constitutional amendments. On the contrary, it would require amendments in the Law on HCJ in order to bring it in conformity with the Constitution – something that the Ukrainian authorities should be interested in without recommendation from outside.

Another example of the failure of the Ukrainian authorities to comply with the Venice Commission recommendations represents Article 25 of the Law on HCJ which deals with the power of this body to consider complaints against judges. Thus, any member of the HCJ has the right to demand and obtain copies of court files of cases that are still pending. Giving the fact that such figures as the Prosecutor General of Ukraine, the deputy Prosecutor General of Ukraine and the Minister of Justice of Ukraine are member of HCJ ex officio such an authority may be transformed in a powerful lever to influence the outcome of judicial decisions court files of which have been requested.

A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able control or direct the former is incompatible with the notion of an independent tribunal.\(^7\) However, the process of politicization the judiciary has been noted by significant number of national and international experts and organizations. Thus, according to the Law on HCJ and the Law on Judicial System and Status of Judges, the main bodies responsible for selecting candidates to be appointed for positions of judges, their transfer from one court to another, their promotion and dismissal are the Supreme Judicial Qualification Board and the High Council of Justice. Both of these bodies proved to interpret the law loosely and use loopholes in it. Thus, the Law on Judicial System does not provide for competitive basis.

---


\(^7\) CCPR/C/GC/32 23 August 2007, § 19
for promotion of judges and despite declared adversarial proceedings the reality is different. For example, in February 2012 the Supreme Judicial Qualification Board issues a recommendation on transferring four judges to the capital city court. A month earlier due to the poor results on qualification tests, they were first appointed as judges of provincial courts. This mechanism proved a simple way to circumvent the law requirements stipulating that a candidate with better test marks has a better chance of getting court position.

As to the government’s submission on the effective steps undertaken to uphold the independency of the judiciary, the law they refer to indeed introduces positive changes. Thus, by these amendments the prosecutors were forbidden to instigate disciplinary proceedings against judges while the case is still under consideration and the prosecutor is a party to it. However, these amendments did not bring drastic changes. Prosecutors are still able to put pressure on judges by means of disciplinary liability, as the prosecutor’s office often demands that a judge be sued after passing a non-guilty verdict, although the alleged reason for suing is quite different (i.e. violation of the statute of limitations).

Another alarming tendency indicating the process of politicization of the judiciary is increasing number of criminal cases brought against the political opposition members ending in complete support of the prosecution by the courts. The same is true of 90% of cases on banning peaceful gatherings by authorities, satisfied by the courts on totally absurd ground, such as for example “negative impact on the image of the capital” or “public nuisances caused by fifes”.

This deviation of the Ukrainian judiciary from the principle of independence and impartiality was also reflected in the decisions of the European Court of Human Rights (ECHR) in cases of Tymoshenko v. Ukraine and Lutsenko v. Ukraine. The ECHR has avoided direct reference to political motives of criminal charges against these prominent political figures; however it did find the violation of Article 18 in connection with Article 5 of the European Convention of Human Rights (detention not motivated by reasons envisaged in the Convention). In addition, several judges did not try to conceal that they view the criminal cases against Tymoshenko as politically motivated.

On paragraph 19

The new Law on the Bar and Advocate Activity was adopted on 5 July 2012 and entered into force on 15 August of the same year. It was widely welcomed by the national and international NGO’s and indeed contains a number of progressive provisions.

However, the law, despite all its positive aspects has also created additional incentives to corruption. This may be illustrated by the schism among the advocates that ensued by conducting alternative conferences and constituent assemblies. Thus, on 15 October 2012 two alternative regional constituent assemblies were conducted in Kharkiv. In the same vein, the national constituent assembly of advocates has not passed without turmoil. Most of the invited delegates gathered in the hotel Rus, set up the National Association of Advocates of Ukraine and Council of Advocates of Ukraine, elected persons to occupy main administrative posts in these bodies and recalled Mr Vysotsky from the post of representative of the Bar before the High Council of

---

8 Judiciary and justice reform in Ukraine. Centre for political and legal reforms. Available at: http://www.en.pravo.org.ua/index.php/judiciary#VII. Reform with the hidden aim
10 CCPR/C/UKR/Q/7/Add. 1, 16 May 2013, § 149
11 Supra note 3, p.99
12 M. Sereda, T. Pechonchik: A gander’s quill is not a threat, or how the courts ban the rallies. Available at: http://www.pravda.com.ua/rus/articles/2012/07/19/6969140/
14 Tymoshenko v. Ukraine, Application No. 49872/11, 30 April 2013, Joint concurrent opinion of judges Jungwiert, Nussberger and Potocki
Justice. Simultaneously, an alternative assembly was being held by Mr Vysotsky in the premises of cinema Kinopanorama attended by about 120 advocates. It should be mentioned that both sides have exchanged recriminations of the using unidentified persons to intimidate the delegates and even of employing physical violence to force delegates to vote in their favor. As a result of the conflict Mr Vysotsky has been brought to disciplinary liability and eventually was banned from exercising his professional duties by the decision of the Control and Disciplinary Commission of 5 April 2013. This was explained by “conducting alternative assemblies” and “making public statements on lawfulness of judgments.” In addition on 17 April 2013 regional control and disciplinary commission of Zakarpattya banned Mr Seryi (who was widely viewed as supporter of Mr Vysotsky) from exercising his professional duties on the basis that he had made some critical remarks on the new Code of Criminal Procedure. It should be noted that these remarks had been made by Mr Seryi on 13 November 2012, whereas the Rules of Lawyer’s Ethics were adopted on 17 November 2012. Thus, the lawfulness of disciplinary liability of Mr Seryi is under serious question giving the principle of non-retroactivity.

In addition, patterns of physical violence against advocates still remain an important issue in Ukraine. Thus, on 17 August 2011 the police brought Kurchenko V.D. into the Sosnowski District Court of Cherkassy in order to prolong his detention, but the judge had already left home and there was nobody to take decisions. Rather than release Kucherenko V.D. from custody as required by Article 29 of the Constitution of Ukraine, the investigator together with the staff of the operational unit Sokol, escorting him to a police car and began to export in an unknown direction. When the lawyer of Kurchenko V.D. – Dmitro Karpenko - tried to intervene and prevent illegal activities Sokol’s officer knocked the lawyer, handcuffed him and dragged into the police car. There the officer placed a black synthetic bag on his head and put on him the floor on her knees and elbows. Law enforcement officers beat Dmitro Karpenko with their arms and legs in different parts of the body, mainly on the back, torso and head. The beating was accompanied by verbal abuse and threats of torture him to death in a basement of police premises. Such a torture lasted for about 15 minutes. After that the man was brought to the gate of police premises and left there. Dmitro Karpenko was diagnosed with closed head injury, concussion, multiple soft tissue injuries of torso and limbs, numerous cut wound on the hands.

Similar incident took place on 24 May 2013 in Bila Tserkva. Advocate Viktor Smaliy, who was defending interests of civil movement activist Aleksandr Gorbach, was beaten by the local police chief in the office of the latter.

As a rule, violence against lawyers remains unpunished which fosters the atmosphere of vulnerability among lawyers. Thus, lawyer Oleg Maksimenko practicing in Kharkiv, on 29 December 2012 was assaulted by unidentified person and sprayed into the face with peeper spray. The victim applied to police on the same day; however, according to our information the investigation has been perfunctory and ineffective and still has not yielded any results.

On paragraph 20

The key role in the reform of juvenile justice in Ukraine plays the technical assistance project “Reforming of the Juvenile Justice System in Ukraine” with the support of the Government of Canada which began to be implemented in 2010 and was designed for four years. With regard to this a working group on the implementation of the system of criminal justice for juveniles in

---

15 Open letter of the Ukrainian Helsinki Human Rights Union on the situation in the Ukrainian Bar Available at: http://www.poryad.com/?p=20333
16 Ibid.
17 Advocates call for investigation of beating of their colleague Dmitro Karpenko by the police Available at: http://helsinki.org.ua/ru/index.php?id=1314883869
18 The Chairperson of the High Qualifying and Disciplinary Commission of the Bar contacts the Interior Minister on the issue of beating of an advocate. Available at: http://vkka.net/?p=5595#more.
19 Number of investigation 12012220500000755
Ukraine was created at the Ministry of Justice of Ukraine composed of the representatives of the Ministry of Justice, Supreme Court, General Prosecutor’s Office, Ministry of Internal Affairs, Ministry of Youth and Sport, Ministry of Health, State Department for the Execution of Sentences, Ministry of Education and Science, High Qualification Commission of Advocates at the Cabinet of Ministers and NGOs.

The project determines the main directions of the assistance and cooperation regarding the creation of the system of juvenile justice and is the result of discussions conducted with the state authorities and NGOs.

Thus, it is planned within the project to develop national legislation framework for implementation of juvenile justice which will take into account the international standards regarding the rights of children.

It is expected to strengthen the legal capacity of the judges and courts in Ukraine, use new approaches to ensure the rights of the juveniles who committed a crime and foster their rehabilitation for prevention of new crimes.

The project is implemented at the national and local levels. It is planned at the interim stage to implement two pilot projects aimed to identify the effectiveness of the fundamental principles of the project.

Within the project these two pilot projects were already implemented – the visit centers for the juveniles were created in Melitopol and Ivano-Frankivsk.

The project is implemented by the Canadian International Development Agency with the participation of Canadian Executing Agency from the Canadian side.

The contribution of Canada in this process is 6,200,000.00 CAD.

According to the Decree of the President of Ukraine “On the Concept of Development of Criminal Justice for the Juveniles in Ukraine” from May 24, 2011 the Action Plan on the implementation of the Concept of Development of Criminal Justice for the Juveniles in Ukraine was approved by the Order of the Cabinet of Ministers of Ukraine on October 12, 2011.

It should be also noted that the Criminal Procedure Code of Ukraine entered into force last year. It introduced such developments in the sphere of juvenile justice:

1) There was introduced a specialization of the investigator in the cases of children and judges who deal exclusively with the cases of children in criminal proceedings against them;
2) There was introduced a similar specialization for the prosecutors (juvenile prosecutors);
3) There was introduced a special structure of the Ministry of Internal Affairs of Ukraine – a division of crime prevention among children (juvenile police);
4) The legislative opportunity of detention of juveniles with adults during pretrial detention was excluded;
5) The confrontation involving juveniles was prohibited;
6) Prosecutor was given the right to submit a civil claim in the interests of juvenile;
7) Juveniles got the opportunity of interrogation outside the courtroom.

As for the measures taken which were mentioned in Section 131 of the 7th Periodic Report of Ukraine on the Implementation of the International Covenant on Civil and Political Rights CCPR/C/UKR/7, it should be noted the following.

1) In order to prevent juvenile crime the Ministry of Education and Science using available statistics and information materials coming from the regions conducts quarterly monitoring of juvenile crime and delinquency. To do this there were created the after-school clubs aimed at professional guidance, implemented relevant programs and comprehensive plans in the regions, signed the treaties on cooperation between educational establishments, as well as developed a regional three-tier model for prevention of juvenile crime.

At the same time almost 80 % of the children in the detention facilities serve their sentence repeatedly which indicates ineffective preventive work, as well as ineffective work after returning of a child from detention.

2) As regards providing legal assistance for the juveniles, who are in conflict with law, currently there is no information regarding organization of such assistance at the appropriate
level. The available information is only about individual charities and religious organizations which provide adequate legal assistance to juvenile offenders within the framework of their activity.

3) The concept of restorative justice in Ukraine is at its initial stage of implementation. In particular, the Ukrainian Center for Common Ground, Kharkiv Regional Mediation Group, NGO “Kyiv Human Rights Protection Alliance” and other organizations are now engaged in the implementation of the mediation in Ukraine. At the same time there is not any comprehensive program of community involvement in the upbringing of juvenile offenders.

4) Within the framework of creation of the rehabilitation system for juveniles who are in conflict with the law the international project “Creation of Preconditions for Reforming the Establishments of Social Rehabilitation for Juvenile Offenders Who Have not Attained the Age of Criminal Liability” was implemented with the support of the Ministry of Youth and Sport of Ukraine, National Academy of the Pedagogical Sciences and Ukrainian Foundation “Protection of the Children Rights”. Currently the centers of socio-pedagogical rehabilitation were created on the basis of Yenakiyevska, Komyshuvaska and Fontanska schools of social rehabilitation. Around 300 children with deviant behavior get rehabilitation in the centers annually.

At the same time, the alternative services for the children with the problems with behavior are not being created, and a systematic training of the pedagogical staffers for the work with children with deviant and delinquent behavior is not conducted.

It`s also worth mentioning that the probation service in Ukraine has not been created yet. Instead, on January 4, 2013 the Bill “On Probation Service” was registered at the Verkhovna Rada of Ukraine # 1197 and currently it`s awaiting consideration.

There are several types of punishment in Ukraine which could be applied to the juvenile offenders and which are alternative to the deprivation of liberty.

According to Article 98 of the Criminal Code of Ukraine only the following main types of punishment are applied to the juveniles, which are alternative to the deprivation of liberty for a certain term or arrest: Fine; Public works; Correctional Works.

**Recommendations:**

1) To introduce a central body aimed at coordination of the work of organizations and associations which deal with restorative justice;

2) It is necessary to provide for separate legal regulation of the issues of assignment and replacement of punishment measures by the educational measures in the Criminal Code of Ukraine.

3) One of the perspective direction of the development of respective section of the Criminal Code of Ukraine is the establishment of the purpose of punishment of the juveniles; development of a system of punishment of the juveniles based on the results of sociological, criminological and comparative research; introduction of articles of the mentioned section linked to the general criminal provisions regarding punishment, its assignment and exemption from punishment and its service.

4) To regulate and introduce effective system of mediation in criminal proceedings:
   - Determining of a number of cases where the appointment of mediation is possible;
   - Inclusion of the time allotted to the mediation to the procedural terms, determining the maximum period to avoid unjustified delay of the procedure by the participants;
   - Regulation of the qualifications for the mediators, their legal status and procedure of selection.

To introduce the practice of family conferences to facilitate solving of the issue of responsibility of the juvenile offenders with the help of alternative ways of punishment, participation of the community in this process and more effective resocialization of the mentioned category of persons.