

Observation of Kharkiv Human Rights Group Ukraine as to the situation with prevention against torture and right to liberty in Ukraine

1. Kharkiv Human Rights Group would like to present to Human Rights Council its observation on the subjects of concern in the field of prevention against torture and right to liberty.

2. Kharkiv Human Rights Group accepts that under pressure from human rights organizations, the government and judicial system of Ukraine have begun to understand the real scale of the problem of torture and are showing the political will to eradicate wrongful practices. A number of positive changes have been introduced into legislation; some moderate progress is visible in case-law; various initiatives to place state activities under civic control are under way. A promising sign of the progress achieved to date is Ukraine's signing of OPCAT on September 2005 and its ratifying in July 2006. However, the above and other efforts in the area of torture prevention are scattered and inconsistent. As a result, many of these efforts fail to bring tangible and sustainable results, and the practice of torture and ill treatment persists. Among the existing problems in preventing torture and ill treatment at government level are the lack of a unified and consistent state policy, weak coordination between various state agencies, insufficient expert knowledge and practical skills.

1. Protection against torture

1.1. Scale of torture

3. Official information about scale of ill treatment is unavailable. According to the sociologists' estimates in absolute numbers throughout the year which preceded the study, 355,293 individuals had suffered beatings and bodily injuries during criminal investigation, while in the same circumstances 93,498 people had been subjected to torture with the use of special equipment, and 56,099 individuals had been beaten up by cellmates at the instigation of police officers.

4. The likelihood of becoming a victim of unlawful coercion by police officers, according to the research, is fairly high: for those held in pre-trial detention centres there was a 65% likelihood, in temporary detention facilities – 57%, for individuals brought to a police station as a suspect – 36%, for those detained on the street and frisked – 31%, while for a witness, summoned to appear at a police station – the likelihood was 8%. Even, if a person had never encountered such a situation, there was still a 1% probability that he or she would become the victim of unlawful coercion by police officers. The most common forms of physical coercion during detention are ill-treatment, torture, and beatings, while in the course of criminal investigations the most common are beatings, inflicting of bodily injuries, to a lesser extent, torture and torture using special means or techniques. The most common forms of psychological coercion are degrading treatment; intimidation; threats, including towards close relatives; blackmail.¹

1.2. Definition of torture in criminal law

5. The definition of “torture” contained in article 127 of the Criminal Code of Ukraine does not fully reflect all elements contained in Article 1 of the Convention against Torture, notably with respect to discrimination. Also, provisions of section 127 §§ 3 and 4 cover only a “law-enforcement

¹ The following people contributed to the research: Professor V.A. Sobolev, Doctor of Sociology (PhD); Professor I.P. Ruschenko, Doctor of Sociology (PhD); Lecturer Yu.A. Svezhentseva, Candidate of Sociology (PhD); Yu.L. Bilousov, Candidate of Sociology (PhD).

officer”. This formulation clearly excludes other state agents from the effect of these provisions. In that section, the element of «torture» is a «violent act». This narrows the scope of that section compared to the definition of Article 1, which defines as torture «any act by which severe pain or suffering... is intentionally inflicted».

6. Convictions of State law enforcement officers for using torture remain rare. Furthermore, punishments meted out by the court in the case of conviction do not correspond to the gravity of the crime. Convicted officers often receive conditional sentences.

1.3. Lack of effective investigation

7. As a rule, allegations about torture and other forms of ill treatment by state official do not result in effective investigation. As practice demonstrates, judges, prosecutors, and investigators, to whom law enforcement bodies bring detainees, pay little attention to formal complaints by the detainees about the use of torture to them, let alone taking initiative in clarifying the circumstances behind their having received visible bodily injuries. The only way to initiate a criminal investigation against law enforcement officers, who have used torture, is to file a complaint to a prosecutor’s office, the latter having exclusive jurisdiction to investigate this crime (see section 112 of Ukraine’s Criminal Procedure Code). Although, according to section 97 of the CPC, a prosecutor is obliged to accept claims and reports about crimes committed or being prepared, offices of the prosecutor have a lot of discretion on deciding whether to initiate an investigation. Although this wide discretion is not directly recognized by legislation or doctrine, it exists as a result of the unlimited margin in assessment, whether enough *grounds* are in place to begin a criminal investigation. Offices of the prosecutor very cleverly use provisions of section 94 of CPC, which reads that «an investigation can be opened only in those occasions, when there is enough data suggesting the elements of a crime». The check which is carried out by the prosecutor on receiving a complaint about torture is usually extremely superficial. Moreover, in practice, such power of discretion is also determined by the insufficiently strong guarantees for complaints to the court, which would make it possible to immediately reverse unwarranted decisions by an office of the prosecutor.

8. The lack of independent, impartial and effective investigations and prosecutions of law enforcement officers in connection with allegations of torture and ill-treatment is partly rooted in the role of the Public Prosecutor in Ukraine. As well as being the body that is responsible for investigation and prosecution of ordinary criminal cases, it is the prosecutors who decide whether a case will be opened against police officers. The lack of independence of the investigating body means that cases against law enforcement officers are inadequately investigated, delayed or stalled, or are not opened at all. It is a common situation when a prosecutor’s office *orders* a police unit to conduct investigating actions concerning the claim about the use of torture. Also, it is quite often, when a prosecutor’s office makes its conclusions only on the basis of the results obtained during an official examination, which was carried out by the relevant police units.

9. Investigations into claims of torture by law enforcement officers are conducted extremely slowly. Investigations can drag on for years.

10. The possibility for victims to obtain an independent expert opinion is extremely limited despite the fact that it is especially vital when investigating claims of torture to obtain timely and high-quality medical evidence. It has become common for victims, having turned to a medical forensic expert institution and undergone medical forensic examination, to not be able to receive the relevant certificate. Very often, as well, it is impossible to obtain documents from medical institutions, where a victim was examined or treated. Medical institutions refuse to give such information referring to some instruction by prosecutor’s offices, but it is impossible to find out more about the subject matter of this instruction.

11. Prosecutor’s office makes no effort for providing security to those who complain against the use of torture. Of special concern are people who are deprived of liberty. Prosecutor’s office, as a rule, fails to act and does not care about security of inmates, who complained against torture. However, there are examples of even more treacherous behaviour on the part of prosecutor’s office. In one case, after mass beating of prisoners by special unit the General Prosecutor’s office had received the

complaints of prisoners transferred by illegal way from the colony. Instead of investigating the causes, why the inmate had had to illegally send complaints to the General Prosecutor's Office – even though the law provides a possibility of a confidential complaint to a prosecutor – the prosecutor's office suggested to punish complainant for reporting the information, which could have testified to crimes and other violations of the law. Thus, the Ukrainian authorities from the outset behave in a way that made any effective investigation impossible. Knowing from the information that officials of the local prosecutor's office might be involved in or, at least, conniving at the actions against which the applicants complained, the General Prosecutor's Office was sending the complaint to the local prosecutor's office.

1.4. Use of confessions

12. The practice of using confessions not made voluntarily in criminal proceedings remains widespread. This is indirectly demonstrated by the use of violence in the police force, since with significant change in the approach of the courts, the number of such instances would be considerably reduced. In criminal procedure there are to this day no reasonably well-developed criteria for determining whether a confession was made voluntarily, nor is there any procedure for the exclusion of questionable confessions from case evidence. Courts hold to rather primitive tests to determine whether the confession was voluntary, usually failing to take into account the specific circumstances, under which defendants are forced, including through the use of torture, to confess. The current investigation system, in which confessions are used as a principal form of evidence for prosecution, creates conditions that may facilitate the use of torture and ill-treatment of suspects. The legislation does not contain sufficiently clear legal provisions ensuring that any statements which have been made under torture shall not be invoked as evidence under any proceedings, as requested by the Convention.

1.5. Violence between servicemen in army

13. The number of dedovschina cases is still high. For example, according to the General Prosecutor's Office, during the first three months of 2003, in all military units of Ukraine, 73 persons were injured as a result of so called "violations of statutory relations [among servicemen]" and 50 persons as a result of assaults and battery. However, in recent years, there were very few cases of murders or suicides because of non-statutory relations.

1.6. Extradition and deportation

14. The legislation in the field of extradition and deportation remains underdeveloped. It does not provide for examination of any circumstances, which the state should take into account according to Article 3 of the Convention against Torture.

Decisions regarding extradition are within the exclusive jurisdiction of the Prosecutor General of Ukraine who resolves such issues without any procedure. Such a decision is taken secret. The law does not even stipulate the duty to inform the individual whose extradition is demanded by another state of the decision taken and the grounds for the decision. However, taking into account that there is no clear procedure to appeal decisions on extradition on the national level, as well as that proving the circumstances evidencing the risk of torture requires serious professional training, for a person, whose extradition is requested, aid of a qualified lawyer is essential. However, these persons, as a rule, are taken into custody and their communication with the outside world is interrupted. As, by definition, these persons are foreigners, their opportunities for receiving qualified aid are very limited. Law does not provide for obligatory presenting a lawyer in such cases.

1.7. Use of antiterrorist units in prisons

15. Of special concern is a practice of the planned use of special units designated to suppress prison riots and other violent acts for intimidating inmates. In support of that the practice of the use of special units at the State Department of Corrections is deeply rooted, there is a letter from the Head of the Department of 20 December 2006, where he admits that during nine months of 2006, a

special unit nine times conducted tactical training and 43 times was brought for conducting searches of inmates and premises, inspections of living and industrial quarters at correctional facilities and investigatory wards.

16. In our opinion, the use of special antiterrorist units, equipped with special tools, for conducting searches is absolutely meaningless, because the suppression of an armed threat on the part of terrorists or suppressing a prison riot requires training absolutely different from that for conducting a search. Therefore, it is hard to believe that the personnel trained in the effective use of violence are used for a wrong purpose – to conduct a search.

2. Right to liberty

2.1. Police detention

17. Although Article 29 of the Constitution of Ukraine establishes that a court warrant is obligatory for any deprivation of liberty, it should be acknowledged that legislation and practice have shown scant respect for this constitutional demand. Despite the clear provisions of Article 29 of the Constitution, which outline the authority of law enforcement officers to detain without court warrant as an exception to the rule, in practice, the situation is rather the opposite and such detentions remain the rule, while detention on the basis of a court order – the exception.

18. In accordance with established practice, «criminal-procedural detention» begins at the moment of compiling a detention protocol. However the definition of this moment is entirely at the discretion of the official leading the investigation. Therefore, in practice, the term of detention is not counted from the moment when the person was in fact deprived of his or her liberty, but from the moment when the official who was responsible for the detention completed all necessary formalities. This situation is of great importance in assessing how well guarantees of the rights of detainees are implemented, guarantees which theoretically are provided by the legislation, because even formally these guarantees come into force only after several hours, and sometimes several days after a person has come under the control of a law enforcement agency.

19. Until a formal decision concerning detention has been taken, a suspect is not considered detained. His/her status while being effectively held in custody by a law enforcement body remains unclear until an official (a detective or investigator) has compiled a protocol for detention. In accordance with prevailing doctrine and practice, it is precisely at this point that agents of the State are obliged to inform the detainee of his/her rights, notify relatives of the detention, provide access to a lawyer, etc. The unclear status of a suspect between the moment of deprivation of liberty and moment when a protocol of detention is compiled, prevent him or her from exercising those rights guaranteed by Article 29 of Ukraine's Constitution and Articles 5 and 6 of the European Convention on Human Rights.

20. Law enforcement officers consider 72 hours to be the period during which they have entirely unlimited authority to hold a person in custody. Judges, before whom a detained person is brought, do not demand the law enforcement officers to provide proof that the person could not have been brought before them within a shorter period.

21. In order to extend the period of detention, the Police combine a case of detention on suspicion of being guilty of an administrative offence with detention on suspicion of having committed a crime. In such cases, the suspect is held for up to 3 days in accordance with Article 264 of the Code of Administrative Offences, and when this period has expired, in accordance with Article 115 of the CPC. Article 263 of CAO gives the police even more authority. The article states that «people who have infringed regulations concerning the use of narcotics and psychotropic substances» can be detained «for a period of up to 10 days with the sanction of the Prosecutor, if the offender does not have documents which identify him or her». Another common method of an extended detention under control of the police is detaining a person as a vagrant up to 30 days. The detention and holding in custody of vagrants is governed by Article 11 of the Law «On the Police». For such detention, the law, as before, requires no warrant: it is sufficient if a law enforcement agency

informs a prosecutor. This allows law enforcement agencies to widely use such detention without sufficient grounds.

22. Another problem, which increases the risk of the use of torture and ill-treatment toward detainees, is a possibility to extend the detention under control of the police. Quite often the prosecution asks to extend the period of temporary detention specifically to avoid a detainee being transferred to a pre-trial detention centre, because this could complicate «the success of the investigation» and «effective work with the suspect».

23. The situation with providing detainees' rights is exacerbated by the absence of a system of free legal aid in Ukraine. The system, which was created during the Soviet times, based on the compulsory participation of a lawyer in cases, where the defendant was unable to pay for lawyer's service, has not been functioning anymore. The amount, which the state offers lawyers for their participation in cases of indigent defendants, is about \$3 a day. This payment does not correspond to the today's realities; in addition, obtaining this payment is overburdened with formalities. Because of the above, lawyers, who participate in cases of indigent defendants, prefer to spare their efforts on obtaining this payment at all.

2.2. Detention on remand

24. Conditions in investigatory wards and prison remain poor. The problem of overcrowding of investigatory wards is only in part related to the funding of the system of facilities for remand in custody. To a much greater extend it depends on the ideology and the system of criminal justice concerning the holding accused persons in custody.

25. The courts less inclined to release defendants from custody. Moreover, it places the judge, «the traditional guardian of personal liberties» in a somewhat strange position, where he or she may decide in favour of pre-trial detention even in a situation, where the prosecutor is seeking the release of the defendant.

26. One of the effective measures, which could reduce the recourse to pre-trial detention, is bail. However, according to court statistics, in 2002, 105 people were released on bail², in 2003 – 110 people³. In 2005, a restrictive measure in the form of bail was used only 275 times. The Supreme Court concluded that courts inadequately use this measure because of citizens' poor financial condition». ⁴ A substantial shortcoming of the bail regulation is that the amount of the bail depends on the possible amount of the material claim by a victim, because part 2 of Article 154-1 reads: «In all cases, the amount of the bail cannot be lower than the amount of a civil suit, substantiated with sufficient evidence». This norm is supported by provisions of part 7 of Article 154-1 of CPC, which reads «the bail deposited by a suspect or accused can be designated by a court for execution of the sentence as a part of material penalty». In addition, the legislation lacks clear provisions about the practical aspects of bail.

27. Ukrainian legislation does not provide for such an important guarantee for detainees as the right to periodic review of the grounds for their detention, although such guarantee is set out in Article 29 of the Constitution. 28. Legislation, as before, does not allow for the fundamental rights of the accused (the suspect) during court hearings held in order to decide whether to remand the person in custody or to release him or her pending trial.

29. Legislation, as before, establishes a maximum term for detention only for pre-trial investigation, but not for trial. That is why the duration of trials directly affects the duration of detention.

² The analysis of work of general jurisdictions' courts in 2002, according to the court statistics, prepared by the Department of Court Practice Generalization and Analytical Work on the Issues of Implementing the Law at the Supreme Court of Ukraine // www.scourt.gov.ua

³ The analysis of work of general jurisdictions' courts in 2003, according to the court statistics, prepared by the Department of Court Practice Generalization and Analytical Work on the Issues of Implementing the Law at the Supreme Court of Ukraine // www.scourt.gov.ua

⁴ The analysis of work of general jurisdictions' courts in 1st half of 2002, according to the court statistics, prepared by the Department of Court Practice Generalization and Analytical Work on the Issues of Implementing the Law at the Supreme Court of Ukraine // www.scourt.gov.ua