

HUMAN RIGHTS IN UKRAINE – 2008

HUMAN RIGHTS ORGANISATIONS REPORT

UKRAINIAN HELSINKI HUMAN RIGHTS UNION

«PRAVA LUDYNY»

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In preparing the cover,
the work «Judith with the head of Holofernes» of Alex Savransky were used
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This book considers the human rights situation in Ukraine during 2008, it is based on studies by various non-governmental human rights organizations and specialists in this area. Each unit concentrates on identifying and analysing violations of specific rights in this period, as well as discussing any positive moves which were made in protecting the given rights. Current legislation which encourages infringements of rights and freedoms is also analyzed, together with draft laws which could change the situation. The conclusions of the research contain recommendations for eliminating the violations of human rights and fundamental freedoms and improving the overall situation.

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Judith — is a figure from the «Book of Judith» in the Biblical Apocrypha. According to the legend, the city of Bethulia was besieged by Assyrian troops led by General Holofernes. The inhabitants faced starvation. The daring Judith steals into the camp of the enemy and conquers Holofernes with her beauty. The General organizes a huge banquet and finally, drunk, falls asleep. Judith cuts off his head, and returns to Bethulia. The Assyrian warriors, seeking the severed head of their leader on the city walls, flee in despair.

The image of Judge was very popular in European literature, painting and music, the story being an example of courage of the local inhabitants before conquerors.

In 1456 Donatello made a bronze statue «Judith and Holoferne» as an allegory for the battle of Florentine liberty against tyranny. In 1465 the sculpture was placed on the Piazza della Signoria. The severed head of Holofernes represented the ousted Medici family, while Judith epitomized the Florentine Republic which had freed itself.

This motif was used by Michelangelo, Boticelli, Giorgione, Titian, Veronese, Karavagio, Pembrandt, Rubens and others, while in music by Scarlatti, Vivaldi, Mozart and others.

FROM THE EDITORS

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Yevgeniy Zakharov, Volodymyr Yavorsky

GENERAL OVERVIEW OF VIOLATIONS OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS¹

Our report concerns the human rights situation in Ukraine in 2008. It would be difficult to give a simple description of the varied tapestry which the human rights situation presented during this period.

There was, on the one hand, a political crisis, which prevented necessary reforms – constitutional, judicial, administrative, reform of the criminal justice system, etc. The struggle of political opponents for power led to the politicization of any issue where each step of the authorities, new draft law or appointment to a post, was assessed purely from the point of view of gaining advantage in the political battle. This battle had an extremely adverse effect on the level to which the State apparatus was governable, and led to an increase in unlawful acts by the local authorities which paid virtually no heed to the recommendations of the central authorities.

On top of the political crisis the second half of 2008 brought a full-scale economic crisis which the government had difficulty coping with, especially due to the loss of control and impossibility of swiftly drawing up and adopting decisions. The economic crisis hit the poorest layers of society hardest, as well as the middle class. Those on low incomes found it even harder to survive because of the rise in prices and inflation, the increase in tariffs on communal services and the lack of adequate social protection. They became even more dependent on their employers, the relations with whom are often feudal-like. Unemployment, including concealed, rose considerably, and to a large extent also affected qualified workers and office workers. The fall in GNP was the worst in Europe, and the already great divide between the standards of living of rich and poor widened still further.

In these conditions the situation with social and economic rights in general could only deteriorate, especially given that safeguarding and defending human rights was not a priority for those in power. As in 2007, the government again suspended the fulfilment of economic and social rights in the Budget for 2008 despite the judgment of the Constitutional Court prohibiting the suspension in implementing these rights via the annual law on the Budget. That is, the government is demonstratively choosing not to enforce the judgment of the Constitutional Court on the protection of socio-economic rights.

On the other hand the presence of political competition and a certain degree of freedom of speech positively affect the level of self-awareness of society which is becoming more mature and able to think clearly. An idiosyncrasy of Ukrainian society with regard to authoritarian rule continues to be its political pluralism which is a good way of preventing the victory of one authoritarian political force over others. Society is looking for new ways of overcoming the crisis, including for protecting human rights.

Human rights organizations have become stronger and have forced the authorities to take their assessments and proposals into account. They have in some issues achieved certain changes for the better. One can cite dozens of examples of successful action by human rights groups in 2008 however these successes drown in a huge sea of human rights violations.

¹ Prepared by Yevgeniy Zakharov, Co-Chair of KHPG.

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As a result, there remains a general assessment by the population of their position as being unprotected. Human rights organizations have gained sufficient capacity to force the State to bear their position in mind, but far from enough to change the overall attitude of the State to the issue of human rights in order to teach them to respect these rights.

Nonetheless it was in 2008 that a new phase began in cooperation between human rights organizations and the State with the creation, jointly with the State, of national institutions which encourage and defend human rights, and cooperation with them. This involved the creation and activities of the Department for Monitoring Human Rights Adherence in the Work of the Ministry of Internal Affairs (DMHRA). The formation of this Department, defining of its mandate and main areas of work, discussion of human rights issues within MIA, all took place in friendly cooperation between the management of the new Department and human rights organizations. Its successes are unquestioned and assure certain progress within the MIA on safeguarding human rights. Of course this cannot fundamentally resolve the human rights problems within the MIA which are the most difficult in the human rights sphere – arbitrary detentions and arrests, unlawful violence in order to extract confessions, including torture, etc. Here changes are needed at the mentality level with decades required to achieve this, as well as systematic reform of the criminal justice system. However the work of the new Department has already been instrumental in identifying those violations, making information about them known, protecting the victims of violations, and studying the conditions which foster such violations. The newly created Department for Monitoring Human Rights Adherence, public councils on human rights, and mobile groups for monitoring observance of rights and liberties have created a new single system of departmental and public control over the observance of rights in the work of police stations. The information policy of the new institution has also been successful, with the creation of its own site <http://umdpl.info>, which is updated on a daily basis, with information about the current work of the Department and human rights issues in the MIA which have been encountered. In less than a year the new Department has succeeded in producing a detailed annual report on the human rights situation in the work of the MIA.²

We would note that in comparison with the new State human rights institution, the analytical and information activities of another national human rights institution which has been functioning for 10 years already – the Human Rights Ombudsperson – leaves a great deal to be desired. It has been four years since there was a report on the human rights situation in Ukraine although according to the law the Ombudsperson should present an annual report. Over the entire 10 years there have only been three annual reports and some special reports. The Ombudsperson's website is updated on average once or twice a week and does not give sufficient information about the work of the Ombudsperson who thanks to her persistence has had certain success in specific cases involving human rights violations.

The experience of the new Department with the MIA is stimulating the creation of analogous monitoring human rights institutions in other State bodies. The creation of new national State institutions protecting and encouraging human rights is promoted also by a phenomenon which has been observed over the last 5-7 years: civil servants have begun appearing with human rights protection thinking, and their numbers are ever increasing. Typical features of such people are a worldview formulated in the perestroika period or after Ukraine gained independence, the lack of experience of adult life in the Soviet environment, a liking for the Internet and knowledge of one or two foreign languages, contact with human rights through their type of work. One can meet such people in the Ministry of Justice, among assistances to National Deputies [MPs], among lecturers in MIA educational institutions, etc.

Among political processes in 2008 which concerned human rights, one should note the efforts of some State bodies, and in the first instance, the President to establish historic truth about the liberation struggle in the 1940s, political repression under the communist regime, the declassifying and publication of archival documents on political repression, and an improvement in access to the Security Service [SBU] archives.

² Human Rights in the activities of the Ukrainian Police, Kyiv – Kharkiv, Prava Ludyny, 2009.

Unfortunately, the overview of positive trends in the human rights sphere can be ended on that, with the other trends being entirely negative. One should first and foremost mention the increasing lack of respect by political forces to the justice system and the principles of the rule of law; efforts to use the courts for political advantage, and unlawful actions with regard to the courts in cases when rulings passed have run counter to political interests. What kind of court reform, what kind of judicial independence can one expect in such circumstances? While there continues to be such an attitude by politicians to the court, one cannot speak of real protection by the State of human rights. In the absence of a strong and independent judiciary, protection of human rights remains unreal. It is not surprising that for several years now parliament has not passed laws aimed at implementing the Concept Strategy for improving court proceedings for the affirmation of fair trial. More detail about this can be found in the unit on the right to a fair trial.

There remains a great problem with enforcement of court rulings: each year over 70% of rulings in civil cases are not enforced. More than 80% of the judgments handed down each year by the European Court of Human Rights concern violations of Article 6 § 1 of the European Convention specifically over non-enforcement of court rulings, including on rulings regarding wages arrears or other payments by State or other enterprises and institutions. Nor in five years has the State done anything to change the procedure to pay debts and give people the money they have earned.

In 2008 the National Expert Commission for the Protection of Public Morality expanded and increased its activities. In our view its decisions were unwarranted and disproportionate intrusion in freedom of expression, and such intrusions did not serve any urgent public need. In general the existence of a separate special body on the protection of public morality is dubious in a democratic society. Serious changes are required to legislation on the protection of public morality in order to achieve clear and foreseeable regulation.

There were also attempts by political opponents to use the law enforcement agencies as instruments in political struggle. This is demonstrated, for example, in the all-round conviction of higher officials that their communications are being monitored – statements to this effect were made on many occasions, though no single case was investigated. This is indirectly confirmed by a significant increase, of more than 1.5 times over 2005 in the number of warrants to intercept communications issued by appellate courts. There were 15 thousand in 2005 and more than 25 thousand in 2008. These figures significantly exceed analogous figures in European countries where more than one thousand orders are issued per year just in France and the Netherlands. A third of the warrants in 2008 were received by investigative units of the SBU. Such an increase in surveillance by enforcement structures over members of the public cannot fail to arouse concern, especially given that guarantees of the right to privacy remain very weak, with no progress in this sphere having been made. On the contrary there is ever more circulation in practice of the identification tax number as a universal identification code which, in violation of the law, is used in all operations. There are constant attempts to introduce biometric data to the new passports both for travel abroad, and the internal document, as well as other unlawful actions flagrantly violating the right to privacy.

The situation in the State Department for the Execution of Sentences which is assiduously holding on to its closed nature and impunity remains stably bad. This is the single State body in Ukraine which has virtually not changed over the years of independence and remains unreformed and a total anachronism.

Other law enforcement agencies also require reform, especially the prosecutor's office, which has powers which lead to a conflict of interests and which carries out general overseeing which is not in keeping with its function.

The National Commission for the Strengthening of Democracy and the Rule of Law has drawn up a progressive Concept Strategy for reform of the criminal justice system³, which is a good

³ Approved by Presidential Decree № 311/2008 from 8 April 2008 «On the decision of the National Security and Defence Council of Ukraine» from 15 February 2008 «On the progress of reforming the system of criminal justice and the law enforcement agencies».

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basis for reform. However the State is in no hurry to reform the law enforcement agencies. Even the tabling in parliament of a draft Criminal Procedure Code which could promote significant improvements in the work of the law enforcement agencies, keeps being deferred, although consensus among lawyers regarding the draft Code has long been achieved.

Flagrant violations of property rights, continued in 2008, these including unlawful seizures of land or other property in spite of the law, the wishes and decisions of local territorial communities or owners. Where the heads of settlement councils resisted unlawful seizures of land, criminal investigations were trumped up against them, as for example the case of Volodymyr Marunyak and other village heads in the Kherson region.

Violations continued of political rights. The Constitutional changes of December 2004 set in motion a real crisis of passive electoral law. Article 38 of the Constitution states that: «citizens have the right to participate in the administration of state affairs, in All-Ukrainian and local referendums, to freely elect and to be elected to bodies of state power and bodies of local self-government». However the Law on parliamentary elections does not allow for free access of citizens to passive electoral law. According to Vsevolod Rechytsky, «It is paradoxical, but in Ukraine we have a situation where one can stand for the office of President by paying a bond and putting oneself forward, yet one can only become a candidate for deputy of a district country by being included on a party list⁴. And when political parties include in their candidate lists only their own members, this is a flagrant violation of the Constitution, infringing the right to be elected. This means the introduction of imperative mandate through the back door. It would seem that Soviet, «democratic» centralism remains the ideal for Ukraine's political elite. With the existing electoral system there is no place for independent individuals who wish to take part in politics, but don't want to attach themselves to a particular party (each of which in some strange way being reminiscent of the Soviet Communist Party). Their intellect and organizational skills are not made use of, which further deepens the degradation of the political elite. This was vividly demonstrated by the local elections in Ternopil and victory of the rightwing radical force VO «Svoboda» which had never won before even in the West of the country (where the supposedly nationalist stand of the party is more likely to be popular – translator).

In conclusion, we are forced, as in previous reports, to conclude that there is no systematic policy at all on improving observance of rights and freedoms in the country. The efforts of human rights organizations, of particular departments and civil servants within the MIA and Ministry of Justice, the National Commission for the Strengthening of Democracy and the Rule of Law to improve the situation have resulted in some progress, however the political crisis, the general attitude of political forces to human rights as to something of lesser importance and insignificant when set against political expediency, prevent systemic improvements to the situation. There remains year in, year out the pressing need to achieve, via the adoption of prepared and already approved Concept Strategies for the criminal justice system, judicial reform and free legal aid, as well as draft new versions of laws on Public Broadcasting, on information, on access to public information and on civic organizations.

⁴ Vsevolod Rechytsky. Ten Postulates regarding the Ukrainian electoral system <http://www.khpg.org/en/index.php?id=1179324516>.

I. THE RIGHT TO LIFE¹

1. PROHIBITION OF DEPRIVATION OF LIFE EXCEPT IN CASES STIPULATED BY LAW

In 2008 there were no killings recorded by the authorities for political motives.

1.1. THE DEATH PENALTY

Ukraine has ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights and the Additional Protocols № 6 and № 13 to the European Convention on Human Rights which in their entirety prohibit the death penalty under any circumstances.

On 15 April 2008 at a meeting with journalists, the Minister of the Ministry of Internal Affairs [MIA] Yury Lutsenko stated that he was personally in support of the death penalty for particularly serious crimes against the individual.² This statement elicited a wave of public protest³, since it came not simply from a politician, but from a minister dealing with State policy in the field of protection of law and order.

On 19 April UHHRU issued an open statement regarding proposals to reinstate the death penalty in which it condemned the attempt at political manipulation by using the issue of the death penalty.⁴

Soon afterwards, on 22 April the Minister of MIA added that the death penalty should be reinstated with a deferment for 10 years. «During this period (10 years) a person sentenced to death will have the possibility to appeal against the court ruling at all stages envisaged by legislation», the Minister explained.

Despite public condemnation of this position the Minister has not changed his stand, although he has stopped making such statements.

1.2. PERMITTED USE OF FORCE RESULTING IN DEATH

In accordance with international standards the State is responsible for the actions and inaction of its representatives, including the law enforcement agencies, military and the personnel of prisons. In cases of urgent need, law enforcement officers may take a human life where there was no prior intention to kill in order to prevent a criminal running away or to protect any person from violence.

However there is often a failure to properly investigate whether the use of force by the law enforcement agencies was reasonable.

¹ Prepared by Volodymyr Yavorsky, UHHRU Executive Director.

² Lutsenko wants to reinstate the death penalty // the UNIAN Information Agency 15.04.2008 <http://human-rights.unian.net/ukr/detail/187527>; Information in English can be found at <http://www.khpg.org.ua/en/index.php?id=1209043568>

³ Cf. Human rights defender: Lutsenko's statements on the death penalty are absurd // <http://tsn.ua/ua/ukrayina/pravozahisnik-zayavi-pro-smertnu-karu-absurd.html>.

⁴ UHHRU Open Statement regarding the proposal to reinstate the death penalty in Ukraine // <http://www.khpg.org.ua/en/index.php?id=1208603992>

I. THE RIGHT TO LIFE

In 2008 52 criminal cases involving the use of firearms by police officers were investigated, these including 6 cases where the use of weapons was not warranted. As a result of the use of weapons by police officers 4 people died last year, and 27 were injured.

2. MEASURES CARRIED OUT BY THE STATE TO PROTECT LIFE: PROTECTION OF THE LIFE OF PEOPLE UNDER ITS CONTROL

The State is responsible for the life of people under its control, for example, while in places of deprivation of liberty or temporarily detained, the armed forces, State hospitals (especially those where people are undergoing compulsory treatment), etc.

There is a significant problem in the numerous violations of the right to life in places of deprivation of liberty or temporary detention (temporary holding facilities, or ITT; pre-trial remand centres or SIZO, penal institutions, etc). Appalling conditions, and medical treatment being often unavailable or inadequate, lead to people dying. A flagrant example was the case of Olha Biliak.

CASE OF KATS AND OTHERS V. UKRAINE (APPLICATION № 29971/04)

On 18 December the European Court of Human Rights passed judgment in the *case of Kats and Others v. Ukraine* finding that Ukraine had violated the right to life. The authorities had not fulfilled their duty to protect the life of Olha Biliak who had been detained on suspicion of committing a crime and was under the total control of the State.

The case involved the tragic death in February 2004 in the Kyiv SIZO № 13 of poet Olha Biliak. the criminal charges against whom have yet to receive a final judgment.

Olha Biliak was arrested on 14 April 2003 and placed in pre-trial detention on suspicion of robbery. However the applicants and lawyers who worked on the case are convinced that the charge was trumped up.

Olha Biliak had a number of chronic illnesses which in the pre-trial remand centre and against the background of HIV infection rapidly worsened and required immediate treatment. Her father, Oleh Kats on 26 September 2003 wrote a letter to the SIZO Administration in which he demanded that his HIV-positive daughter be hospitalized. However, the prison authorities refused to transfer her to a specialist hospital. Similarly in January 2004 the Prosecutor turned down the request to release Olha.

While in custody, Olha Biliak kept a diary in which she described everything that was happening to her and those around her in the conditions of SIZO № 13. After her death her father placed this diary on the Internet, and it can be read at <http://olgabilyak.kiev.ua/>. According to information from the diary, Olha's health seriously deteriorated in December 2003. However, despite serious respiratory problems, a very high temperature and rapid weight loss, the necessary diagnosis was not carried out and treatment boiled down to the use of medication to keep down her temperature.

At the beginning of January 2004 Olha complained to doctors of stomach pain and vomiting and was diagnosed with chronic gastritis. On 21 January the SIZO Administration found her HIV-positive and on the basis of this on 29 January the local police department sent a request to release her.

Against a background of procrastination over her release, Olha Biliak died on 1 February within the walls of the SIZO. The official assessment concluded that she had died of an HIV-linked illness – progressive septic pneumonia. However the direct cause of death was also inadequate medical treatment while in the SIZO.

In 2008 convicted prisoners in penal institutions committed five murders, while four people received serious bodily injuries.⁵

⁵ Information «On the level of lawfulness in the country in 2008 (in accordance with Article 2 of the Law «On the prosecutor's office»).

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We should also mention the situation with observance of the right to life in the Armed Services. Civic organizations receive information about cases of «didivshchyna» (bullying or hazing of new conscripts), including those resulting in the death of a soldier. One can welcome an improvement in investigations into such reports and the conviction of those responsible in some prominent cases.

In 2006 26 military servicemen died in service under various circumstances. In 2007 this figure fell to 20, while according to the totals for 2008, it dropped to 14. Of the 14 who died while carrying out military service duties in 2008, 5 committed suicide, 3 died while carrying out household maintenance activities, 2 during military training, and one person died from a car accident, another drowned, another from an accident, while one person died as the result of inappropriate relations (the formal term for «didivshchyna»). Among those who died were 4 officers, 2 military servicemen from the Military Service on contract, and 8 military conscripts. In 2008 there were also 61 deaths among military servicemen not related to their service, i.e. during time off or on leave. For comparison, the figure for 2007 was 69.⁶

The following was the death linked with inappropriate relations.

The Head of the Military Law and Order Service in the Armed Forces of Ukraine, Major-General Fedir Makavchuk on 11 February 2008 informed the press about the death of a conscript Andriy Poperechny who on 10 February at around 16.40 during military formation lost consciousness and fell, dying 20 minutes later without regaining consciousness. According to the forensic medical examination, he died of heart failure caused by a blow to the chest. The Prosecutor of the garrison initiated a criminal investigation and the soldier who dealt the blow was taken into custody. The Commandant of the military unit and the company commander were suspended from their duties during the investigation⁷ In October 2008 information emerged that the soldier involved had been sentenced to four years imprisonment. The killing was classified as manslaughter through carelessness. The Central Department of the Military Law and Order Service within the Armed Forces were also ordered to pay Andriy Poperechny's parents and sister 80 thousand UAH each, as well as 42 thousand UAH in material damages.⁸ It is odd that the management were not punished for «didivshchyna».

3. MEASURES TAKEN BY THE STATE TO PROTECT LIFE: OTHER ASPECTS

The number of deaths from external causes in everyday life between January and December (broken down by cause of death and type of location)⁹

	Urban and rural populated areas		Urban areas		Rural areas	
	2008	2007	2008	2007	2008	2007
<i>Deaths</i>						
Total № of deaths from external causes	59907	64989	37082	40545	22825	24444
<i>This including</i>						
– pedestrians suffering as the result of a transport-linked accident	3791	4677	2377	3004	1414	1673

⁶ Head of the Military Law and Order Service in the Armed Forces of Ukraine, Major-General Fedir Makavchuk: «The coefficient of expenditure on people calculated per 1,000 military servicemen, decreased from 0.13 in 2007 to 0.09 in 2008.» // News from the Press Service of the Ministry of Defence, 10.01.2009, <http://www.mil.gov.ua/index.php?lang=ua&part=news&sub=read&id=13908>.

⁷ «At the present time it is known that military serviceman Andriy Poperechny died from reflex heart failure as the result of being struck with the palm of the hand in the chest. This diagnosis was given by forensic medical experts», – Major-General Fedir Makavchuk // News from the Press Service of the Ministry of Defence 11.02.2008, <http://www.mil.gov.ua/index.php?lang=ua&part=news&sub=read&id=11211>; <http://www.mil.gov.ua/index.php?lang=ua&part=news&sub=read&id=11209>.

⁸ «The killer of our son asked our forgiveness, assuring us that with Andriy and other victims during military service he had been on friendly terms» // the newspaper 'Facts and commentaries' 15.10.2008 <http://www.facts.kiev.ua/archive/2008-10-15/90938/index.html>.

⁹ Information from the State Committee of Statistics http://www.ukrstat.gov.ua/express/expr2009/0209/38_doc.zip

I. THE RIGHT TO LIFE

– people involved in car accidents	2992	3653	2009	2542	983	1111
– other transport-linked accidents	2652	2967	1395	1630	1257	1337
– from falls	3378	3378	2417	2423	961	955
– from chance action of inanimate mechanical forces	466	473	252	281	214	192
– from drowning or immersion in water	3506	4283	1787	2173	1719	2110
– from other accidents preventing breathing	2467	2727	1417	1592	1050	1135
– Accidents involving smoke or fire	2569	2656	1221	1347	1348	1309
– accidents caused by natural factors	4401	4159	2839	2717	1562	1442
– accidental poisoning or the influence of alcohol	8119	8515	4692	4794	3427	3721
– from other accidental poisoning by toxic substances	2911	3113	1849	1979	1062	1134
– from deliberate self-injury (including suicide)	9436	10037	5298	5638	4138	4399
– from the results of an attack aimed at killing the person or inflicting injuries	3766	4229	2514	2885	1252	1344
– from cases of injury without clear intent	8255	8842	6328	6817	1927	2025
– other causes	1198	1280	687	723	511	557
<i>Per 100 thousand head of population</i>						
Total № of deaths from external causes	129,5	139,7	117,2	127,8	156,0	165,3
<i>This including</i>						
– pedestrians suffering as the result of a transport-linked accident	8,2	10,0	7,5	9,5	9,7	11,3
– people involved in car accidents	6,5	7,8	6,4	8,0	6,7	7,5
– other transport-linked accidents	5,7	6,4	4,4	5,1	8,6	9,0
– from falls	7,3	7,3	7,6	7,6	6,6	6,4
– from chance action of inanimate mechanical forces	1,0	1,0	0,8	0,9	1,5	1,3
– from drowning or immersion in water	7,6	9,2	5,6	6,9	11,7	14,3
– from other accidents preventing breathing	5,3	5,9	4,5	5,0	7,2	7,7
– Accidents involving smoke or fire	5,6	5,7	3,9	4,2	9,2	8,8
– accidents caused by natural factors	9,5	8,9	9,0	8,6	10,7	9,7
– accidental poisoning or the effect of alcohol	17,6	18,3	14,8	15,1	23,4	25,2
– from other accidental poisoning by toxic substances	6,3	6,7	5,8	6,2	7,2	7,7
– from deliberate self-injury (including suicide)	20,4	21,6	16,8	17,8	28,3	29,8
– from the results of an attack aimed at killing the person or inflicting injuries	8,1	9,1	7,9	9,1	8,5	9,1
– from cases of injury without clear intent	17,8	19,0	20,0	21,5	13,2	13,7
– other causes	2,6	2,8	2,2	2,3	3,5	3,8

It can be seen from these figures that most deaths are as the result of traffic accidents, alcoholic or other poisoning, and suicide.

The imposition in November 2008 of considerably greater punishment for violation of the Road Code significantly reduced the number of people who died from road accidents. This can explain the fall in number of traffic-related fatalities as compared with 2007.

There are virtually no effective State programmes to counter alcoholism and suicide.

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Deaths from specific medical causes

	2008		2007	
	deaths	per100000 head of population	deaths	per100000 head of population
Total number of deaths	754462	1631,0	762877	1640,3
<i>including</i>				
Some infectious and parasitic diseases	16999	36,7	16802	36,1
<i>Including tuberculosis</i>	10301	22,3	10506	22,6
<i>HIV-related illnesses</i>	4997	10,8	4541	9,8
Tumours	89042	192,5	90030	193,6
Blood and vascular diseases, and particular problems involving:				
Immune mechanisms	315	0,7	351	0,8
Endocrinal diseases and digestive disorders and problems with metabolism	2827	6,1	3087	6,6
Psychological disorders and dysfunctional behaviour	2849	6,2	3014	6,5
<i>Including psychological disorders or dysfunctional behaviour due to the use of alcohol</i>	2079	4,5	2266	4,9
Nervous system disorders	7342	15,9	7047	15,2
Disease of the eye and its supplementary apparatus	1	0,0	2	0,0
Disease of the ear and papillary growths	44	0,1	55	0,1
Vascular disorders	480260	1038,2	480624	1033,4
<i>Including alcohol-related cardiomyopathy</i>	9030	19,5	8985	19,3
Respiratory disorders	23322	50,4	25075	53,9
Digestive system disorders	35231	76,2	33595	72,2
<i>Including alcohol-linked liver disease</i>	5109	11,0	4813	10,3
Skin and subcutaneous disorders	546	1,2	559	1,2
Skeletal and muscle system and Connective tissue	722	1,6	721	1,5
Diseases of the urinary and genital organs	3160	6,8	3295	7,1
Pregnancy, childbirth and post-natal complications	80	0,2	94	0,2
Specific conditions arising during: the prenatal period	2620	5,7	2507	5,4
Congenital disorder or defect Chromosomal anomalies	2088	4,5	2212	4,8
Unidentified or unspecified causes	26254	56,7	27829	59,8
External causes of death	60760	131,3	65978	141,9
<i>transport-linked accidents</i>	9605	20,8	11463	24,6
<i>from drowning or immersion in water</i>	3514	7,6	4296	9,2
<i>accidents involving smoke or fire</i>	2601	5,6	2698	5,8
<i>accidental poisoning or the influence of alcohol</i>	8119	17,6	8515	18,3
<i>other accidental poisoning by toxic substances</i>	2944	6,4	3188	6,9
<i>suicide</i>	9436	20,4	10037	21,6
<i>The results of an assault aimed at killing or inflicting injury</i>	3766	8,1	4229	9,1

One should also pay attention to a small reduction in infant mortality. In previous years this figure consistently rose. However there has been a small increase in the number of unknown or unspecified deaths which in total reach 4.5%. This figure would seem too high and could suggest concealment of the real causes of death.

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Over 75% of children die of perinatal pathology and congenital development disorders. A lot of people believe that this is due to the limited possibilities of Ukrainian medicine to provide high-quality diagnosis and qualified assistance through a lack of modern equipment,¹⁰ as well as due to doctors' negligence.

Infant deaths (up till the age of 1) broken down by cause of death¹¹

	2008		2007	
	infants	Percentage of the total	infants	Percentage of the total
Total number of deaths	5049	100,0	5188	100,0
<i>from the following causes:</i>				
Some infectious and parasitic diseases	161	3,2	192	3,7
<i>Among them, tuberculosis</i>	2	0,0	3	0,1
<i>viral diseases HIV</i>	10	0,2	19	0,4
Tumours	53	1,0	53	1,0
Blood and Vascular diseases, and particular problems with the immune system	26	0,5	52	1,0
Endocrinal diseases and digestive disorders and problems with metabolism	42	0,8	46	0,9
Nervous system disorders	140	2,8	168	3,2
Vascular disorders	66	1,3	60	1,2
Respiratory disorders	136	2,7	183	3,5
<i>Including influenza and pneumonia</i>	78	1,5	123	2,4
Digestive system disorders	33	0,7	32	0,6
Specific conditions arising at the perinatal stage	2620	51,9	2507	48,3
<i>Including heart or vascular disorders in the prenatal stage</i>	1251	24,8	1214	23,4
<i>Specific infections of the perinatal period</i>	493	9,8	445	8,6
<i>Haemoglobin linked disorders in the foetus or new-born baby</i>	553	11,0	496	9,6
Congenital development disorder or deficiency and Chromosome anomalies	1240	24,6	1331	25,7
<i>Including congenital disorders of the nervous system</i>	110	2,2	127	2,4
<i>Congenital vascular problems</i>	449	8,9	523	10,1
<i>Congenital problems of the digestive system</i>	100	2,0	103	2,0
Other illnesses	3	0,1	9	0,2
Unspecified or unknown causes of death	229	4,5	224	4,3
External causes of death	300	5,9	331	6,4
<i>The results of an assault aimed at killing or inflicting injury</i>	14	0,3	20	0,4

From time to time cases emerge involving medical blunders and the victims of these. Some cases have involved deaths.

¹⁰ See, for example, Children's life for half a million // Tetyana Katrychenko «Glavred», 21.03.08 <http://ua.glavred.info/print/articles/12889.prn>.

¹¹ The demographic situation in Ukraine in 2008. Express Bulletin. State Committee of Statistics. http://www.ukrstat.gov.ua/express/expr2009/0209/25_doc.zip.

CASE INVOLVING INFRINGEMENTS OF PATIENTS' RIGHTS

A woman from Pervomaisk in the Kharkiv region was registered and undergoing examinations in connection with her second pregnancy in a women's consultation unit where she lived. She was examined three times, including with an ultra scan. Between 36 and 38 weeks of pregnancy she did not have an ultra-scan examination due to the lack of equipment in the district hospital where the maternity unit was located.

Four days before her labour she was hospitalized in the maternity unit complaining of stomach pain. However no additional examination or treatment was ordered and she was sent home. Also, in connection with a diagnosis of foetal placenta insufficiency and in breach of Ministry of Health Order № 503 she was not sent for a higher level clinic (third level).

On the day of labour she again came to the maternity unit where she had already spent four days complaining of pain in the area of the stomach. The beginning of labour was artificially induced via an incision in the foetal sack. However the first part of the labour was not in accordance with the norms for labour with it taking too long to open the cervix. This reflected a secondary weakness of the labour activity and required that a caesarean be carried out in accordance with clinic protocols. However the midwife doctor involved in the labour lost control over how it was run. He infringed the protocol of control over running the labour, the heartbeat of the foetus was not measured and recorded, nor was a partogram taken. It is claimed that there was a failure to intervene in timely fashion when the situation demanded it. The foetus had the umbilical cord wound around its neck, which had not been diagnosed due to the lack of an ultra-scan examination, and in connection with the development of secondary weakness of labour activity, died within the womb at an unknown time. The doctor lost control over the running of the labour which is his functional duty, this making him culpable for damaging the health of the woman giving birth. An operation which was damaging to the foetus was carried out within the womb. There are a number of documents, including an expert medical opinion indicating the doctor's share of blame.

The woman has lodged a claim with the court in defence of her rights.

There is no law to protect the interests of victims of medical error. However the main problem is not even the fact that this or that Article of the Criminal Code is difficult to apply due to unclear or too narrowly worded provisions. The problem is that the Ministry of Health at one stage lobbied to have prerogative in carrying out expert assessments of medical activities whereas this should have been under the jurisdiction of the Ministry of Justice. Any expert assessment is carried out by the Ministry of Justice with only medical ones for some reason left to the Ministry of Health. Clearly those accused or suspected of an offence cannot check their own behaviour. If you then add the closing of ranks, it is easy enough to predict the court prospects of such cases

4. THE STATE'S DUTY TO ENSURE AN EFFECTIVE INVESTIGATION

INTO THE TAKING OF A LIFE

The State is obliged to ensure the enforcement of laws which prohibit the arbitrary taking of life by ensuring proper investigation into all suspicious cases of deprivation of life. The investiga-

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tion must be carried out efficiently and without delay, and demonstrate effectiveness and independence.

Investigations are fairly often carried out without observance of such principles.

It is also worth analyzing what protection people have against unlawful deprivation of life, since this also reflects the effectiveness of the investigations carried out.

Crimes causing the death of the victim¹²

		Crimes registered			Percentage solved%		Crimes investigated (uncovered) ¹³		Unsolved crimes as of 1.01.2008
		2007	2008	change%	2007	2008	2007	2008	
Particular types of crimes	Murder (or attempted murder)	2906	2707	-6,8	93,7	93,1	2990	2802	7103 (209 in 2008)
	Intentional grave bodily injury	5486	5055	-7,9	88,8	91,4	5189	4972	17939 (465)
	including Those resulting in a fatality	1850	1633	-11,7	92,8	94,2	1802	1687	–
	Infringements of road safety	13526	11294	-16,5	65,8	76,4	10193	10369	–
	including Those resulting in a fatality	3569	2852	-20,1	64,8	77,6	2581	2629	9472

One should note that the number of registered crimes gives only the statistics for criminal investigations actually initiated. However it is not unusual for investigations to not be initiated, especially in equivocal cases or where the investigators have a particular interest. There are especially often refusals to launch a criminal investigation where it was law enforcement officers who took a life, over death as the result of a road accident, in places of deprivation of liberty, etc.

Most reports of a crime are returned without a criminal investigation being launched (according to MIA figures – around 75%). Without such a criminal file it is virtually impossible to carry out a proper investigation. One cannot, for example, organize a forensic medical analysis, or apply other investigative measures (for example, a search). In many cases the witnesses are not even questioned, not to mention the use of all measures for examining a crime. Witnesses are also not criminally liable for giving false testimony if a criminal investigation has not been launched. Later refusals to initiate criminal investigations can be revoked by the courts however more often than not that does not have an impact on the effectiveness of the investigation. For victims of a crime it is difficult to receive access to the material of an investigation, or in the case of a refusal to open a criminal file, totally impossible. They are virtually never informed about the course of the investigation. There is also a problem with recognition of the procedural position of the victim in criminal cases launched, this being through a separate resolution by the criminal investigator.

¹² According to official MIA statistics for 2008. Available on the MIA website: <http://mvs.gov.ua/mvs/control/main/uk/publish/article/control/main/uk/publish/article/170319;jsessionid=3114654682FFD6EE8BE566DE33BF2FCD>.

¹³ This refers to criminal investigations submitted to the court. It should be noted that according to figures from the State Judicial Administration of Ukraine, on average 11-14 thousand criminal investigations are returned each year from the courts for further investigation (in accordance with Articles 232, 246, 281 and 249-1 of the Criminal Procedure Code), this being approximately 6-8% of the total number of criminal investigations.

For example, in the already outlined case of Kats and others v. Ukraine (Application № 29971/04), the European Court of Human Rights in its judgment from 18 December 2008 found that there had been violation, amongst others, of Article 2 of the European Convention which stipulates procedural obligations regarding protection of the right to life. The Court found, for example, that there had not been an effective and independent investigation into Olha Biliak's death in the SIZO. The case had been investigated by the Prosecutor's Office for 4 years and 9 months and was still continuing. During this time courts had three times revoked the resolution refusing to initiate a criminal investigation. The Prosecutor's Office, in its turn, had not undertaken actions which were the cause of these court rulings. Furthermore, the prosecutor's office avoided investigated what in the view of the victims was the cause of Olha Biliak's death – the quality of the medical assistance she was given. Certain investigative measures specifically the questioning of Olha's cellmates was carried out by the SIZO Administration, this not complying with the criteria of independence of the investigation. The Prosecutor had made no effort to question these 8 people. The rights of the victims were violated during the investigation. For example, their status was not defined, they were refused access to the results of the investigation, not informed about the course of the investigation, or that it was not being continued, etc.

The European Court of Human Rights had previously found that the investigation into the case of *Gongadze v. Ukraine*¹⁴ had been ineffective, given the serious details and gaps in the investigation which undermined the ability of the investigators to establish the cause of death or those responsible, whether the direct perpetrators, or those who ordered or organized the crime.

Later in the case of *Serhiy Shevchenko v. Ukraine*¹⁵ the European Court also found a violation of the right to life due to the failure to carry out an effective and independent investigation into the death of a person while doing military service. The Court stated that the investigation had not been consistent, had contained significant failings, that not all evidence had been thoroughly examined, and that certain evidence, for example, testimony of the victim's relatives and friends about his having no suicidal inclinations had not been taken into consideration at all. Furthermore the investigation had not been independent given that it had at the initial stage been carried out by military people who might have been implicated in his death, and later by the Military Prosecutor who was also not independent since the detectives and criminal investigators have to observe military discipline. The application had also not been granted victim status in the investigation.

All of these cases indicate a number of significant systemic problems with investigations into deaths arising in very many cases.

The Prosecutor also agrees that investigations are carried out slowly, that criminal files are often not opened in timely manner, and that priority investigative measures are not of a high standard. Cases have become common where unlawful decisions are taken to terminate the criminal investigation and close the file. As a result of this during 2008 the Prosecutor revoked 59.1 thousand resolutions terminating investigations, 6.5 thousand resolutions to close a criminal file and issued 57.6 thousand written instructions.

The Prosecutor acknowledges that often the place where bodies were found is examined not by criminal investigators, but by police inspectors or detective inquiry officers, without the involvement of forensic medical experts. This leads in future to incorrect procedural decisions being taken, including the decision to refuse to initiate a criminal investigation over signs of a violent death. Last year the Prosecutor revoked 48 such decisions, initiating action at the same time under Articles 115-119 of the Criminal Code.

Overall, according to information from the Prosecutor General, over 118.8 thousand crimes, or one in three of the crimes committed in 2008, remain unsolved. The total number of unsolved crimes

¹⁴ Application № 34056/02, Judgment from 9 November 2005, <http://www.echr.coe.int/>

¹⁵ Application № 32478/02, Judgment from 4 April 2006, <http://www.echr.coe.int/> 4 квітня 2006 року, <http://khp.org.ua/index.php?id=1179480242>.

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including figures for previous years exceeds 2 million, of which over 1 million were grave or particularly grave crimes, more than 7 thousand murders, and over 9 thousand fatal road accidents.¹⁶

5. DISAPPEARANCES

Ukraine has not signed the UN International Convention for the Protection of All Persons from Enforced Disappearance.

No cases were reported last year of politically motivated disappearances.

6. RECOMMENDATIONS

1) Introduce effective independent mechanisms for investigating deaths, especially those caused by the actions of law enforcement officers.

2) Change criminal procedure legislation in order to provide more rights to victims, including to the families of those killed, and to increase their impact on the course of the investigation. It should be made compulsory to allow the victim the opportunity to see all material of the case after its conclusion.

3) Pass a Law «On patients' rights» providing safeguards for the observance of patients' right to life.

4) Ensure the availability of independent forensic medical examinations for assessing causes of death.

5) Introduce proper mechanisms for ensuring adherence to legislation in the work of the law enforcement agencies, as well as appropriate government and public control.

6) Carry out reforms into health care aimed at preventing the rise in infant and child mortality

7) Sign and ratify the International Convention for the Protection of All Persons from Enforced Disappearance passed on 20 December 2006 (Resolution of the UN General Assembly A/RES/61/177).

¹⁶ Information «On the level of lawfulness in the country in 2007 (in accordance with Article 2 of the Law «On the prosecutor's office»)

II. PROTECTION FROM TORTURE AND OTHER FORMS OF ILL-TREATMENT¹

1. CRIMINALIZATION OF TORTURE

In 2008 legislators made an effort to bring criminal legislation into line with Articles 1 and 4 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter the Convention against Torture). A law passed on 14 April 2008 introduced amendments to Article 127 of the Criminal Code.

The changes to the first part of this Article can be seen in the comparative table.

Version from 15 April 2008	Version from 12 January 2005
Torture, that is, the deliberate inflicting of severe physical pain or physical or moral suffering through beating, being tormented, or other violent actions in order to force the victim or another person to commit acts which are against their will, including receiving from them or another person information or a confession, or in order to punish them or another person for actions which they or another person committed, or which they are suspected of having committed, as well as to intimidate or discriminate against them or other persons.	Torture, that is, the deliberate inflicting of severe physical pain or physical or moral suffering through beating, being tormented, or other violent actions in order to encourage the victim or another person to commit acts which are against their will, including receiving information, testimony or a confession from them or another person, to punish them for actions which they committed or which they are suspected of having committed, or to intimidate them or other persons.

Paragraphs 3 and 4 of the previous version of Article 127 which envisaged a special perpetrator – an employee of a law enforcement agency – have been removed. Instead amendments have been made to paragraph 2 of Article 127 which now allows for liability of a broader range of people – officials who act with use of their official position.

Overall one can positively rate the changes to Article 127 which now envisages a wider range of aims which if present make it possible to deem the behaviour torture, and which allows for the motive of discrimination.

Although at first glance it may seem that liability for torture has been lessened, however a more thorough study of the system of criminal legislation demonstrates that the actions envisaged in paragraphs 3 and 4 of Article 127 in the previous version remain punishable under other articles of the Criminal Code. For example, torture committed by an employee of a law enforcement agency which led to a person's death can fall under paragraph 2 of Article 127 or paragraph 2 of Article 115 of the Criminal Code, with these in total envisaging sentences of up to life imprisonment.

¹ By Arkady Bushchenko, Bar Lawyer, KHPG Legal Expert, Head of the UHHRU Board.

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There remains a problem with classifying actions which cannot be called violent, but which cause «severe physical pain or physical or moral suffering». Such actions cannot be covered by the current version of Article 127 despite the commitments set down in Articles 1 and 4 of the Convention against Torture.

We should add that it is possible to decide whether the current version of Article 127 complies with the requirements of these Articles of the UN Convention against Torture only on the basis of court practice in applying it, for example, problems can arise with the interpretation of the wording «with use of official position».

2. PREVALENCE OF TORTURE

The use of torture by the police and in closed institutions remains an issue. The factors giving rise to the use of torture are the same as those noted in the Annual Reports from 2004-2007.²

The European Commission in its Report on Implementation of the European Neighbourhood Policy in 2008 noted numerous reports alleging torture and ill-treatment by the police, although on a slightly smaller scale as compared with the previous period. It also pointed out the lack of punishment of law enforcement officers, the insufficient legal safeguards against ill-treatment by the police and ineffectiveness of investigations into torture.³

The UN Working Group on Arbitrary Detention which was in Ukraine on an official mission from 22 October to 5 November 2008, stressed that there were repeated and often convincing reports from all over the country of torture and other forms of ill-treatment by the police aimed at extracting a confession. The Working Group received numerous allegations of such practice from victims whom they spoke with in places of deprivation of liberty and who sometimes showed them the marks of ill-treatment.⁴

In 2008 several judgments were passed by the European Court of Human Rights regarding Ukraine's violation of various aspects of the prohibition of ill-treatment set out in Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Yaremenko v. Ukraine (№ 32092/02, 12 June 2008),
Kobets v. Ukraine (№ 16437/04, 14 February 2008),
Ukhan v. Ukraine (№ 30628/02, 18 December 2008),
Solovyov and Zozulya v. Ukraine (№ 40774/02, 4048/03, 27 November 2008),
Spinov v. Ukraine (№ 34331/03, 27 November 2008),
Ismailov v. Ukraine (№ 17323/04, 27 November 2008),
Mikhaniv v. Ukraine (№ 75522/01, 6 November 2008),
Soldatenko v. Ukraine (№ 2440/07, 23 October 2008).

Ukraine was yet again found responsible for ill-treatment of detainees while being held by the police. In the case of *Ismailov v. Ukraine*, the European Court stated that there was sufficient evidence to conclude that Mr Alim Ismailov had received bodily injuries while in a Simferopol police station in April 2004. Those guilty of ill-treatment have to this day not been established due to the slack investigation by the Prosecutor's office.

Reports of ill-treatment by the police continue to be received by civic organizations. The UHHRU network of Public Advice Centres in 2008 registered 234 complaints alleging various forms of ill-treatment. The following are some examples.

In the Ordzhonikidze Police Station in Kharkiv police officers tried to force Svitlana Pomilyaiko and another woman to confess to a theft. Svitlana was kicked, had a bag placed over

² Available at: <http://www.helsinki.org.ua/en/index.php?r=a2b3> and <http://www.khpg.org.ua/en/index.php?r=a2b4c12>.

³ Implementation of the European Neighbourhood Policy in 2008, Progress Report Ukraine, Brussels, 23/04/2009, SEC(2009) 515/2

⁴ Human Rights Council, Tenth session, A/HRC/10/21/Add.4, 9 February 2009

her head preventing her from breathing. The other victim was tortured by applying tweezers to her nipples. Following their release from the police station, doctors found that both women had bodily injuries. The officers had a criminal investigation launched against them and were dismissed.

In the evening of 27 June 2008 Serhiy Ushakov and his wife were detained on suspicion of murder and brought to the Frunzensky District Police Station in Kharkiv. They were held in the police station for 24 hours without any registration and Ushakov was forced into confessing to the crime. It was only on 28 June, after a lawyer was called in, that the detention was registered. During the interrogation as accused, Ushakov retracted his confession and stated that he had made it under duress because of torture and threats that his wife would be subjected to torture. In the evening of 1 July 2008 the Prosecutor for the Frunzensky District of Kharkiv, having examined the upper part of the detained man's body and seen bruises and scratches, initiated a check into the lawfulness of the police officers' behaviour. Late in the evening when Mr Ushakov and his wife were in the Deputy Prosecutor's office, figures in authority from the Frunzensky Police Station burst into the room, used force to abduct Ushakov and his wife and disappeared. That same night employees of the prosecutor's office found Ushakov's wife in one of the offices of the Frunzensky Police Station. Ushakov himself was found only on 2 July 2008 thanks to the actions of the Department for Internal Security of the Kharkiv Regional Central Department of the MIA and officers of the SBU [Security Service]. To date no results of an investigation into the torture and other unlawful behaviour of the police officers have been received.

During the night of 20-21 March 2008 in Zhytomyr traffic police officers brutally beat Valentin Kopychuk, an officer of the border guard forces. The latter received medium severity bodily injuries and spent almost three months in hospital. After the assault, to give their actions a more lawful appearance, the police officers drew up a protocol over flagrant disobedience purportedly shown by Kopychuk to the police officers. Kopychuk was shortly afterwards convicted of this offence by the Korolyovsky District Court. Up till now there has been no investigation whatsoever into the complaint lodged by the victim about the brutal beating he suffered.

Serhiy Kuntsevsky was detained during the day on 2 October 2008. That evening he died in the police station from a brain injury. His brother and another person who were also detained and interrogated in the police station that day heard how Serhiy was being beaten in the next office and saw him still alive, but badly beaten. According to reports, a criminal investigation has been launched against several police officers.

The widespread use of torture is confirmed by the practice of the Department for Monitoring Human Rights Adherence in the Work of the Ministry of Internal Affairs.

Over recent years the number of reports of hazing in the army has been falling. According to figures from the Ministry of Defence, the number of crimes linked with such relations in the armed forces fell from 133 to 103 in 2008 and makes up 12.6% of all crimes. The number of crimes linked with the use of force against subordinates decreased from 64 to 53. For example, in the Land Forces in 2008 there were 22 cases of hazing as against 33 in 2007. In the Air Force and the Marine Forces, the number of such offences had also noticeably fallen from 31 in 2007 to 23 in 2008 and by 43 in 2007 to 38 in 2008, respectively. For infringements of the rules on relations and exceeding authority through the use of force in 2008 94 people were convicted against 161 in 2007. In 2008 criminal files were submitted to the court on 15 officers and 34 people from the sergeant corps who had used physical force.⁵

⁵ «The Head of the Military Service of Public Order in the Armed Forces of Ukraine, General-Major Fedir Makavchuk «More than 80% of formations and military units of the Armed Forces live without offences», Press Service of the Ministry of Defence, 10.01.2009, http://www.mil.gov.ua/news/print_news.php?lang=ua&id=13909.

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3. INVESTIGATIONS INTO COMPLAINTS OF TORTURE AND ILL-TREATMENT

Investigation into cases of torture and ill-treatment by the police remain on the whole ineffective. Several judgments from the European Court of Human Rights found violations of Article 3 of the Convention specifically due to the failure of the prosecutor's office to carry out a timely, thoroughly and unbiased investigation into allegations of torture.

In the case of *Spinov v. Ukraine*, decisions refusing to initiate a criminal investigation were taken 7 times, but revoked by higher prosecutors or by the court. It was only after four years and seven months that the investigation finally began, however it would be unrealistic to hope for any success in such a belated investigation.

In the case of *Ismailov v. Ukraine* the investigation into a complaint alleging torture began only two years and two months after the repeated revoking of decisions refusing to initiate a criminal investigation. The courts stated that the version for the origin of bodily injuries given by the prosecutor's officer clearly contradicted medical evidence. Therefore in one of the next decisions by the prosecutor's office there was no mention at all of the reason for the injuries.

In the case of *Kobets v. Ukraine*, the relevant authorities learned of the applicant's allegations of torture from the doctor of the ambulance brigade the day after the events. However no decision was taken for seven months, and it was only after a year that a criminal investigation was initiated. The investigation lasted four years and was terminated several times, but renewed following a court ruling or decision from a higher-level prosecutor.

On 26 June 2008 the Ukrainian Helsinki Human Rights Union passed to the Prosecutor General's Office a list of approximately 90 cases involving torture and ill-treatment in Ukraine which had not been investigated by prosecutor's offices. Among them were cases involving events from 2001 which had still not received thorough investigation.⁶

Some of the people alleged by the victims to have been involved in the torture are to this day working in the law enforcement agencies and successful moving up the career ladder. For example, one of the former police officers who was involved in the inhumane treatment of Mr Afanasyev (cf. Judgment of the European Court of Human Rights from 5 April 2005), and was later named in an analogous complaint by Mr. Bocharov, is at the present time holding a managerial position in the tax police of the Moskovsky District in Kharkiv. Two other people who are alleged by Mr Bocharov to have subjected him to torture are still working in different sections of the police.

This is only one of the examples where people possibly implicated in torture or inhuman treatment of people detained have, due to the inefficient investigation, continued to work in the law enforcement against, feeling a sense of impunity and instilling this same sense in others.

According to MIA figures, in 2008 only 4 criminal investigations were initiated over torture and beating by police department officers, and only one person was convicted. Throughout 2008 only 3 police department officers were dismissed for torture and beating through disciplinary proceedings. They were officers who had worked in the police departments for 6 – 20 years.

4. VIOLATION OF THE PRINCIPLE OF NON-REFOULEMENT DUE TO THE THREAT OF TORTURE

On 4 and 5 March 2008 11 Tamil asylum seekers were forcibly returned to their country of origin. All 11 asylum seekers had registered with and received documents from the Kyiv office of the UNHCR confirming that they were asylum seekers in Ukraine. Six of them had applied for refugee status to the Ukrainian authorities.⁷

⁶ More details at «Don't say you didn't know» <http://www.helsinki.org.ua/en/index.php?id=1214673585> and On combating bad press <http://www.helsinki.org.ua/en/index.php?id=1222259683>

⁷ More detail is given about this case in the section on the rights of refugees and asylum seekers

As earlier with the extradition of Uzbekistan nationals in 2008, there were violations of fundamental procedural rights of asylum seekers. According to the 1951 UN Convention relating to the Status of Refugees, asylum seekers should be provided with access to translators and legal assistance, the right to appeal against a decision to deport them, as well as access to the procedure for gaining refugee status. This time the asylum seekers were not able to receive access to legal assistance, and the representatives of the UNHCR were also unable to get to see the men. An appeal from the UNHCR to the Ukrainian authorities to provide a fair assessment of the applications was not heeded.

Furthermore, as with previous cases of *refoulement en masse* of asylum seekers to their country of origin, no regard was given to the norms of international law which prohibit the return of a person to a country where he faces torture and ill-treatment

5. THE LACK OF ADEQUATE PROCEDURE FOR DECISIONS ON EXTRADITION

It should be noted that at the present time we are not aware of any case where the Ukrainian authorities have flouted temporary measures applied by the European Court of Human Rights through Rule 39 which puts a halt on extradition or any handing over of a person to his or her country of origin. At the present time the use of this temporary measure by the European Court is the only possibility of stopping extradition. The domestic legal system does not provide adequate protection from extradition or any handing over of a person to another country in violation of international norms of human rights protection.

On 23 October 2008 the European Court of Human Rights issued a first judgment regarding extradition from Ukraine. The Court found that Ukraine would be in breach of Article 3 of the Convention if it extradited Mr Soldatenko to Turkmenistan.

The judgment encapsulates vital provisions which should be used by domestic courts for the development of national practice.

Firstly, it demonstrates that protection on the basis of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms is broader in scope than protection under Articles 32 and 33 of the 1951 Convention relating to the Status of Refugees.

Secondly the judgment shows how to use the reports of international bodies and nongovernmental organizations regarding the situation in the country, and not base oneself purely on information provided by the receiving country;

Thirdly, the European Court confirmed its position, established in the Case of *Saadi v. Italy*, that where the applicant proves that s/he is part of a group systematically subjected to ill-treatment, then the protection of Article 3 of the Convention does come into play if there are serious grounds for believing that such ill-treatment is practised.

Fourthly, the Court extended this principle to cover a group suspected or accused of committing offences, thus establishing a total ban on extradition to Turkmenistan.

Finally, the Court did not recognize the diplomatic assurances of the Prosecutor's Office of Turkmenistan to be reliable guarantees against ill-treatment since 2) it was not certain that this body had the authority to give assurances on behalf of the country, and also, most importantly, 2) it was not convinced that in the absence of an effective system of torture prevention and the lack of openness to international bodies, one could not check that such assurances had been honoured.

In this judgment the Court also noted the lack of an effective means of legal protection from possible extradition in violation of Article 3 of the Convention. The Court stated that the provision in Article 55 of the Constitution and Article 2 of the Code of Administrative Justice «are potentially capable of providing an effective remedy in respect of complaints that Article 3 would be violated by decisions to extradite, provided they offered sufficient safeguards. Such safeguards would require,

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for example, that the courts could consider the compatibility of a removal with Article 3 and then, in a given case, could suspend the extradition»

It should be noted that a confirmation of the potential capacity of the procedure set out in the Code of Administrative Justice to provide adequate protection in a case involving extradition was the ruling of the District Administrative Court in Kyiv from 2 July 2008 in the case of Lema Susarov. However that case remains to this day the only example where the courts have taken arguments based on international human rights norms into consideration.

6. IMPLEMENTATION OF THE OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT [OPCAT]

Ukraine joined this Optional Protocol on 21 July 2006, thus committing itself to create within a year national preventive mechanisms which meet the criteria of independence set out in Part IV of the Protocol.

No national preventive mechanisms have yet been created.

On 10 December 2008 the National Commission for the Strengthening of Democracy and the Rule of Law at a meeting attended by President Yushchenko adopted a draft Concept Framework for State Policy on Prevention of Torture and Inhuman or Degrading Treatment or Punishment.⁸

The draft envisages the creation of a temporary Council for coordinating State policy on prevention of torture and other forms of ill-treatment. It was planned that the Council would function until the adoption of legislation on national preventive mechanisms meeting OPCAT requirements. It was planned that the Temporary Council would develop an acceptable model of national preventive mechanisms, prepare a draft law on creating permanent preventive mechanisms, and draft amendments to normative legal acts enabling their efficient functioning.

However the draft Concept Framework has still not been signed by the President. According to information available, agreement of this draft is being blocked by the State Department for the Execution of Sentences. The Ministry of Justice informs that it has already drawn up a draft law aimed at the creation of a preventive mechanism for preventing torture and other cruel, inhuman or degrading treatment or punishment in Ukraine. The draft law envisages the creation of a special State body which will carry out control over penal institutions.

7. RECOMMENDATIONS

Not one of the recommendations from last year's report has been implemented and they therefore all remain current.

1. Adopt at legislative level a strategy framework for creating a system of prevention and protection from torture and ill-treatment, as well as an action plan, based on the said concept, with clearly defined directions and stages of activity;

2. Bring the elements specified of the crime of «torture» into line with Article 1 of the UN Convention against Torture, in particular, establish liability for actions which are not violent but which should be recognized as torture according to Article 1 of the Convention against Torture.

3. Institute the gathering of statistical data in courts and law enforcement agencies on crimes which contain elements of «torture» in the understanding of Article 1 of the UN Convention against Torture;

⁸ Mykola Onishchuk: «The new Criminal Procedure Code is the basis for key reforms in criminal proceedings» // Ministry of Justice website <http://www.minjust.gov.ua/0/18102>.

4. Make it impossible to apply amnesty and parole for people who have committed actions, which have elements of «torture» in the meaning of Article 1 of the UN Convention against Torture;
5. Promote the creation of effective mechanisms of public control over investigations into allegations of torture and ill-treatment.
6. Provide by legislative means for the activities of non-governmental experts and expert bureaux;
7. Ensure access by victims and their legal representatives to medical documents which are of importance in proving torture or ill-treatment;
8. Assign the same validity as evidence to conclusions provided by independent medical and other experts, who conduct studies at the request of the alleged victim of torture or their legal representative, as that of conclusions made by experts assigned by an investigator or court;
9. Provide individuals who initiate an investigation or other legal procedure regarding allegations of torture or ill-treatment access to free legal aid should they be unable to pay for the services of a lawyer;
10. Introduce provisions in Ukrainian legislation on the inadmissibility of any testimony of the accused (suspect) received at the pre-trial stage of the criminal investigation without a lawyer being present;
11. Provide the appropriate guidelines to prosecutor's offices and judges for using measures to ensure the safety of individuals who have made an allegation of torture, in particular, if such an individual is held in custody, then to move him or her to another remand centre;
12. Eliminate the practice whereby judges «extend detention» of suspects held in police custody, or, at least, introduce necessary amendments in order to transfer people whose detention is extended by a judge to a pre-trial detention centre, and not leave them held in police custody;
13. Introduce into legislation the right of access and the appropriate procedure for gaining access to an independent doctor and independent expert whom the person detained may choose, especially for persons, who are held in custody;
14. Review provisions of current legislation in order to provide the right to legal representation to people who make allegations of torture, regardless of whether or not criminal proceedings are initiated;
15. Provide clear guidelines to prosecutor's offices and judges concerning immediate consideration of claims and complaints related to investigations into torture;
16. Give individuals facing deportation to another country the right to court review of an appeal against the relevant decision of executive bodies, and appropriate court procedure capable of investigating the circumstances which could significantly influence the decision on deporting (extraditing) the individual to the other state.
17. Put an end to the practice of deploying special anti-terrorist units and swift response groups in response to peaceful protest actions by prisoners
18. conduct investigations into reports of mass beatings of prisoners at the level of the Prosecutor General
19. Create a system for ensuring the safety of people making complaints about torture and ill-treatment, as well as witnesses, especially those in places of confinement
20. Ensure in practice uncensored correspondence by prisoners with the Prosecutor, the Human Rights Ombudsperson and the European Court of Human Rights.
21. Set out in legislation and ensure in practice the right to uncensored correspondence between prisoners and the domestic courts, the UN Human Rights Committee and other international bodies, as long as with a lawyer.
22. Put an end to the practice of punishing prisoners for sending complaints to State bodies via illegal channels, and in each case where a complaint was delivered by illegal means conduct a check as to whether the administration are making it possible to send complaints about the actions of the administration
23. Stop the practice of passing on complaints sent by prisoners to the Human Rights Ombudsperson to the Department for the Execution of Sentences.

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24. Apply measures to create the possibility for nongovernmental organizations to visit institutions of the Department for the Execution of Sentences.

25. Accelerate the creation of national preventive mechanisms.

26. Bring to justice people guilty of violating the principle of re-foulement of refugees and asylum seekers.

27. Create clear and transparent procedure for appealing about decisions to deport or extradite, which envisage, for example, the mandatory provision of a lawyer and translator, as well as access to the court without delay.

28. Put an end to the practice of violating the principle of confidentiality in view of the applications of refugees, and in particular stop the practice of passing confidential information to a third country.

III. THE RIGHT TO LIBERTY AND SECURITY¹

Legislation and practice regarding the right to liberty remain virtually unchanged. The number of people detained on suspicion of committing a crime is far in excess of the numbers actually convicted of crimes.

Examination by the courts of cases on deciding whether to remand a person in custody²

№ 3/п	Region (oblast referred to unless otherwise indicated)	Cases under consideration			Examined				
					total			Including applica- tions allowed	
		2007	2008	Rate of change	2007	2008	Rate of change	2007	2008
A	B	1	2	3	4	5	6	7	8
1	Autonomous Republic of the Crimea	2770	2877	3,86	2700	2864	6,07	2488	2586
2	Vinnycja	1780	1224	-31,24	1774	1214	-31,57	1577	1016
3	Volyn	792	787	-0,63	786	787	0,13	612	617
4	Dnipropetrovsk	4515	4191	-7,18	4494	4182	-6,94	4169	3848
5	Donetsk	5263	5081	-3,46	5238	5057	-3,46	4753	4543
6	Zhytomyr	847	799	-5,67	842	793	-5,82	746	721
7	Transcarpathian	552	507	-8,15	540	504	-6,67	378	339
8	Zaporizhya	2116	2351	11,11	2093	2337	11,66	1830	1834
9	Ivano-Frankivsk	519	601	15,80	471	583	23,78	425	504
10	Kyiv	1006	991	-1,49	977	989	1,23	894	847
11	Kirovohrad	1228	1301	5,94	1220	1291	5,82	1094	1130
12	Luhansk	3137	3110	-0,86	3109	3106	-0,10	2799	2875
13	Lviv	1213	1116	-8,00	1212	1115	-8,00	1084	982
14	Mykolaiv	1260	1244	-1,27	1218	1200	-1,48	1068	1078
15	Odessa	3174	3613	13,83	3162	3596	13,73	2608	2860
16	Poltava	871	820	-5,86	858	806	-6,06	760	688
17	Rivne	410	450	9,76	374	436	16,58	290	335
18	Sumy	1001	1069	6,79	978	1051	7,46	867	902
19	Ternopil	275	315	14,55	272	314	15,44	235	276

¹ By Arkady Bushchenko, Bar Lawyer, KHPG Legal Expert, Head of the UHHRU Board.

² According to information from the State Judicial Administration.

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20	Kharkiv	2877	3075	6,88	2870	3052	6,34	2405	2627
21	Kherson	1199	1263	5,34	1195	1248	4,44	1052	1114
22	Khmelnysky	707	719	1,70	703	719	2,28	586	632
23	Cherkasy	1093	932	-14,73	1089	929	-14,69	903	761
24	Chernivtsi	523	675	29,06	520	675	29,81	417	581
25	Chernihiv	826	899	8,84	817	894	9,42	750	769
26	Kyiv city	3751	4013	6,98	3728	3972	6,55	3277	3382
27	Sevastopol city	658	744	13,07	656	742	13,11	483	527
31	Military courts of the Central Region	68	70	2,94	67	70	4,48	38	45
34	Military Courts of the Marine Forces	43	40	-6,98	42	39	-7,14	19	21
total		44474	44877	0,91	44005	44565	1,27	38607	38440
including	Local ordinary (except military)	44363	44767	0,91	43896	44456	1,28	38550	38374
	Military garrison courts	111	110	-0,90	109	109	0,00	57	66

Detention without a court order is the rule with the presence of a court order being the exception. This is despite the fact that Article 29 of the Constitution demands the contrary. Thus the vast majority of all criminal procedure detentions are unlawful. One of the purposes of such detention is to extract a confession from a person suspected of having committed a crime. The entire system of detective inquiry and criminal investigation is based on receiving such confessions. One and the same unlawful means continue to be used in order to achieve this aim. These have become standard and are perceived by the police, prosecutor and court as the norm: unregistered detention; pressure to reject the services of a defender; the use of administrative arrest for the purpose of criminal prosecution; extension of the period of detention to 10 days, and others. The degree to which this practice is widespread was confirmed by the work of the Department for Monitoring Human Rights Adherence in the Work of the Ministry of Internal Affairs (DMHRA), created within the MIA in 2008). Human Rights Aides to the Minister have received more than 200 applicants just on issues regarding unlawful detention.³ At the same time, only 4 police officers were punished in 2008 for infringing the periods for holding a person in custody (against 3 in 2007).

The problems identified and recommendations made in the reports from 2004–2007 remain current. It should be noted that conditions in temporary holding facilities, centres for the reception and distribution of vagrants and other MIA places where people are held in custody have slightly improved. This has come about to a large extent thanks to the constant visits to police special units by mobile groups monitoring human rights observance. In 2008 with the creation of DMHRA, the number of visits increased sharply and covered the entire country.

In 2008 several opinions were issued by international bodies which confirm the problems identified in previous years' reports.

1. THE USE OF ADMINISTRATIVE DETENTION FOR THE PURPOSE OF CRIMINAL PROSECUTION

The UN Working Group on Arbitrary Detention which visited Ukraine on an official mission from 22 October to 5 November 2008 noted in its report that the law enforcement agencies are

³ Human rights in the work of the Ukrainian police – Kharkiv, Prava lyudyny, 2009. – p. 48. Available at <http://umdpl.info>.

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inclined to circumvent the time limits for bringing somebody before a judge by using detention for administrative offences. This restricts the right to defence and control of the court since courts base their decisions purely on police protocols. The period of administrative detention is used by the police to get the person to confess to a criminal offence (Items 59-61 of the Report).⁴

At the beginning of 2009 the European Court of Human Rights issued its Judgment in the case of *Doronin v. Ukraine* (16505/02, 19 February 2009). It found that there had been a violation of Article 5 of the Convention and that administrative detention had been used for the purpose of criminal prosecution. On 19 April 2000 the investigator had ordered that the applicant be brought to him as the suspect in a criminal case. On 20 April the applicant was detained in Kharkiv and taken to the investigator in Poltava. On that same day he was accused of resisting police officers, and on 21 April the Oktyabrskiy District Court in Poltava sentenced the applicant to five days' administrative detention. .

The European Court of Human Rights considered that even if one were to assume that the applicant had indeed shown resistance to the police officers, this had happened after he was detained on suspicion of committing a crime and therefore the authorities should have ensured the procedural guarantees due a person detained on suspicion of committing a crime. Furthermore the Court noted that during the administrative detention, the applicant had been questioned with regard to a criminal case. The Court concluded that the administrative detention had been a part of the applicant's detention in custody as a suspect.

The use of administrative arrest and detention remain very widespread in criminal proceedings.

2. DETENTION FOR VAGRANCY

The problem of detention for vagrancy was noted in previous years' reports. In its report the UN Working Group on Arbitrary Detention also touched on this problem which has been raised by human rights organizations for several years now, and yet still remains unresolved in Ukraine's legal system.

The Working Group noted that legislation does not contain a definition of the term «vagrant» and detention is in practice used to anyone who cannot provide means of identification. The Working Group also mentioned that detention for 30 days without being brought before a judge is in violation of Article 9 § 4 of the International Covenant on Civil and Political Rights.

The use of detention «for vagrancy» is also very widespread in criminal proceedings in order to obtain additional time and opportunity for extracting a confession.

According to MIA data in 2008 584 people were detained for vagrancy.

3. REMAND IN CUSTODY

In 2008 the European Court of Human Rights issued judgments in cases against Ukraine which back the conclusions of previous reports regarding systemic violations of the right to liberty.

3.1. NON-ENFORCEMENT OF A DECISION ON RELEASE FROM CUSTODY

In the Case of *Kats and others v. Ukraine* (№ 29971/04, 18 December 2008 the investigator's Order to release Olga Biliak from custody which it was claimed had been issued on 29 January 2004 was not carried out under 1 February. The unwarranted delay was one of the reasons for Olga Biliak's death in SIZO [remand centre] № 13. The Court concluded that for 3 days she had been held in custody illegally, in breach of the Order for her release.

⁴ Human Rights Council, Tenth session, A/HRC/10/21/Add.4, 9 February 2009

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The Case of *Mikhaniv v. Ukraine* (№ 75522/01, 6 November 2008) concerned yet another practice which is widespread among the law enforcement agencies, this being to manipulate the charge in order to bypass a court ruling ordering that the accused be released. In this case the applicant was twice released from custody by court order. However immediately after the court rulings, the prosecutor once again arrested him on other charges which were part of the same investigation. The European Court stated that although for the new arrest following the court ruling charges had been used that were formally different from those concerning the court ruling, the charges were part of one and the same investigation. It noted that this situation «gives the strong appearance that, on two occasions, the authorities used the largely similar charges, which had already been part of the case against the applicant, as a pretext to secure his continued detention, thereby circumventing the effect of courts' orders on the applicant's release. It does not appear that the domestic law clearly regulated such a situation or provided sufficient guarantees against abuse»

3.2. DETENTION WITHOUT A COURT ORDER

In the Case of *Svershov v. Ukraine* (№ 35231/02, 27 November 2008) a systemic problem in Ukraine's legislation was highlighted, where individuals whose cases are submitted to the courts are held in custody without court order, but purely on the basis of the submission of the case to the court. This same problem was found in the cases of *Solovyov and Zozulya v. Ukraine* (№ № 40774/02 and 4048/03, 27 November 2008) and *Yeloev v. Ukraine* (№ 17283/02, 6 November 2008).

3.3. LACK OF JUSTIFICATION OF COURT RULINGS

The cases of *Svershov v. Ukraine*, *Solovyov and Zozulya v. Ukraine*, *Yeloev v. Ukraine* and *Mikhaniv v. Ukraine* reveal a number of cases regarding the justification of remand in custody during criminal proceedings. In all the cases a violation of Article 5 § 3 of the Convention was found in the lack of grounds for the court orders remanding the people in custody. It was stated that the courts had issued these orders merely on the grounds that the person was charged with a crime of a certain degree of severity, while no circumstances were cited to suggest the risk that the person would abscond, or any other grounds to warrant holding them in custody. Furthermore the courts in their rulings had not discussed the possibility of applying other preventive measures. These problems have been noted in previous reports. The situation regarding grounds for court rulings on remand in custody is not changing and gives grounds to predict that these violations will be among the most frequent in future judgments passed down by the European Court of Human Rights.

3.4. PROCEDURAL GUARANTEES FOR A PERSON DETAINED WHILE THE QUESTION OF REMAND IN CUSTODY IS BEING DECIDED

In the case of *Svershov v. Ukraine* violation was found of Article 5 § 4 of the Convention due to the fact that the court in its ruling did not answer the arguments of the defence which were in favour of releasing the applicant.

In the case of *Yeloev v. Ukraine* the violation of Article 5 § 4 was found because the court had refused to examine the latest appeal from the applicant to be released, referring to the fact that he had been turned down before several times.

3.5. REMAND IN CUSTODY PENDING EXTRADITION

In previous reports we have noted that people being held in custody for the purpose of extradition do not have the possibility of initiating a court review of the grounds for their continued remand in custody, this violating Article 5 § 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The European Court of Human Rights in the cases of *Soldatenko v. Ukraine* and *Svitporusov v. Ukraine* (№ 2929/05, 12 March 2009 found violations of Article 5 § 4 of the Convention precisely on the grounds set out in previous reports.

Furthermore, in these cases, as well as in the case of *Novik v. Ukraine* (№ 48068/06, 18 December 2008) violation was found of Article 5 § 1 of the Convention due to the total lack of clear and foreseeable procedure regulating detention and remand in custody pending extradition.

4. RECOMMENDATIONS

All last year's recommendations remain current.

1. Introduce amendments to legislation which would make detention without court sanction the exception, this being in compliance with the restrictions provided for by Article 29 § 3 of the Constitution

2. Bring the time limit for bringing a person before the court, set down in Article 106 of the CPC, into line with Article 29 of the Constitution, taking into account the time necessary for the judicial examination and ruling;

3. Define the starting point for detention on suspicion of committing a crime or an administrative offence based on the actual circumstances of the case, not on the decision of a law enforcement officer;

4. Define in law separate criteria of legality for detention and remand in custody and annul provisions in Item 2.5 of the Joint Order by Ukraine's Ministry of Internal Affairs and the State Department for the Execution of Sentences № 300/73 of 23 April 2001, which considers a detainee's release when the suspicion is not confirmed or when the term of detention has expired as a breach of the law, and other similar instructions;

5. Include in the subject matter of hearings where the question of remand in custody or release is to be decided all circumstances touching on whether detention is warranted, including the following:

- grounds for the suspicion or charge, in connection with which the prosecution demands that the suspect (accused) be remanded in custody;

- grounds for the period in which a person is held in custody by a law enforcement agency prior to being brought before a judge.

6. Establish a clear presumption in favour of a person's release and provide that the onus of providing proof of grounds for remand in custody be shifted to the prosecution;

7. Introduce provisions, which would exclude remand in custody or its extension on the basis of purely hypothetical assumptions;

8. Formulate the risks in connection with which detention is allowed in such a way as to exclude remand in custody depending on the position of accused and tactics employed by the defence;

9. Introduce provisions which would exclude the practice of detaining a person after his/her release by a judge on the basis of «concealed» accusations;

10. Formulate the risks in connection with which detention is allowed in such a way as to exclude remand in custody depending on the position of accused and tactics employed by the defence;

11. Exclude from legislation the institution of «detention extension» by a judge, or, at least, introduce necessary amendments to the legislation, in order to exclude the practice of returning a person to a police unit after detention has been extended;

12. Introduce amendments to Article 165-2 § 4 of the CPC, in order to exclude detention without court control for longer than the period established by Article 29 § 3 of the Constitution;

13. Introduce amendments to Article 165-2 § 4 of the CPC, in order to exclude detention without court control for longer than the period established by Article 29 § 3 of the Constitution;

14. Establish clear and detailed procedural rules for court review of whether to remand a person in custody or release him or her pending trial, in particular ensuring the following:

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– mandatory participation of the person, who has been deprived of liberty, in any detention hearing where the question of his or her remand in custody or release pending trial is being considered

– the accused and his/her lawyer must be provided with a copy of the investigator's (prosecutor's) request for his/her remand in custody or extension of custody;

– the remanded person and his/her lawyer must be given the right to study the materials, which justify the request for his/her remand in custody or extension of custody

15. Prepare procedure, which would encourage the use of bail instead of detention;

16. Define more clearly the judge's scope of powers concerning remand in custody, in particular, to establish clearer criteria for exceptional cases, when a judge can go beyond the margin of his/her general authority;

17. Shorten the maximum term of remand in custody during pre-trial investigation

18. Bring the rules of administrative detention into conformity with the requirements of Article 29 of the Constitution;

19. Introduce amendments to legislation which would exclude the use of administrative detention for the purpose of criminal investigation, for example, by providing mandatory release of a person suspected of having committed an administrative offence pending the hearing into the case

20. Introduce amendments to the Code of Administrative Offences (in particular, to Article 26) and other legislative acts, which would exclude police custody of a person without a court order for over 72 hours.

21. Provide procedure for court hearings concerning the detention of vagrants and people begging, or, at least, enable them to appeal against such detention and provide rules for such procedure;

22. Ensure that detention and subsequent remand in custody of a person pending extradition is enforced exclusively on the basis of a court decision, as well as the right of a person remanded in custody pending extradition to periodic review of the detention.

IV. THE RIGHT TO A FAIR TRIAL¹

1. OVERVIEW

The right to a fair trial is not fully secured either in the Ukrainian Constitution or in legislation, with only individual aspects protected by law.

In December 2005 the National Commission for the Strengthening of Democracy and the Rule of Law which is a permanent advisory-consultative body under the auspices of the President began drawing up a Strategy Concept for Judicial Reform. On 10 May 2006 the President approved this Strategy Concept for improving the justice system to ensure fair trial in Ukraine in accordance with European standards², prepared by the National Commission.

Later, in order to implement the Strategy Concept, several draft laws were prepared which the President submitted to parliament. In April 2007 these drafts were placed on the parliamentary agenda, however before their consideration it transpired that the President had sent a letter recalling them. He had «changed his mind» about supporting judicial reform due to pressure from the Supreme Court and for other reasons of political expediency.

Since according to parliamentary procedure, draft laws on the agenda cannot be withdrawn, they were considered and passed by parliament in their first reading. Their future progress was however hampered by the dissolution of parliament.

Later the President changed the makeup of the National Commission for the Strengthening of Democracy and the Rule of Law.³ Some of those who had taken a direct role in drawing up the Strategy Concept and the relevant draft laws were removed, and some currently serving judges and employees of the judiciary were included. This did not, however, lead to a review of the Strategy Concept for reform, although attempts to achieve such a review were made.

The draft laws on judicial reform were prepared by the parliamentary Committee on justice issues as a combined draft law «On the Judicial System and the Status of Judges». This was approved by the Committee on 18 June 2008 for its second reading in parliament. Overall, with a few exceptions, the draft law is in line with the previously approved Strategy Concept and international human rights standards.

Despite this, many months have passed and parliament has yet to pass this draft law. One of the reasons is opposition from the Supreme Court and the BYuT [Bloc of Yulia Tymoshenko] faction in parliament. The draft laws envisage reform of the judicial system, a reduction in the number of judges of the Supreme Court from 95 to 20 and the creation of a High Criminal and High Civil Court. This would logically result in a judicial system with four specialized bands of courts headed by a high court. Against this, the Supreme Court began to speak out in favour of separate adminis-

¹ Prepared by Volodymyr Yavorsky, UHHRU Executive Director. Since there have been no significant changes, the conclusions reached in the Reports for 2004 to 2007 remain entirely relevant

² Presidential Decree from 10 May 2006 № 361/2006.

³ Presidential Decree № 914/2007 from 24 September 2007 «On a new makeup of the National Commission for the Strengthening of Democracy and the Rule of Law» <http://www.president.gov.ua/documents/6758.html>.

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trative courts with the future aim of abolishing the High Administrative and High Economic Courts, and creating a three-tier single system of courts. It is for this reason that during the last year there has been serious criticism by the BYuT faction of the administrative courts.⁴ This criticism is often not well-founded or concerns problems which are in fact even greater in the system of ordinary courts. The reform, in addition, changes the procedure for forming the Council of Judges and restricts the powers of heads of the courts which cannot please current Supreme Court judges who at present totally control these processes.

Fair court proceedings and proper defence of human rights and fundamental freedoms are possible only where there is good procedural legislation. However legal regulation of criminal justice has not been reformed since Soviet times. The Criminal Procedure Code from 1960, despite some updating, does not meet European standards with regard to human rights protection. The National Commission for the Strengthening of Democracy and the Rule of Law prepared a new draft Criminal Procedure Code, approved it at its meeting and in autumn 2008 sent it to the President so that he would table it in parliament for the development of the Strategy Concept for Criminal Justice which had been adopted via a Presidential Decree from 8 April 2008.⁵ At the end of spring 2009 this draft law had still not been tabled in parliament.

Cases involving administrative offences are generally examined with infringements of a number of standards of the right to a fair trial, through numerous restrictions on the right to defence, etc,

As of January 2009 there were 780 courts: 666 local general jurisdiction courts; 13 military garrison courts; 27 appellate courts of general jurisdiction; 2 military appellate courts; 11 appellate economic courts; 27 local economic courts; 7 appellate administrative courts and 27 district administrative courts. According to the staffing schedule there were around 8,829 judges working in these courts although with the number of vacancies there are in fact several hundred less.

During 2008, local and appellate courts examined approximately 9,884,954 cases and files, this being around 14.5% more than in 2006 and over 60% more than in 2005. There was an increase in cases in administrative courts (of more than 50%) and in civil cases (of around 13%), while the number of criminal cases fell.⁶

2. INDEPENDENCE OF COURTS AND JUDGES

In this area two problems need to be differentiated: independence of the judicial branch of power and independence of particular judges both from bodies of other branches of power and within the judiciary itself. There is a separate problem with the existence of military courts which do not meet the criteria for independent court proceedings.

During the Fourth Regular Congress of Ukrainian Judges on 13 November 2008, the Head of the Ukrainian Council of Judges Petro Pylypchuk in his address stated:

«Events of the last months and years demonstrate the lack of acceptance by many of those who hold political power in Ukraine of the fact that independence and inviolability of judges in carrying out proceedings are fundamental principles for the functioning of the judiciary in democratic countries. <...> this lack of acceptance is evidenced in the disregard for the legal principles of the work of the courts, in the passing of judgments and in actions which infringe fundamental principles of the functioning of the judiciary and jeopardize citizens' rights and freedoms. <...> In general terms I am obliged to say that

⁴ Cf. for example, «In the organization and running of court proceedings by the administrative courts there are significant flaws which need immediate rectification»: // Supreme Court website, 6 April 2009 <http://www.scourt.gov.ua>; «Ukraine's administrative courts: summary and consequences of their work» // «Dzerkalo tyzhnya» № 13 (741) 13 — 20 April 2009, <http://www.dt.ua/1000/1050/65884>; «Can a Ukrainian defend himself against unlawful actions of the authorities in administrative courts // the information agency UNIAN, 15.04.2009 <http://human-rights.unian.net/ukr/detail/190450>;

⁵ Available at: <http://www.president.gov.ua/documents/7703.html>.

⁶ According to official figures from the State Judicial Administration posted on their website: <http://www.court.gov.ua>.

those methods, those means and tools used by institutions of power and political structures when interfering in the work of the courts constitute:

– deliberate undermining of the authority of the judiciary, systematic statements from high-ranking officials about unprofessional judges, their low moral calibre, rampant corruption in the courts, irresponsibility, not being under control, clan corporate interests, public ridicule of judges, insulting remarks about them as a means of blackmailing judges of higher level courts who are to examine this or that court case;

– attempts to pass laws which «revise» the status of judges; establish strict control over their activities; abolish indefinite terms; restriction of the financial provisions for judges on retirement; the restriction of the powers of bodies of judges' self-government; constant attempts to restrict or get rid of those small material and social guarantees set down in the Constitution and Law «On the status of judges»;

– unlawful interference in the administering of justice;

– the blocking of courts, judges' offices, including with the involvement of enforcement structures;

– insufficient financing of court activities, financing of the court authorities on a manual basis;

– entangling judges in the political struggle;

– manipulations with the reorganization of courts and dismissals of judges whose rulings do not concur with someone's interests, initiating criminal investigations against such judges;

The passing by some judges of dubious or «commissioned» rulings, flagrant violation by them in some cases of the rules of jurisdiction, involvement in so-called corporate raid seizures, corrupt dealings, including crimes, dragging out examination of court cases, participation in dodgy arrangements, a callous attitude to people, unethical behaviour of some judges and employees of the courts – none of this, of course, raises the authority of the judiciary.».

There are quite often attempts from various quarters to exert influence on judges and interfere in their work. This is borne out by surveys among judges. It must be said that the results of surveys carried out by different organizations vary considerably, however all of them confirm that they face attempts to influence them.

The procedure for choosing judges continues to lack transparency which can create favourable conditions for abuse and dependence of judges on the public officials involved in the procedure.

Powers to decide staffing issues within the court system give the Verkhovna Rada and National Deputies, as well as the President and members of his Secretariat, the opportunity to influence judges.

Nor is such influence from the Cabinet of Ministers to be included, given that the present Head of the Supreme Court was previously one of the leaders of the political force which is headed by the Prime Minister, however there is no direct proof of such influence. In fact, after losing the power to appoint the heads of courts, the opportunities for the President and his Secretariat to influence the courts have been reduced.

A typical example demonstrating the weakness of judicial independence was the situation around the appeal against the President's Decree setting early parliamentary elections for October 2008. During these events, the President issued a decree which simply abolished the court in which the appeal was to be heard, and revoked the decree which had appointed the judge who was supposed to examine the case⁷, and also allowed the deployment of internal troops to guard the courts, while National Deputies from the BYuT faction in their turn physically blocked the work of the District and High Administrative Courts, permanently positioning themselves in these court premises and not letting the court proceedings go ahead.⁸ Human Rights Watch issued a special statement to

⁷ In general the practice of the President in revoking decrees appointing judges has become common. The President has no grounds for dismissing a judge and therefore the decree appointing the person is revoked. This gives rise to many questions, for example, what to do with the rulings which the given judge passed down during all the years he or she occupied that post, what to do with their salary, etc. The legal absurdity in the issue of such decrees is clear.

⁸ For more on this conflict see: «Supreme Court Head speaks of threat to Ukraine's justice system <http://www.helsinki.org.ua/en/index.php?id=1224081422> : «Council of Judges critical of mounting pressure on

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high-ranking public officials demanding that they stop interfering in judicial proceedings.⁹ It was over these actions that the President and the BYuT parliamentary faction received the Ukrainian Helsinki Human Rights Union's anti-award «Thistle of the Year» for the most flagrant political interference in the work of the justice system.¹⁰

There is no clear legally established system for determining judges' remuneration. An inadequate level of material provisions for judges has made such positions unattractive for highly-qualified lawyers. At the same time, the favourable conditions the posts offer for receiving certain benefits which are questionable from the point of view of their legality make them attractive to people whose aims have nothing in common with the impartial administering of justice. It should, however, be noted that there has been an increase in judges' salaries over the last few years.

The inadequate material and social provisions for judges, especially those of local courts, place the independence of judges in jeopardy. This is exacerbated by a lack of appropriate financing of the courts which forces the latter to seek other options for meeting their requirements with regard to a good level in administering justice.

Judges in administrative posts carry out administrative and economic functions not intended for judges. The chairpersons of courts distribute cases among judges, form panels of judges for review of cases, have influence over judges' career issues and social provisions (holidays, bonuses, etc). The chairpersons of courts in turn, due to the need to get additional funds for the court, depend on those who allocate these funds: local and central authorities, as well as commercial enterprises.

It was because of the major role played by court chairpersons that the battle continued last year for the authority to appoint them. The procedure for appointments to administrative posts in the court is today the subject of much discussion. In courts of general jurisdiction chairpersons and their deputies were until recently appointed and dismissed by the President on the submission of the Verkhovna Rada Speaker, on the basis of a recommendation from the Council of Judges. In specialized courts this was on the submission of the Chairperson of a high specialized court on the basis of a recommendation of the Council of Judges of the relevant specialized courts. However on 16 May 2007 the Constitutional Court found such Presidential powers to be unconstitutional. At present the issue of judges' appointment to administrative posts in the courts remains unregulated in law despite this being required by the Constitution.

On 30 May 2007 the Verkhovna Rada adopted a Resolution «On temporary procedure for appointing judges to administrative posts and dismissing them from such posts» which gave the power to appoint chairpersons of courts and their deputies to the High Council of Justice. The latter did not make use of these powers since according to the Constitution which sets out the competence of this body in full, the High Council of Justice does not have such authority, nor can such issues of court structure be regulated through a Verkhovna Rada Resolution.

The next day, i.e. 31 May, the Council of Judges adopted a Decision «On the appointment of judges to administrative posts in general jurisdiction courts and their dismissal from such posts». With this the Council took on the said powers by interpreting current norms of the Law «On the Judicial System of Ukraine». This Decision was shortly afterwards upheld by the VIII Extraordinary Congress of Judges. Thus at the present time it is in practice the Council of Judges which makes appointments to administrative posts in general jurisdiction courts.

The Deputy Prosecutor General Rinat Kuzmin stated that he was planning to demand the dismissal of 350 judges. These were judges who had been, in his view, unlawfully, appointed by the Council of Judges to administrative posts since there was no normative act giving the Council

judges» <http://www.khpg.org.ua/en/index.php?id=1225136676> and «Political Monopoly <http://www.khpg.org.ua/en/index.php?id=1224425564>

⁹ Ukraine: Respect Independent Judiciary: *Political Leaders Should Stop Using Court as Political Tool*, Human Rights Watch statement from 21 October 2008 <http://www.hrw.org/en/news/2008/10/28/ukraine-respect-independent-judiciary>.

¹⁰ More on the Thistle of the Year anti-awards for 2008 at: <http://www.helsinki.org.ua/en/index.php?id=1229084701>.

such powers. He applied to the High Council of Justice to have them dismissed for infringing their oath.¹¹

Numerous attempts to influence judges over particular cases are made by National Deputies. They can do this by sending Deputy's submissions, telephone calls, meetings with the judges or chairpersons of the courts, etc.

Various forms of influence upon judges are applied, ranging from letters, telephone calls and personal visits to the judges and chairpersons of the courts, to open criticism of the court rulings in specific cases if they have a different view as to a just outcome. Such non-procedural relations between different parties and the judge are not prohibited by law and are a common occurrence.

The results of a survey among judges, prosecutors and bar lawyers indicate a continuing high level of attempts at influencing the court's position during examination of cases. 71% (against 77% in 2007) of judges, 54% (against 67%) and 81% (against 89%) of bar lawyers confirmed awareness of such instances. Some decrease in the level of influence can be explained by positive internal changes in the judicial system itself since over the last year there has been a reduction in influence from the heads of the courts. The most active in trying to wield unlawful influence on the court are: the parties to the case and their representatives – 55% (against 48% in 2007); Representatives of the media (41% (against 28%)); participants in political rallies and pickets – 41% (35%); National Deputies (MPs) 40% (against 39%) and representatives of political parties – 34% (against 35%). The answers from the respondents (judges, prosecutors and lawyers) suggest that there is considerable pressure on judges and heads of the courts from a large number of people during judicial examination of cases. The following forms of influence are most often used: threats to do damage to somebody's career, to have them dismissed or have disciplinary proceedings brought against them; bribery; friendly advice.¹²

An ineffective system of judge accountability in some cases allows them to avoid professional liability, while in others creates favourable conditions for exerting pressure on those judges who demonstrate independence and integrity in their work.

For example, the media reported that at the beginning of 2008 the Prosecutor initiated a criminal investigation against a judge of the Borispol City-District Court for professional negligence. This judge in one criminal case allowed an application by the defendant's lawyer and changed the preventive measure from remand in custody to a signed undertaking not to abscond as a result of which the defendant was able to go into hiding¹³. At the same time we do not know the details of this case and cannot therefore state unequivocally that the initiation of a criminal investigation was used by the Prosecutor's Office for the purpose of exerting influence (or revenge). However in any democratic country it would look strange that the Prosecutor – a party to the proceedings – should initiate a criminal investigation against the judge for allowing an application from the defence.

The influence exerted by the Prosecutor during court hearings into cases is confirmed by the results of monitoring carried out jointly by the Centre for Judicial Studies and the Ukrainian Independent Association of Judges in 2008. According to their survey, 31% of the respondents confirmed attempts by Prosecutors to unlawfully exert influence on the position of the court during the examination of court cases.

The Prosecutor General's Office reports that in 2008 due to what it considers to be infringements of the law by judges, it submitted to the High Court of Justice 47 proposals (against 42 in

¹¹ *Deputy Prosecutor General initiates the dismissal of 350 judges* // Internet publication «Korrespondent», 2 February 2009 <http://korrespondent.net>.

¹² «Monitoring of Judicial Independence in Ukraine: 2008», 2 December 2008, <http://helsinki.org.ua/en/index.php?id=1228330337> ; The study was carried out by the Centre for Judicial Studies with the support of the Council of Judges of Ukraine, the All-Ukrainian Independent Judges' Association, the Union of Bar Lawyers of Ukraine and the Ukrainian Association of Prosecutors. It was based on a survey carried out during August and September 2008 in 8 regions of the country of 1,072 judges of appellate and local courts, together with 630 regional and district-level prosecutors and 590 bar lawyers.

¹³ «A criminal investigation has been initiated against a judge for «negligence» // 16 January 2008 <http://newsru.ua/crime/16jan2008/suddia.html>.

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2007), 44 to accept an application to have judges dismissed for acting in breach of their oath, and 3 to have disciplinary proceedings brought against judges of high specialized courts. The proposals regarding submissions to have judges dismissed were, the Prosecutor General's Office asserts, made where judges had been responsible for flagrant and systematic violations of legislation with major consequences regardless of the sphere of legal relations. However in view of the complex procedure for considering such proposals, only 1 of them was allowed (regarding a judge of the Shevchenkivsky District Court in Kyiv).

From 2006 to March 2009 only three judges were dismissed in connection with criminal convictions, however the practice is more widespread of dismissing judges accused of committing a crime without awaiting the court verdict on the grounds of acting in breach of their oath.

One of the latest examples began in December 2009 when staff from the Prosecutor's Office and the Security Service [SBU] found 1 million USD and 2 million UAH in the office of the Chair of the Lviv Administrative Court of Appeal Ihor Zvarych. After this I. Zvarych gave a press conference at which he stated that the money was the result of «sowing» during the opening of the court according to an old tradition. On 18 December the Verkhovna Rada gave permission for his arrest and dismissed him from his position as judge in connection with a breach of his oath.¹⁴

Judges do not usually receive harsh criminal sentences suggesting that corporative solidarity is involved.

It is much more common for administrative pressure to be placed on a judge via disciplinary proceedings.

Overall during the period from 1 January 2006 to 1 March 2009 349 judges from general jurisdiction courts were dismissed on the following grounds¹⁵:

- 1) on an application to retire (this right is held by judges who have worked for 20 years or those unable to work due to health reasons) – 242 judges;
- 2) at their own wish – 43 judges;
- 3) because their term of tenure has ended – 30 judges;
- 4) in connection with a breach of their judges' oath – 23 judges;
- 5) on reaching the age of 65 – 8 judges;
- 6) due to the entry into force of a conviction – 3 judges;.

Other grounds were not applied.

Resolution of issues regarding dismissal of judges by political bodies (the President and Verkhovna Rada) for which the judge corps is not a priority very frequently leads to delays. It is common for judges who have reached retirement age or whose term of tenure has end to receive their salary for six months and a year further, however to not have the right to examine court cases. At the same time, until the issue of the judge's leaving is resolved, the position is not considered vacant preventing attempts to find a replacement.

Disciplinary proceedings are carried out by:

- 1) Judicial Qualifications Commissions – dealing with local court judges;
- 2) High Judicial Qualifications Commission of Ukraine – dealing with judges of appellate courts;
- 3) High Council of Justice – dealing with judges of high specialized courts and of the Supreme Court.

Disciplinary penalties against a judge are applied no later than six months after the disciplinary offence has been discovered, not counting time when the person was temporarily unfit for work or was on leave. This regulation explains problems with an effective mechanism for disciplinary liability. Often Judicial Qualifications Commissions cannot meet such time limits since they do not work on a regular basis, and issues of disciplinary offences are considered as miscellaneous items since

¹⁴ <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=698-17>

¹⁵ «Report on the judicial system and judicial reform in Ukraine». Centre for Political and Legal Reform, March 2009, p. 22 www.pravo.org.ua

issues of attestation take priority. Therefore a considerable number of disciplinary proceedings cases against judges are simply terminated because the six month time limit has elapsed.

From 2006 to 27 June 2008 the High Judicial Qualifications Commission considered 38 applications to bring disciplinary proceedings against judges (8 – in 2006, 15 – in 2007, 15 – in 2008). 27 applications were turned down (7 – in 2006, 11 – in 2007, 9 – in 2008); 6 disciplinary proceedings were initiated (1 – in 2006, 4 – in 2007, 1 – in 2008). Review of 3 cases in 2008 was cancelled because the initiators withdrew their applications, and 2 cases have still not been reviewed. From the total number of disciplinary cases considered, four judges faced disciplinary measures. In 2006 one judge had his qualification class reduced by one class, from second to third; 2 judges were reprimanded in 2007, and one in 2008.¹⁶

Rules of challenge are foreseen to enable the removal of a biased judge from a case. At the same time it would be difficult to call this challenge procedure democratic. In civil and administrative proceedings, in order to avoid abuse of the right of challenge and use of it to drag out a case, the rule has been introduced whereby it is the judge against whom a challenge has been made who decides whether it should be allowed. In economic court and criminal proceedings it is the chairperson of the court who decides. The first variant does not promote an impartial decision regarding removal of the judge since it is the judge who determines whether or not he or she is prejudiced (most often judges will not admit that they are acting in favour of one of the parties). The second gives the chairperson of the court additional scope for interfering in how other judges' cases are dealt with.¹⁷

For the first time the European Court of Human Rights found that there had been a violation of the right to a fair trial in the consideration of a case by a military court.

In the case of *Miroshnik v. Ukraine*, the Court noted that according to domestic legislation, military court judges are military servicemen and are part of the Ukrainian Armed Services which are subordinate to the Ministry of Defence. It also pointed out that this Ministry had carried out the material and technical service for military courts and if judges needed an improvement in their living conditions, provided them with flats and houses. Moreover, the day to day servicing of military courts was also carried out by this Ministry. The Court mentioned that the said procedure for the financing of military courts had been abolished in 2002 through a relevant law. In the Court's view, the above-mentioned aspects of the activities of the military courts gave Mr Miroshnik objective grounds for doubting their independence in dealing with his case which involved the Ministry of Defence.

3. FINANCING OF THE JUDICIARY

It is established practice that the State Budget designates funding for the judiciary which is considerably less than what is needed in order to provide for the real needs of the courts, especially those needs directly related to the administering of justice. Despite the fact that the role and functions of the courts, and their workload, have radically increased, the methods for determining annual expenditure on them have not changed in any significant way over the last many years.

The funding requirements for the State Judicial Administration are only about 50% covered each year, with most of this going on salaries and social payments. This is despite the fact that spending on the judiciary is increasing annually, with one and a half times more money allocated in 2008 than for the previous year.

At the present time the principle of division of power within the judicial system is violated: courts administer justice and should be independent of any other branch of power or particular individuals. Yet the courts are dependent on the executive branch of power over financial, material and technological and social issues. A confirmation of this is the status of the State Judicial Administration [SJA] as a central body of executive power.

¹⁶ Information Herald of the High Judicial Qualification Commission № 2(6)'2008, Published by the High Judicial Qualification Commission with the support of the USAID project «Ukraine: Rule of Law».

¹⁷ «Report on the judicial system and judicial reform in Ukraine». Centre for Political and Legal Reform, March 2009, p.37, www.pravo.org.ua.

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State duty which is paid for applications to the court is not directly channelled to meet the needs of the courts. In general, this duty is too low.

There remains a problem with implementation by the Cabinet of Ministers of the Law on the Budget regarding full financing without any delays of expenditure already improved.

According to the Law «On Ukraine's State Budget for 2008», the State Judicial Administration [SJA] should be allocated 2448.7 million UAH for ensuring the functioning of the courts and institutions. In fact, 111 million UAH, or 30% of the amount allowed for carrying out court proceedings and capital expenditure were not provided. Moreover during the year the payments were spread unevenly with 40% of the total amount planned by SJA coming in November – December. This is despite the fact that in the State Budget for 2008 spending on the justice system would only cover 48% of the real need.

At the end of 2008 only protected Articles of the Budget had been paid in full and on time. These include remuneration, extra payments linked to remuneration, monthly payments to judges who are entitled to retire but are continuing to work, spending on health revitalization for judges and payment of municipal charges and energy.¹⁸

The vast majority of courts are in cramped and unsuitable premises. There are not enough courtrooms, consulting chambers, rooms for remand prisoners brought to the court or defendants, for court managers, for prosecutors and lawyers, witnesses, etc. This means that the premises stipulated by procedural legislation and which are needed in order to properly examine cases are not available. In a lot of cases, judicial examination is postponed, leading to proceedings being dragged out and violation of people's rights and legitimate interests. The court, designed to administer justice, in fact is forced to break the law.

There have been a good few cases where courts newly-created in connection with judicial and legal reforms have simply not been provided with premises which has halted any further measures linked with the reform process.

The SJA is not able to pay off loan arrears built up by 1 January 2009 because of a Budget programme to purchase housing for judges costing 5.3 million UAH, and provide the courts with proper premises – 2.5 million UAH. Of 3,780 general jurisdiction courts only 91 (12%) are in premises which can be called suitable for administering justice. There are 77 (11%) local ordinary courts; 4 (15%) local ordinary courts of appeal (in the Volyn, Ternopil and Chernihiv regions and in Kyiv). 5 (45%) economic courts of appeal (the Donetsk, Zhytomyr, Zaporizhzhya, Odessa and Lviv regions) and 4 (18%) local economic courts (the Crimea, the Volyn, Zhytomyr, Odessa and Sumy regions) The remaining court premises need reconstruction or reconstruction with building additions, or new building work. As for ensuring proper premises for administrative courts, all district and appellate administrative courts are provided with working premises. However for 50% of administrative courts the premises can only be viewed as temporary due to the insufficient amount of space. The main reason for the unsatisfactory situation is that the majority of local authorities with sufficient powers do not prioritize the importance of solving this problem. At the same time 45 court premises are at the stage of construction or reconstruction. Due to inadequate funding, the time taken for carrying out work is well in excess of norms (there are sites where work began back in the 1990s). Just for making it possible to use sites with incomplete construction and reconstruction, 161.3 million UAH are needed.

The State programme for providing courts with proper premises for 2006-2010, adopted through Cabinet of Ministers Resolution from 4 July 2006 № 918 is in danger of collapsing. In implementing this programme in 2008 a mere 2% of the total needed was allowed for, with this making it

¹⁸ Conclusions on implementing the Budget and using funding from the Budget in 2008. State Judicial Administration website, <http://www.court.gov.ua>; Resolution of an extended and joint meeting of the Presidium of the Verkhovna Rada, the Presidium of the Council of Judges and the panel of the State Judicial Administration from 18 April 2008 «On the administering of Justice I from 18 April 2008 «On the situation with administering justice in 2007, and tasks for 2008»».

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impossible to begin construction of 195 new court buildings, or to continue construction or reconstruction on 45 sites begun in previous years.¹⁹

In the Law «On the State Budget of Ukraine for 2009» expenditure on carrying out organizational provisions for the work of general jurisdiction courts amounts to 1 984 168,2 thousand UAH which does not take into account either real needs – more than 9 billion UAH, or inflation. In comparison with 2008 expenditure on maintaining courts has fallen by 464,4 UAH. More than 90% of the Budget comprises social expenditure and communal services and less than 3% – spending on the administering of justice..

4. ACCESS TO JUSTICE

The principle of free access to justice entails the duty of the courts to not refuse to examine cases within their jurisdiction; convenient location of courts and a sufficient number of courts and judges.

Less than half of the people surveyed (42%) consider information about the court process to be sufficiently comprehensive. At the same time 58% of representatives of companies consider court information to be entirely accessible.²⁰

Ratio of number of judges to the size of the population (February 2009)²¹

Types of courts	Number of judges on the staff	Number of people per judge	Number of judges per million head of population
General courts including military	6 381	7 231	138
Local	4 645	9 934	100
Appellate	1 736	26 580	37,6
Administrative courts	1 121	41 163	24
Local (district)	672	68 666	14,5
Appellate	352	131 090	8
High Administrative Court	97	475 708	2
Economic courts	1 214	38 009	26
Local	677	68 159	15
Appellate	442	104 397	10
High Economic Court	95	485 723	2
Supreme Court	95	485 723	2
Constitutional Court	18	2 56 353	0,4
<i>Total</i>	<i>8 829</i>	<i>5 226</i>	<i>191</i>

It should be noted that according to the Code of Administrative Justice certain categories of administrative cases are also examined by local general courts (except military). Therefore the total number of judges who can deal with administrative cases comes to 5,712, this meaning a ration of 1 judge for 8,078 people, and per million head of population there are 124 such judges.

¹⁹ «A meeting has taken place of the panel of the State Judicial Administration (State Judicial Administration website 26 February 2009, <http://www.court.gov.ua>).

²⁰ Study of corruption in Ukraine's judicial system: general jurisdiction and appellate courts. July 2008. «Management Systems International» (MSI) in cooperation with the research company «InMind», Kyiv <http://www.ukrainerol.org.ua>.

²¹ «Report on the judicial system and judicial reform in Ukraine». Centre for Political and Legal Reform, March 2009, p.48, www.pravo.org.ua.

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The calculation of the ration between the number of judges of economic courts and the population is not so indicative since these courts mainly consider cases between legal entities.

We should also stress that the number of judges presented here reflect the official staffing numbers however around one thousand posts remain vacant. Therefore the number of members of the population per working judge is in fact much higher than in the table.

There remains a serious problem with the number of judges: over 800 vacancies remain unfilled and for over 400 judges their first five-year term has ended and they are awaiting indefinite appointment.

On the other hand since the creation of administration courts, considerable problems have also arisen regarding the jurisdiction of the courts. The number of disputes is especially large regarding the division of jurisdiction between economic and administrative courts. There have been many examples where all courts in turn have refused to examine a case claiming that the dispute is not under their jurisdiction

Another aspect of restricted access to justice is the fact that individuals can not lodge appeals with the court against laws, Presidential Decrees and Resolutions of the Verkhovna Rada in cases where their rights and liberties are limited. The said legal acts can only be declared unconstitutional by the Constitutional Court, and individuals do not have the right to lodge constitutional submissions. Even the courts do not have this right, except the Supreme Court.

Court costs which an individual will have to bear should not become an impediment to legal defence of his or her rights. This means that the requirement that justice be accessible can only be observed where there is an efficient system of legal aid, especially to those on low incomes.

One of the important conditions for access to justice is the level to which the public is informed about the organization and work of the courts. There can be no accessibility if the judicial system remains complicated and a person doesn't know which court has jurisdiction over his or her case.

There is a significant problem for people living in isolated rural areas to gain access to the courts. The overwhelming majority of district [raion] centres in Ukraine are not geographical centres of the districts. This leads to unequal opportunities for rural residents to reach the necessary local court. The lack of public transport routes makes access for rural residents to the courts even more problematical or downright impossible. This means that local (district, city-district) courts continue to be inaccessible for a certain part of the rural population due to both the considerable distances involved and / or the lack of transport between a person's home and the relevant court. In view of this, the question of drawing up and implementing the institution of magistrates is of importance.

5. THE RIGHT TO LEGAL AID AND TO DEFENCE

One of the most widespread systemic problems in the human rights sphere is violation of the right to defence and the failure to provide qualified legal aid.

According to Article 261 of the Code of Administrative Offences, a person does not have the right at all to meet with his or her defender, while during the subsequent investigation into such a case and its examination by the court the presence of a lawyer is not obligatory. This is despite the fact that the European Court of Human Rights regards such procedures in many cases as criminal procedural in their essence and that therefore the rights of the individual to a fair trial should fully apply.

Criminal procedure legislation is also flawed. It all begins with the fact that it is the investigator who issues a decision allowing a defence lawyer to take part in the case. One should also note the difficulty for a defender in communicating with a person in custody. On the one hand a person remanded in custody does have the right to see their defender without others being present, without any limitation on the number of such visits or their duration. However on each occasion notification is required from the investigator to the administration where the person is being held. Investigators often make use of this.

Legislation contains separate provisions regulating the provision of free legal aid, yet a system ensuring real access to such assistance has yet to be created.

The procedure for appointing a lawyer (defender) through lawyers' associations, as envisaged by the Criminal Procedure Code, was introduced under different historical circumstances and does not

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therefore take modern forms and conditions for the functioning of the bar lawyers' profession into account, and consequently fails to provide high-quality and timely legal assistance.

The State provides free legal aid only in some categories of criminal cases or for some categories of people accused. The quality of such aid is generally low, and often such appointed lawyers are simply present during the proceedings, without actively fulfilling their procedural defence functions. This is partially due to the pitiful payment for their services: the amount paid to bar lawyers in such cases is a mere 15 UAH *for a full working day*, and to get this a lawyer has to obtain three documents.

On 11 June 2008 the Cabinet of Ministers adopted Resolution № 539 «On amendments to the Procedure for remuneration to bar lawyers for providing citizens with legal aid in criminal cases at the State's expense», with this coming into force from 1 January 2009. It increased the size of remuneration for lawyers with this fixed on the level of 2.5% of the minimum hourly rate for a bar lawyer during proceedings at detective inquiry, pre-trial investigation or court examination of a criminal case (as of the beginning of March 2009 this was a little more than 15 UAH per hour). Clearly this level is also too low when compared with the market fees charged by lawyers.

6. REASONABLE TIME LIMITS

Due to shortcomings in judicial procedure, as well as the not always warranted extended jurisdiction of the courts, for example, in examining administrative offences, judges are unable to give timely and high-quality consideration of cases.

Courts quite often return claims lodged without grounds, while judges procrastinate with investigating cases and hand down rulings outside what can be called a reasonable time frame.

No clear mechanism has been drawn up for establishing the court's liability for procrastination with examining cases, as well as judges' liability for not carrying out their duties in a qualified manner.

Efficiency of consideration of cases by local general jurisdiction courts²²

№ 3/n	Indicator	2007	2008	Rate of change, %
<i>Criminal cases</i>				
1	The number of cases where proceedings have been completed, in total	186244	182100	-2,23
2	Cases scheduled for examination with infringements of the time limits set down in Article 241 of the Criminal Procedure Code [CPC]	1425	1202	-15,65
	<i>Percentage of the number of cases where proceedings have been completed</i>	0,77	0,66	X
3	Cases scheduled for examination with infringements of the time limits set down in Article 256 of the CPC	3867	3609	-6,67
	<i>Percentage of the number of cases where proceedings have been completed</i>	2,08	1,98	X
4	The number of unconsidered cases at the end of the reporting period	40348	44891	11,26
	<i>Percentage of the number of cases where proceedings were underway</i>	17,81	19,78	X

²² According to figures from the SJA for 2008.

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5	Including cases where consideration is over 6 months late (not counting cases where proceedings were terminated)	5363	7642	42,49
	<i>Percentage of the number of cases not considered cases not counting cases where proceedings were terminated</i>	18,60	22,67	X
<i>Administrative cases</i>				
6	The number of cases where proceedings have been completed, in total	126035	148972	18,20
7	Including with infringements of the terms for examination set down by the Code of Administrative Justice	14439	13912	-3,65
	<i>Percentage of the number of cases where proceedings have been completed</i>	11,46	9,34	X
8	The number of unconsidered cases at the end of the reporting period	19970	65069	225,83
	<i>Percentage of the number of cases where proceedings were underway</i>	13,68	30,40	X
9	The remainder of unconsidered cases (not including cases where proceedings have been terminated)	18557	63844	244,04
	<i>Percentage of the number of cases where proceedings were underway</i>	12,71	29,83	X
10	Cases over 2 months late (not including cases where proceedings have been terminated)	5299	10000	88,71
	<i>Percentage of the number of cases not considered not counting cases where proceedings were terminated</i>	28,56	15,66	X
<i>Civil cases based on law suits, separate proceedings</i>				
11	The number of cases where proceedings have been completed, in total	1240758	1257092	1,32
12	Proceedings in cases concluded over the time limits established by the Civil Procedure Code	123484	138696	12,32
	<i>Percentage of the number of cases where proceedings have been completed</i>	9,95	11,03	X
13	The number of unconsidered cases at the end of the reporting period	207892	252686	21,55
	<i>Percentage of the number of cases where proceedings were underway</i>	14,35	16,74	X
14	Percentage of the number of cases excluding cases where proceedings were terminated)	183805	230882	25,61
	<i>Percentage of the number of cases where proceedings were underway</i>	12,69	15,29	X
15	Cases over 3 months late (not including cases where proceedings have been terminated)	40846	60184	47,34
	<i>Percentage of the number of cases not considered, excluding cases where proceedings were terminated</i>	22,22	26,07	X

As can be seen from this table, the number of cases not considered is increasing considerably, and this is a cumulative effect. The situation is similar in the High Courts and Supreme Court, but better in courts of appeal.

There is a particularly acute problem with the Supreme Court's workload from cassation appeals against general jurisdiction court rulings in civil cases. The situation was temporarily improved by passing the function of judging at cassation level in civil cases to general courts of appeal. The courts of appeal were handed cassation appeals submitted to the Supreme Court before 1 January 2007, while all appeals which began coming from the beginning of 2007 are again piling up, overloading the Supreme Court. On average in 2007 there were 57 new cases for each judge of the Supreme Court (in the Civil Proceedings Chamber the number is considerably higher). By some estimates at the end of 2008 there was a build up of 22 thousand cases still to be examined.

There are also problems in the High Administrative Court where the load is high as well. The reason here is that the Court does not have a full number of judges. If it was working to full capacity, the problems would disappear.

There is an irrational method for allocating judges to courts which leads to some having an excessive workload, while others don't have enough to do. There are also problems with judges not being appointed due to parliament working irregularly.

The average workload for a local court judge is 178,86 cases and files a month (against 160,04 in 2007) and for an appeal court judge – 9,61 (11,27 in 2007). The average monthly workload for a judge in the district administrative courts is 78,08 cases and files (y 2007– 59,61), while in administrative courts of appeal the figure is 29,92 (against 11,42 in 2007).

During the first half of 2008 there were on average for the year 800 cases for each judge of the Lviv Administrative Court of Appeal, this being an increase of 25% over the previous six month period. Due to the difficult political situation and the blocking of the work of the Verkhovna Rada, judge vacancies have still not been filled. Accordingly, of the 76 judges as per the staffing schedule, only 14 are at the present time administering justice. At the same time 11 judges have been waiting for National Deputies' vote for over half a year. Their appointment would make it possible to accelerate considerable of claims received by the court and bring the period of time for examining cases into line with current legislation. This is while in the first half of 2008 the present judge corps only managed to examine 37% of the overall number of cases awaiting consideration by the Lviv Administrative Court of Appeal.²³

It is worth pointing out that the military courts have virtually no workload.

Legislation basically fails to provide for the right of parties to legal proceedings to appeal against the excessive duration of proceedings. Nor does it guarantee the right to compensation of damages incurred as a result of unwarranted delay in hearing a case in court.

Infringements of reasonable time spans are more and more often the reason for Ukraine losing cases in the European Court of Human Rights

In the case of *Lugovoi v. Ukraine* (application № 25821/02) the European Court of Human Rights found that there had been a violation of reasonable periods for examination in this case which had gone on for around 10 years.

In the case of *Rishkevych v. Ukraine* (application № 35312/02) the Court decided that in this case the length of criminal proceedings – over 4 years – was excessive and did not meet the requirements of a «reasonable period».

The Court had previously passed such judgments on a number of occasions involving analogous cases.²⁴

²³ «One judge of the Lviv Administrative Court of Appeal has to cope with 800 cases // 6 August 2008, <http://www.helsinki.org.ua/index.php?print=1218006649>.

²⁴ Cf. *Antonov and Others v. Ukraine* (№ 14183/02, judgment of 22 November 2005 and *Yurtayev v. Ukraine* (№ 11336/02, judgment of 31 January 2006).

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7. PRESUMPTION OF INNOCENCE

In the present criminal procedure system the principle that a person is presumed innocent unless proven otherwise is often infringed. This is caused both by flawed legislation, and by the lack of respect for this principle demonstrated by public officials, including those who hold the highest posts in the country (the President, the Minister of Internal Affairs, the Prosecutor General and others.) The lack of a proper level of legal culture among high level public officials causes considerable problems. Virtually every press conference given by top officials of the MIA or the Prosecutor General's Office is accompanied by information about a crime uncovered or a criminal identified long before any verdict has been handed down by the courts on these criminal investigations.

Nor does legislation guarantee the presumption of innocence in cases involving administrative offences

The right to not incriminate yourself is a part of the presumption of innocence, however cases remain common where a person is first interrogated as a witness, and then the testimony is used against him or her when charges are laid.

The following can also be considered infringements of the presumption of innocence in legislation:

- 1) the practice by the court of returning criminal cases for further investigation;
- 2) the possibility of launching a criminal investigation against a specific person, and not over a specific crime.

*The number of criminal cases returned by first instance courts*²⁵

№ 3/π	Indicator	2007	2008	Rate of change	
					%
1	The number of criminal cases considered by the courts (taking into account cases returned to Prosecutors under the procedure in Article 232 of the CPC, and not counting cases that were not initiated other than through a complaint from the victim.	185773	181415	-4358	-2,35
2	Cases returned by first instance courts for further investigation (Articles 246, 281 of the CPC) (not counting cases that were not initiated other than through a complaint from the victim.)	6858	5751	-1107	-16,14
	<i>Percentage of the number of completed proceedings into criminal cases of public prosecution</i>	3,69	3,17	X	X
3	Cases returned to prosecutor's offices in accordance with Article 249 of the CPC	1444	1250	-194	-13,43
	<i>Percentage of the number of completed proceedings into criminal cases of public prosecution</i>	0,78	0,69	X	X
4	Criminal cases withdrawn by the prosecutor's office in accordance with Article 232 of the CPC	2873	1826	-1047	-36,44
	<i>Percentage of the number of completed proceedings into criminal cases of public prosecution</i>	1,55	1,01	X	X

²⁵ Figures from the State Judicial Administration for 2007 available on the official website <http://www.court.gov.ua>. Cases being examined in appellate and local general jurisdiction courts and returned for further investigation or withdrawn by the prosecutor's office (not including cases which were not initiated following a complaint from the victim). The data does not show the work of the Supreme Court.

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5	Total number of criminal cases returned by the courts and withdrawn by prosecutor's offices (not counting cases that were not initiated other than through a complaint from the victim.	11175	8827	-2348	-21,01
	<i>Percentage of the number of completed proceedings into criminal cases of public prosecution</i>	6,02	4,87	X	X
6	Number of people with respect of whom judgments or resolutions of local courts to return cases for further (pre-trial) investigation were revoked at appeal level.	2029	1959	-70	-3,45
7	Separate judgments issued regarding infringements of legislation in conducting detective inquiry or pre-trial investigations	2348	2452	104	4,43

An additional infringement of the presumption of innocence is the application of amnesties with respect to people whose criminal examination is still in process without their consent.

A serious problem linked with the presumption of innocence is the extremely low percentage of acquittals. This low percentage was typical for the judicial system from back in Soviet times, which can be explained by the retention of Soviet traditions of criminal process, the restricted application of adversarial process, especially at pre-trial stage and a system of further investigation (where there is insufficient evidence of guilty the courts often return a case to the investigators for «further investigation», where the case is often closed without an acquittal).

In 2007 165.5 thousand people were convicted in Ukraine, while only 689 were acquitted, with 337 of these being in private prosecution cases. This means that acquittals are handed down in less than half a percent of cases! These figures count both rulings which have come into force and those which haven't. If we take only sentences which came into force in 2007, then the numbers acquitted were even lower – 459 people, of whom 300 were in private prosecution cases. We thus see that in those cases involving the State prosecution, acquittals are a real rarity.

There were almost no noticeable changes in practice from 2005-2007 which is reflected in the ratio of convictions and acquittals.

The numbers of people convicted and acquitted²⁶

	Convicted – number in thousands / as a percentage	Acquitted – number in thousands / as a percentage
2005	196,6 / 99,5%	0,9 / 0,5%
2006	177,6 / 99,5%	0,9 / 0,5%
2007	165,5 / 99,5%	0,7 / 0,5%

In 2008 the number of acquittals fell to 539 of which 8 were revoked at appeal level with a new verdict, while 57 were revoked with the case being sent for further investigation.

8. ENSURING JUSTICE OF THE CRIMINAL PROCESS

There is still a major problem with the lack of proper practice regarding the admissibility of evidence in the criminal process. It is common for judges to use evidence obtained with violation of human rights: the right to defence, the use of torture and ill-treatment, the use of a person's testimony against him or herself, etc.

²⁶ According to data from the State Judicial Administration (http://www.court.gov.ua/home/home.php?razdel_id=11899). These figures cover both sentences which have come into force, and those that have not.

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The European Court of Human Rights is increasingly paying attention to these problems.

In the case of *Lutsenko v. Ukraine*²⁷ the European Court found that there had been a violation of the right to a fair trial in the use as main evidence of Lutsenko's own testimony given during a previous investigation as a witness and which he had later retracted. The Court found that the right of defence had been restricted through the violation of guarantees regarding testimony against oneself and ordered the government to carry out a new court examination into the case.

In an analogous case *Shabelnyk v. Ukraine*²⁸ the European Court also found that there had been a violation of Article 6 of the Convention because the murder conviction against M. K was based on evidence obtained through violation of Mr Shabelnyk's right and privilege to remain silent and not incriminate himself, as well as because he had been obstructed and stopped from exercising his right to defence when being interrogated by the pre-trial investigation unit. In this case Shabelnyk had begun incriminating himself when questioned as a witness and warned of criminal liability if he refused to give testimony. Then after having received his testimony and on the basis of it, he had been charged and later convicted.

Another systemic problem is the lack of nongovernmental forensic medical assessments. One can with good grounds doubt the independence of State-employed experts in examining cases against the authorities or State institutions. The Ministry of Justice issues permits for their work, ensures funding and also establishes standardized method guides for the work of experts. These method guides are often fairly controversial and the question arises as to whether it is possible at all to introduce a single methodology for expert assessments of moral damage inflicted.

As well as well-founded doubts as to the independence of State-employed experts, there is also a problem with the effectiveness of the activities of this State system. For example in Ukraine there are no experts or method guides at all on certain types of knowledge. Due to the lack of separate method guides, specialists and equipment, some forms of crime detection, technical engineering and commodity expertise are not carried out. The Ministry of Justice has not resolved the issue of accreditation of Ukrainian forensic science institutions according to the international ISO 17025 standard, and Ukraine's joining the European Network of Forensic Science Institutes [ENFSI]. As a result, international cooperation is hampered in carrying out complex, multiple element expert assessments, nor is methodological backup being developed through differentiation of scientific research and wide exchange of information on a single methodological basis has not been organized.²⁹ Clearly all these difficulties would be easily overcome if there were also nongovernmental forms of expert analysis.

9. ENFORCEMENT OF COURT RULINGS

The present system for enforcing court rulings is not efficient and there is effectively no system of control over the work of the State Bailiffs' Service. The European Court of Human Rights in judgments passed down against Ukraine most often finds that there has been a violation of the right to a fair trial especially due to the non-enforcement of rulings from domestic courts within a reasonable period of time

The following are some examples of European Court of Human Rights judgments connected with court rulings not being enforced for a long time.

²⁷ Judgment from 18 December 2008 (Application № 30663/04), <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>

²⁸ Judgment from 19 February 2009 (Application № 16404/03) <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>

²⁹ «The lack of an expert assessment means incomplete court proceedings» // Official report from the Accounting Chamber of Ukraine: panel decision, 25 November 2008 http://www.ac-rada.gov.ua/achamber/control/uk/publish/category/main?cat_id=411.

Lopatyyuk and others v. Ukraine, from 17 April 2008: 121 employees against the State-owned company «Atomspetsbud»;

Pashuk v. Ukraine (Application № 34103/05) from 12 June 2008: over the non-enforcement of a court ruling on a payment of compensation to teachers. Parliament passed a law on recognizing awarded amounts as State debt, however the European Court found that such a law violates the right to a fair trial due to the infringement of the reasonable timeframe for enforcing such a ruling.

Miroshnik v. Ukraine from 27 November 2008: non-enforcement of a court ruling for over 8 years regarding compensation for expenses incurred on military uniform and over the unlawfulness of his dismissal.

There were also judgments regarding non-enforcement of court rulings in the cases of *Kharchuk v. Ukraine*, *Saksontseva v. Ukraine* and dozens of others.

Without enforcement of court rulings the right to a fair trial loses any meaning since it remains formal and for show, and does not ensure the protection and restoration of violated rights and freedoms.

According to statistics, as of 1 January 2009 the State Bailiffs' Service was due to enforce 7 982 785 writs of execution worth in total 61 242 694 122 UAH. This was 666 004 documents and 9 038 849 520 UAH more than in 2007 (when 7 316 781 writs of execution were due to be enforced worth 52 202 844 603 UAH). Bailiffs completed 5 126 775 documents (64,2% of the total awaiting enforcement) worth 20 945 516 222 UAH (34,2%), this being 629 509 documents and 1 905 385 071 UAH more than for 2007 (when 4 497 266 writ documents were completed, worth 19 040 131 151 UAH). 2 760 682 writ documents were actually enforced (34,66% of the number awaiting enforcement) and 6 036 963 509 UAH retrieved. (9,9%), this being 369 481 documents and 456 632 551 UAH more than for 2007 (during 2007 2 391 201 documents were actually enforced, and 5 580 330 958 UAH in all retrieved.).

At the end of the period in question, there were 2 856 010 documents remaining, worth 9 905 529 819 UAH, this being 36 495 documents and 7 744 263 889 UAH more than in 2007 when there were 2 819 515 writ documents outstanding worth 32 161 265 931 UAH.

The average workload for each State Bailiff is 108 writ documents per month.

In terms of the number of completed writ documents the following regions were lower than the average around Ukraine (64,2%): the Donetsk region – 54,2% and Sevastopol – 54,6%. As for the amounts according to completed writ documents the following were lower than the average (31,3%) around Ukraine: the Donetsk region – 4,2%, Ivano-Frankivsk region – 31,3%, Rivne region – 30,0%. According to the number of actually enforced writ documents figures lower than the average for Ukraine (34,6%) were seen in: the Donetsk region – 22,4%, Kyiv – 22,9%, Sevastopol – 24,9%. In terms of the amounts according to completed writ documents following actual full enforcement, the average figure for the country (9,2%) was not reached in the Kherson region – 6,7% and the Ivano-Frankivsk region – 6,9%. The largest amounts as per terminated writ documents were in the Dnipropetrovsk region – 1 383 818 878 UAH., the Donetsk region – 3 666 666 304 UAH and in Kyiv – 1 106 125 409 UAH.³⁰

The present Laws «On the State Bailiffs' Service» and «On Bailiffs' proceedings» have to a large extent exhausted their potential which was merely as a transitional stage in moving towards the creation of an effective European model for compulsory enforcement of court rulings. The work of seven thousand bailiffs over almost ten years has not been able to guarantee the enforcement of justice, and with the present legislative approach it would be futile to expect any other results.

Attention has been given to this problem on many occasions in the higher echelons of power. In March 2008, for example, the President issued a Decree «On supplementary measures to increase effectiveness of enforcement of court rulings».³¹ The situation however with to this day remains appalling.

³⁰ On the main conclusions of the work of the Ministry of Justice and its territorial bodies in 2008 and tasks for enhancing the efficiency of its work in 2009 <http://www.minjust.gov.ua/>.

³¹ V. Yushchenko has issued a decree on increasing the efficiency of implementation of court rulings // Yurydychna praktyka <http://yurpractika.com/news.php?id=0013764>

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At the legislative level, there is a paradoxical situation whereby the State to a large extent defends debtors rather than those seeking to extract the debt and effectively provides legal opportunities for avoiding implementation of court rulings.

The State needs to prioritize the interests of the aggrieved party – the person seeking what the court has recognized their right to. It is this which should be at the basis of modern doctrine on ensuring enforcement of rulings. Yet in current legislation the debtor is offered ample scope for evading enforcement and bearing no liability for this. The paradox is that effectively legislation makes enforcement of a court ruling impossible without the consent of the debtor to each procedural act which is essentially illogical.

One of the directions for improving enforcement of rulings would be the introduction of non-governmental forms of enforcement which would make it possible to reduce corruption during the organization of compulsory enforcement and prevent administrative influence on the process of enforcement. This would make it possible to significantly shorten time periods for enforcement and effectively increase the motivation for enforcement through contractual relations and the introduction of real competition in the enforcement process.³²

There are also problems in the fact that gaps in legislation create the conditions for escaping liability for non-enforcement of rulings.

According to data from the Prosecutor General's Office, following checks by Prosecutor's offices, 258 criminal investigations were initiated over deliberate non-enforcement of court rulings, two thirds of which were passed to the court.

Despite certain efforts by the authorities, the fundamental problem is not being resolved and the number of court rulings not enforced increases every year.

10. CORRUPTION IN THE JUDICIAL SYSTEM

The problem of corruption in the courts has over the last decades become systemic.

According to a survey carried out in March 2008 by the Kyiv-based company InMind as part of an ACTION [«Promoting Active Citizen Engagement in Combating Corruption in Ukraine»] project, implemented by Management Systems International [MSI] with the financial support of USAID, members of the public, companies, lawyers and prosecutors give more or less the same assessment of the system of corruption in the courts. Around 80% of representatives from each of these groups consider the judicial system to be in one way or another corrupt. At the same time, the percentage of those individuals and companies that have themselves encountered corruption is significantly lower – around 27%.³³ Even so the figure is fairly high with one in four having personally encountered corruption in the courts.

Almost a third of lawyers and prosecutors see corruption as a normal thing at all stages of court proceedings. A further third of those surveyed (36-39%) say that it is the pre-trial investigation that is the most corrupt stage. In addition, 64% of lawyers and prosecutors surveyed are convinced that over the last year the level of corruption in the judicial system has risen. Among corrupt dealings which both individuals and companies most often use are personal connections, and next in line demanding or voluntarily offering a bribe. We would note that companies practise to an equal extent offers of unofficial payments (20%) and encounter demands (21%).³⁴

The results show a greater number of cases of corruption from individuals turning to the appeal courts, as against local courts. The opposite is true of the situation with companies. Among types

³² M. Onishchuk: The State Bailiffs' Service on the way to reform and effectiveness // Dzerkalo tyzhnya [The Weekly Mirror] № 9 (688) 8 – 14 March 2008 <http://www.dt.ua/1000/1050/62281/>

³³ The results of the survey are taken from the ACTION website (<http://www.pace.org.ua/content/category/1/1/53/lang,en/>).

³⁴ Press release, 17 July 2008 (<http://www.pace.org.ua/content/category/1/1/53/lang,en/>)

of corruption encountered both by individuals and by companies, those most often encountered are the use of personal connections, followed by demanding or voluntarily offering a bribe.³⁵

Judges themselves do not deny that there is bribe-taking in the courts. Half of the judges had one way or another encountered offers of bribes in the form of money or services, 40% seeing this very often, 10% not infrequently.

The most widespread practice involving corrupt relations is using personal connections. Bar lawyers are more often than others involved in corrupt relations, followed by judges and court employees.³⁶

On 9 July 2008 officers from the Prosecutor General's Central Department on Investigating Particularly Serious cases and the MIA Central Department for Fighting Organized Crime arrested «red-handed» one of the chairpersons of a district court in the Dnipropetrovsk region. He was alleged to be taking a bribe of 50 thousand USD for handing down a ruling changing remand in custody of one of the defendants in a criminal case to a signed undertaking not to abscond. The Prosecutor General initiated a criminal investigation over elements of the crime set down in Article 368 § 3 of the Criminal Code. The investigation is underway.

The phenomenon of corruption is thus quite widespread in the judicial system with its existence posing a great threat to the transparency and justice of the courts.

11. RECOMMENDATIONS

1) Continue implementing the Strategy Concept for improving the justice system to ensure fair trial in Ukraine in accordance with European standards passed by Presidential Decree and approved by international experts of the Council of Europe Venice Commission). In particular, pass the combined Law on the Judiciary and on the Status of Judges³⁷ and Law on Court Duty which were submitted by the President to the Verkhovna Rada in December 2006, passed by parliament in their first reading and already prepared by the parliamentary committee for their second reading.

2) Continue implementation of the Strategy Concept for reforming the system of free legal aid approved by Presidential Decree on 9 June 2006 № 509/2000.³⁸

3) Begin implementation of the Strategy Concept for reforming criminal justice, passed by Presidential Decree on 8 April 2008 № 311/2008³⁹, in particular, by reforming criminal procedure law and passing a new Criminal Procedure Code⁴⁰

4) The Cabinet of Ministers must ensure funding of the courts at the level of the justified requests of the SJAU and Supreme Court

5) Make amendments to procedural legislation and the law on enforcement proceedings which will ensure mandatory entry of all court rulings into the Single State Register of Court Rulings.

6) High-ranking public officials should avoid direct accusations against any individuals of having committed different crimes since such accusation place in jeopardy the person's right to the presumption of innocence. Such accusations may only be made after a court verdict has come into legal force

³⁵ Ibid .

³⁶ According to the results of a survey of judges from the site of the USAID Project «Ukraine: Rule of Law» (http://www.ukrainerol.org.ua/index.php?option=com_docman&task=doc_download&gid=72&Itemid=23).

³⁷ Parliamentary committee combines two draft laws – № 0917 and 0916 -, submitted by the President into one № 0916, which joins the name and subject of regulation. Available at: http://gska2.rada.gov.ua/pls/zweb_n/web-proc4_1?id=&pf3511=30845.

³⁸ Available at: <http://www.president.gov.ua/documents/4549.html>.

³⁹ Available at: <http://www.president.gov.ua/documents/7703.html>.

⁴⁰ It should be noted that what is involved here is not the draft Criminal Procedure Code which has been under review in parliament for years, since it does not establish internationally accepted procedure for observing people's rights and liberties during the criminal process. This is a draft Code drawn up by a working group of the National Commission for the Strengthening of Democracy and the Rule of Law.

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7) The President, Cabinet of Ministers and Parliament should stop the practice of awarding honours to serving judges, as well as including serving judges on various executive bodies

8) Judges of the Supreme Court and other courts should withdraw from all consultative and advisory executive bodies.

9) The President should stop the practice of revoking his decrees appointing judges to posts instead of using the procedure set down in legislation for dismissing judges.

10) The authorities should as a matter of urgency resolve the problem of incomplete staffing of many courts, and also ensure the full functioning of the system of administrative courts.

11) Via legislation ensure the work of nongovernmental experts and expert bureaux

12) Legislative norms need to be drawn up and passed for ensuring reasonable time spans for judicial examination of cases. Compensation should also be envisaged for violations of their rights through the failure to observe reasonable time spans.

13) Implement the National Action Plan on ensuring proper enforcement of court rulings approved by Presidential Decree on 27 June 2007 № 587/2006.

14) On the basis of the Strategy Concept for improving court proceedings increase the efficiency of the Bailiff's Service by strengthening legal and social defence of State Bailiffs, improving guarantees of independence, as well as the legislative norms which directly regulate the procedure for enforcement of rulings.

15) The place of the State Bailiffs' Service needs to be clearly defined within the system of State bodies. Individuals applying for jobs connected with enforcing court rulings must take a qualifying test and have a probationary period. It would be expedient to gradually remove the monopoly of State activity in enforcing court rulings and envisage the possibility of transferring it to non-State enforcers or enforcement agencies under the efficient control of the Ministry of Justice.

16) Raise the liability of debtors for non-enforcement of court rulings or for deliberately creating conditions which make enforcement impossible, as well as introducing incentives for voluntary enforcement of a court ruling.

V. THE RIGHT TO PRIVACY (THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE)¹

1. CONSTITUTIONAL REGULATION

The right to privacy is guaranteed by the Ukrainian Constitution. Article 32 states: «No one shall be subject to interference in his or her personal and family life, except in cases envisaged by the Constitution of Ukraine». The Constitution also envisages protection of specific aspects of privacy. For example, Article 30 guarantees inviolability of home (territorial privacy); Article 31 – privacy of mail, telephone conversations, telegraph and other correspondence (communications privacy); Article 32 prohibits the collection, storage, use and dissemination of confidential information about a person without his or her consent (information privacy), while Article 28 stipulates that no one shall be subjected to medical, scientific or other experiments without his or her free consent (guaranteeing certain elements of physical privacy).

Constitutional norms provide an exhaustive list of grounds for intrusion into privacy and the conditions for such intrusion. However, there remain many inconsistencies between the norms of relevant legislation with the requirements of the Constitution. Legislation largely fails to meet international standards, is contradictory and does not comply with the concept «in accordance with the law», in the understanding of European Court of Human Rights case law. Another important factor in part arising from the shortcomings in legislation is the application of the law by, for example, law enforcement agencies which is to a large extent lacking in respect for the right to privacy and is often a source of violations.

2. SURVEILLANCE AND INTERCEPTION OF COMMUNICATIONS

Over recent years the use of technical means of surveillance of individuals has become widespread.

There are, on the one hand, reports of such means being used by private individuals. At the same time it is reported that representatives of the authorities are also involved in using technical means for gathering information about citizens (including, of course, unlawfully).

According to information from the Supreme Court press service² in 2008 general appellate courts considered **25 thousand 86 applications** from the law enforcement agencies for permission to intercept communications, to seize correspondence or use other technical means of receiving information linked with a restriction in people's constitutional rights. For comparison, in 2005 15

¹ By Ruslan Topolevsky, Centre for Legal and Political Research «SIM»

² Information from the Press Service, 7 April 2009, <http://www.scourt.gov.ua/clients/vs.nsf/0/3C922D8997530E69C2257591004ECC44?opendocument>

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thousand such applications were made; in 2006 – 19 thousand 649 and in 2007 – 19 thousand 989. Most of the applications in 2008 came from heads of operational divisions of the Ministry of Internal Affairs (MIA) (14,815) the Security Service (SBU) (8,323) and the tax police (1,655). In addition, courts considered 193 applications from other bodies, including the Prosecutor's Office and subdivisions of the State Border Guard Service. The largest number of applications were considered by appellate courts in Kyiv – 3,806; Zaporizhya region – 2,460; Donetsk region – 1,546; Mykolaiv region – 1,194; Odessa region – 1,139; Luhansk region – 1,089; Khmelnytsky region – 1,072, the Lviv region – 1,043, as well as the Autonomous Republic of the Crimea.

At the same time, on average the SBU each year completes investigations into no more than 900 criminal files of which no more than 700 reach the court. It would appear that over 7.5 thousand warrants are received not in order to investigate criminal cases and the question must arise what the purpose is of such measures.

According to information from the Prosecutor General's Office³ only 19% of the material received as a result of investigative operations carried out by the SBU goes on to be used to initiate criminal investigations. For example, in Kyiv and the Kyiv region of the 96 warrants issued for investigative operations, not one was used as evidence in a criminal case. One must therefore ask why 4/5 of all investigative operations are carried out by the SBU and how the material obtained is in fact used.

The same situation can be seen with investigative operations carried out by the MIA.

The problem is exacerbated by the fact that legal norms are often unclear with regard to the procedure and limits of permitted intrusion into people's privacy. For example, there remains no law on personal data protection, and the law on investigative operations does not fully comply with the principles of clarity and foreseeability.

Even the Prosecutor General's Office acknowledges the flaws in this procedure. For example, in practice the prosecutor's office cannot appeal to the courts against the issuing of a court warrant for interception of communications. Such a warrant may only be cancelled by a court or by the body which applied for the warrant. This means that control is virtually non-existent.

There remains a need for changes to legislation referred to by the European Court of Human Rights in the Case of «Volokhy v. Ukraine», with regard, for example, to the fact that with individual surveillance the law does not clearly stipulate the limits and conditions under which the authorities can exercise discretionary powers. It also fails to provide sufficient guarantees of protection from arbitrary will in applying surveillance measures, and does not make it obligatory to inform a person that he or she had been subjected to surveillance measures. People cannot therefore find out that measures which intrude upon their right to confidentiality of correspondence were applied, and even if they do find out, in practice there are no real mechanisms for appealing against such actions.

The mechanism for issuing a warrant for wiretapping remains flawed. Legislation does not set out clear grounds for interception of communications, nor does it stipulate the time period during which this can take place.⁴

Given the fact that legislation and practice with regard to temporary restrictions on the right to privacy are equivocal and incomplete, on 28 March 2008 the Plenum of the Supreme Court issued Resolution № 2 «On some issues regarding the application by Ukrainian courts of legislation when issuing permits for temporary restrictions on certain constitutional human rights and civil freedoms in investigative operations of the detective inquiry and pre-trial investigation units»⁵

³ Information «On the level of lawfulness in the country in 2008 (in accordance with Article 2 of the Law «On the prosecutor's office») http://www.gp.gov.ua/ua/vlada.html?_m=publications&_t=rec&id=23367.

⁴ V. Yavorsky «How investigative operations carried out by the SBU comply with human rights standards <http://www.helsinki.org.ua/index.php?id=1240739358>

⁵ Although such resolutions are of a recommendatory nature, they are aimed at ensuring correct and standardized application by the courts of legislation and provide an idea of the legal position of the Supreme Court, and

The Resolution summarizes legislation and practice and provides recommendations to the court on applying legislation regulating the procedure for issuing a permit for entering the home or other premises of a person, interception of communications, monitoring of correspondence, telephone calls, telegraph or other correspondence, and the use of other technical means for obtaining information linked with the restriction of people's constitutional rights.

The Resolution refers to the laws regulating the procedure for restricting the right to privacy and classifies such restrictions (undisclosed gaining of access to a person's home or other property; interception of information from communication channels; monitoring of correspondence, telephone conversations, telegraph or other correspondence; and the use of other technical means of obtaining information; survey or search of a person's home or other property (Article 14-1, § 5; Article 177, § 4, Article 190 of the Criminal Procedure Code [CPC]); compulsory removal from a person's home or other property (Article 14-1, § 4; Article 178 of the CPC); seizure of correspondence and interception of communications (Article 14-1, § 4; Article 187 of the CPC); scrutiny and removal of correspondence and study of intercepted information (Article 187 of the CPC). The Resolution indicates that the restriction of such rights and freedoms when carrying out investigative operations, detective inquiry or pre-trial investigation work is permissible only upon a justified court order (except in cases envisaged by Article 30 § 3 of the Constitution), and should be of an exceptional and temporary nature.

Among other things it is stated that courts are not entitled to issue warrants for carrying out investigative operations which temporarily restrict the person's constitutional rights and freedoms if an investigative operations or counter-espionage investigation has not been initiated, or if there is no information to indicate that it was impossible to receive the information in any other way.

The Resolution also gives attention to timeframes during which it is intended to restrict a person's rights, however in any cases these timeframes may not exceed the periods for carrying out a specific investigative operation case. However certain investigative operation cases can last for many years or until the grounds for initiating them disappear, i.e. always.

Furthermore, in issuing warrants for such measures the court is not entitled to determine whether a person is guilty of committing a crime, to assess the evidence from the point of view of their reliability or adequacy for qualifying the actions of the person or determining other issues which must be revolved during judicial examination of a criminal matter.

In February 2008 it was announced that the Prosecutor General's Office had complicated its investigation over the unlawful wiretapping of politicians during the 2004 Presidential campaign. The victims included the current Prime Minister Yulia Tymoshenko and her lawyer, and it is likely that members of Viktor Yushchenko's staff, and he himself, were tapped. The wiretapping was carried out on the basis of a court warrant however it is asserted that the warrant was issued on the basis of an application to tap the telephones of members of a criminal gang, while the mobile telephones stipulated were actually those of the politicians. Member of the Committee on fighting organized crime and corruption, Mykola Dzhyha (Party of the Regions), however, claims that the wiretapping of leaders of the opposition in 2004 was carried out by chance. Nonetheless the investigation team did not establish who had initiated the operation⁶.

It is probably for this reason that in March 2009 members of the Yulia Tymoshenko Bloc [BYuT] sent all appellate courts with jurisdiction to consider applications for wiretapping or interception warrants lists of telephone numbers belonging to high-ranking officials which they suspected SBU of tapping.

According to Sviatoslav Oliynyk from BYuT, «We made up a list at our own discretion of key figures and those who were possibly already facing wiretapping. We did this so that courts, prosecutors and investigative bodies would do an additional check as to whether any sanctions for those names issued corresponded to the material of their investigative operations cases. We gave

are therefore a basis for local and appellate courts when issuing rulings.

⁶ They got the wrong number // Kommersant – Ukraine № 32 – 26.02.2008 <http://kommersant.ua/doc.html?path=\komua\2008\032\11484809.htm>

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the specific telephone numbers in order to draw the attention of the competent individuals involving in issuing warrants that these telephones belonged to public politicians and not to people under criminal investigation.»

According to press reports, deputies sent the Prosecutor General's Office a list containing 11 numbers, and to the appellate courts an expanded list with 30 telephone numbers. The newspaper «Kommersant-Ukraine» reports that the lists contained the mobile phone numbers of Prime Minister Yulia Tymoshenko, the First Deputy Prime Minister Oleksandr Turchynov, Deputy Heads of the BYuT faction Andriy Kozhemyakin and Andriy Portnov, the Prosecutor General Oleksandr Medvedko, his Deputies Mykola Holomsha and Renat Kuzmin, as well as the first Ukrainian President Leonid Kravchuk. Furthermore, a source within the faction informed that the name of the «leader of one of the enforcement bodies» was on the shortlist.⁷

Such action from the BYuT faction received a mixed response. According to media reports, the Head of the SBU Press Service Marina Ostapenko asserted that the SBU was acting within the law and that if there were any doubts about this, then deputies should approach the Prosecutor's Office. The Head of the Kyiv Regional Court of Appeal Yury Nechyporenko said that he had received no such list, yet that he was positive about the initiative, while Yury Vasylenko, former judge of the Kyiv Court of Appeal stated that such actions were in breach of the law on investigative operations since such operations could also be carried out with respect to them.⁸

The media also reported that the Deputy Prosecutor General Renat Kuzmin had asked the Prosecutor General Oleksandr Medvedko to check whether it was lawful to tap his telephone conversations. He stated that he had learned that from January to December 2008 the SBU had carried out investigative operations against him, including those which restricted his human rights. He asserted that the permit to carry out such investigative operations had been obtained in the Zhytomyr Regional Court of Appeal on the basis of falsified documents, and in view of this asked for the matter to be checked and a criminal investigation initiated. He said that after this a criminal investigation had been launched over intrusion into his private life however the SBU had appealed against the decision to initiate it with the court. Renat Kuzmin also informed that the Head of the Kyiv Court of Appeal had unwarrantedly changed jurisdiction, and directed the case to the Sviatoshynsky Court in Kyiv and that the latter, having examined the case, had returned it to the Court of Appeal which had again sent it to the Sviatoshynsky Court. Mr Kuzmin also alleged that the SBU was engaged in unlawful wiretapping of leading politicians and was monitoring all politicians which the regime didn't like online.⁹

It is ironical that claims that they were being tapped, or could be tapped, were made both by National Deputies from the political bloc which includes the Prime Minister's party who were supposed to be adopting legislation on guarantees against wiretapping, and from the Deputy Prosecutor General who in his turn is responsible for ensuring that the law is adhered to in the country. If such people do not have the legal mechanisms to protect their right to privacy, it is clear that it is virtually impossible for the average citizen to defend his or her right to privacy.

In January 2009 the Kyiv Administrative Court of Appeal considered an administrative suit asking the court to declare unlawful the Cabinet of Ministers Resolution № 1169 from 26.09.2007 which approved «Procedure for obtaining a court order to carry out measures which temporarily restrict human rights and the use of the information obtained». The application lodged by Viacheslav Yakubenko and supported by the Ukrainian Helsinki Human Rights Union Strategic Litigations Fund was turned down, however the Court issued a separate judgment which reminded the Prime

⁷ BYuT has drawn up a list of officials who are candidates for unlawful wiretapping // the TSN information service of the television channel «1 3 March 2009 <http://tsn.ua/ua/ukrayina/byut-sklav-spisok-posadovtsiv-kandidativ-na-nezakonne-prosluhovuvannya.htm>

⁸ «BYuT leaks politicians who could be tapped» // <http://24.ua/news/show/id/80752.htm>

⁹ «Deputy Prosecutor General Renat Kuzmin: «Somebody would like specifically Kuchma to end up behind bars» // the newspaper «Komsomolskaya Pravda in Ukraine», 13 April 2009 <http://kp.ua/daily/130409/176618/>

Minister Yulia Tymoshenko of the need to draw up and submit to the Verkhovna Rada a draft law on the Procedure for obtaining a court order to carry out measures which temporarily restrict human rights. It stresses that this law must be line with the Convention and case law of the European Court of Human Rights with regard to this Article.¹⁰ It in fact suggests that those drawing up the law make use of UHHRU recommendations.

This meant that enforcement should be ensured of Presidential Decree № 1556/2005 «On observance of human rights during investigative operations using technical means» which ordered the Cabinet of Ministers to not only draw up the procedure for granting warrants for interception of communications, but also to submit to parliament proposals on amendments to Ukraine's laws on safeguarding observance of civil rights when investigative operations are being carried out. However the Cabinet of Ministers had drawn up instructions on restrictions of citizens' rights, but had not prepared the relevant proposals.

According to European standards, any application for access to personal information must be sufficiently well-founded. It should indicate the circumstances of the case and explain why it is only in this way that the needed information may be obtained. At the same time, after the termination of a criminal investigation or its being passed to the court, the person should be informed that surveillance measures were used against him or her. This makes it possible to appeal against the actions of the law enforcement agencies in court. There should also be independent control over these activities (usually carried out by an Ombudsperson). There is however none of this in Ukraine.

3. CONTROL OF THE INTERNET

According to reports, the SBU for the purpose of countering so-called «computer terrorism» is continuing to carry out measures of monitoring of Internet users and regulation of the Ukrainian segment of the Web. Despite the lack of legal definition of the SBU's powers in this sphere, it continues to implement technical possibilities for carrying out such control.

According to responses from the SBU to UHHRU information requests, SBU activities on monitoring Internet traffic and emails are carried out in accordance with the law on investigative operations. Yet it is clear to everybody that this is impossible since such monitoring is general and not based on an individual approach and cannot therefore be carried out according to cases initiated involving investigative operations and court warrants as required by legislation. It then becomes plain that there simply are no clear legal grounds for these investigative operations. Such measures are obviously carried out on the basis of secret instructions and in no way brought into line with democratic standards.

4. PROTECTION OF PERSONAL DATA

Ukraine has still not ratified the Council of Europe's Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, № 108, and the Additional Protocol to it, On 25 March 2008 the Verkhovna Rada registered a new draft law «On protection of personal data».¹¹ It should be noted that back in March 2006 the Verkhovna Rada passed in full a draft law «On Personal Data Protection»¹². However the President used his power of veto. The law had been reworked by the Ministry of Justice on the basis of a draft Law «On Personal Data Protection» which had during 2005-2006 been drawn up by a working group attached to the Ministry of Justice. This

¹⁰ Rule of Law not of the Cabinet of Ministers <http://www.helsinki.org.ua/en/index.php?id=1233313551>

¹¹ Draft law № 2273 from 25.03.2008 (authors: National Deputies O. Shevchuk, V. Lytvyn, V. Polokhalo, K. Samoiyk) Available in Ukrainian at http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=32124

¹² Draft Law № 808 from 25.05.2006 (from 10.01.2003 № 2618 prior to the 2006 parliamentary elections). Authors: M. Rodionov, S. Nikolayenko, I. Yukhnovsky and P. Tolocho.

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working group had included members of human rights organizations, and it took into account most European standards of personal data protection. On 9 January 2007 the draft law was passed in a significantly reworked and improved version and having taken into consideration the President's suggestions. However, without any particular grounds, the President once again vetoed the draft, putting forward his suggestions.¹³ Following this, parliament never actually considered this draft law.

We would note that sale of databases created by State bodies via the Internet or simply at markets is fairly widespread. The media report some cases where people are detained or prosecuted over this. For example, in September 2008 SBU officers detained an SBU employee who was trying to sell three carriers of data from State bodies for 500 USD each, passing them off as legal software, licensed video and audio disks, as well as an electronic device with secret information.¹⁴ In January 2009 the person was convicted by the Obolonsky District Court in Kyiv of the crime under Article 361-2 of the Criminal Code (unauthorized sale or circulation of information on restricted access which is stored in computers, automated systems, computer networks or on carriers of such information). He was sentenced to 2 years but not imprisoned, receiving a trial period of 24 months on the grounds of genuine repentance and active cooperation in investigating the case.¹⁵

4.1. STATE REGISTER OF VOTERS

At the beginning of 2007 parliament passed the Law «On the State Register of Voters» which came into force on 1 October 2007. The law envisages the creation of a single State register of voters which would include the personal data of individuals entitled to vote and the use of this when drawing up electoral lists during elections at any level, and referendums. However the preparation of this register ran up against a number of court suits over the running of the procurement tender.¹⁶ Due to the court proceedings against the Central Election Commission [CEC], the tender for procurement of goods and services for the creation of an automated information and telecommunications system for a State Register of Voters was declared void.

Soon the Cabinet of Ministers approved new timeframes¹⁷ for carrying out measures to create a State Register of Voters and allowed procurement from one participant.¹⁸ After lengthy procedure including a Presidential Decree, Prosecutor's Order, an appeal from the President to the Constitutional Court, and so forth, the CEC finally, on 16 June 2008, announced an open tender for the purchase of technical equipment and programme software for the State Register of Voters. At long last on 8 August 2008 CEC signed a contract with the «Corporation «SSAPS». [from Single State Automated Passport System] to create the programme software for the State Register of Voters. This consortium already controls the system for issuing passports [i.e. internal documents] for Ukrainian citizens and passports for travel abroad.

4.2. THE GATHERING OF PERSONAL DATA BY STATE BODIES

The number of databases collected by the State continues to grow and those already existing are expanding despite the lack of legislation on protection of personal data.¹⁹

¹³ Available here http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=27270

¹⁴ «The SBU has arrested somebody selling secret databases in Kyiv» // the Internet publication «Korrespondent.net», 2 September 2008, <http://korrespondent.net/kyiv/572749>

¹⁵ In Kyiv a person has been convicted for selling databases of information in the possession of the State// Report from the SBU Press Service, 23 January 2009

¹⁶ «Why work on creating a State register of voters is being hampered, or how to work in friendly manner with your hands tied» // site of the Central Election Commission http://www.cvk.gov.ua/drv/1_26062008.htm

¹⁷ Cabinet of Ministers Instruction from 12 March 2008 № 437 http://www.cvk.gov.ua/drv/1_26062008_d7.pdf

¹⁸ Cabinet of Ministers Resolution from 17 April 2008 № 363 http://www.cvk.gov.ua/drv/1_26062008_d8.pdf

¹⁹ Information on State institutions' databases can be found (in Ukrainian) in the List of electronic information databases of Ukrainian State institutions http://uk.wikipedia.org/wiki/Перелік_електронних_інформаційних_

On 30 September 2008 the Administration of the State Border Guard Service issued Order № 810 «On approving Provisions on an information and telecommunications system of border control «Hart-1» of the State Border Guard Service.»²⁰ The following functions of the «Hart-1» system are mentioned: «formation of databases about people who have crossed Ukraine's border, including the recording of biometric data of people who, in accordance with legislation, are prohibited from entering Ukraine or temporarily restricted in their right to leave Ukraine, including cases pursuant to instructions from the law enforcement agencies regarding people hiding from bodies of detective inquiry, criminal investigation or the court, trying to avoid serving a criminal sentence, invalid, stolen or lost documents for leaving the country, and other databases created and used in accordance with legislation», as well as automating the processes for checking this information.

Clearly this order was one of the elements towards enforcing the Cabinet of Ministers Instruction № 439-I from 12 March 2008 «On approving an action plan for 2008 on creating a system for control over foreign nationals and stateless persons arriving on Ukrainian territory and recording their biometric data».²¹ However there were no legislative grounds for such decisions then and there remain none. The Cabinet of Ministers exceeded its powers in issuing such an Instruction.

Therefore, soon afterwards the Government submitted to the Verkhovna Rada a draft law²² which envisages recording the biometric data of foreign nationals and stateless persons, both when organizing a visa, and at passport control points on the State border, if nothing else is envisaged by legislation. It is planned that the list of items of biometric information and the procedure for providing it should be determined by the Cabinet of Ministers. In April 2009 the Verkhovna Rada in the space of an hour adopted this draft law in its first and final reading, however in May the President vetoed it following an appeal from human rights groups²³ due to the lack of proper protection of personal data.

At the present time the main electronic classifier used for gathering and process personal data about Ukrainian nationals is the identification number issued by the State Tax Administration. The sphere of its use is constantly being expanded and goes well beyond the limits of the purpose for which it was introduced, that is, tax registration. Without an identification code one cannot legally find work, have access to pensions, exercise ones right to education, receive a student grant or unemployment benefit, organize concessions, open bank accounts, register business activities, receive State educational diplomas, carry out any form of notarized actions, receive an internal passport, or one for travel abroad, etc.

Therefore in reality we have a situation where the administrative practice of State executive bodies is knowingly violating the Law on a Single Register of Individual Taxpayers, and is using the tax number for purposes not envisaged in by this Law.

Another serious problem is that the authorities and State institutions regularly divulge confidential information about individuals. It is a standard occurrence for information to be disclosed about a person's state of health, their income, size of communal charges arrears and so forth.

This state of affairs is seen by experts as being due to the lack of clarity of the basis legal mechanisms for gathering information about individuals. This includes first and foremost the failure to stipulate requirements on protecting personal data during computer processing in State information & telecommunications systems. There are no criteria for what information can be justifiably gathered, especially with regard to those engaged in economic activities involving non-State forms of ownership.

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²⁰ Available at <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=z1086-08>

²¹ Available at <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=439-2008-%F0>

²² Draft law № 3079 from 28.08.2008 on amendments to Article 25 of the Law «On the legal status of foreign nationals and stateless persons» (author of the initiative – the Cabinet of Ministers) http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=33169.

²³ UHHRU Open Appeal against collection of biometric data <http://helsinki.org.ua/en/index.php?id=1239888387>

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In May 2008 during the elections to the Kyiv City Council the Minister of Internal Affairs Yury Lutsenko notified of plans to publish «blacklists» of people with a criminal past who were standing for office as deputies of the City Council. Giving a specific example, Lutsenko said that in the candidate list of the party «Ukraine's Conscience», there was a woman who had been prosecuted 14 times for prostitution. «I think that the public should know this» he stressed, and stated that the full list would be posted on the MIA official website.²⁴ It is clear that such actions are directly linked with the activities of the political force which Lutsenko represents. It would seem that the selective circulation of personal data which has been divulged in connection with Yury Lutsenko's term as Minister of Internal Affairs could be an infringement of the right to privacy.

On the next day, 21 May 2008, the MIA published information on its official website about 18 candidates for the post of deputy of the Kyiv City Council and the various offences they committed.²⁵ The continuation of this story was comical since it turned out that the law enforcement officers had mixed up people with the same first and last names, and the actual candidate for deputy had never engaged in prostitution, but was a university lecturer. Later in April 2009 the Pechersky District Court in Kyiv found that the information had been inaccurate, and ordered the Minister to pay 5 thousand UAH in moral compensation²⁶. After this incident the Minister did not try to circulate similar information, yet the information in question remains to this day on the MIA website.

5. SEARCHES

There remains a problem with procedure for carrying out searches or seizures not carried out in a person's home or other property since such actions may be undertaken without a court order, which does not meet international standards. Certain problems arise during the search of lawyers' premises linked with the fact that the premises may contain information which individuals have entrusted to their lawyer and which should have special protection. In practice, however, there is no such protection.

For example, on 5 April 2008 in the limited company «West Ukrainian Legal Alliance» a search was carried out by police officers from the Rivne Regional Department of the MIA. This was on the basis of a court order issued by a judge of the Rivne City Court on 4 April 2008 sanctioning the search of the home and other possessions of T.M. Kalyta despite the fact that the premises indicated in the court ruling do not belong to Mr Kalyta and a part of it is rented by lawyers M.M. Davydyuk, R.S. Shevchuk and S.V. Udovychenko. Article 10 of the Law «On the Bar» states that «...any interference in lawyers' activities is banned, together with demands that a lawyer, his assistant, officials and technical staff of lawyers' associations divulge lawyers' confidential information. On these issues they cannot be questioned as witnesses. Documents linked with the carrying out by a lawyer of a client's instructions are not subject to scrutiny, disclosure or removal without their consent.» Pursuant to Article 9 § 1 of the same law, lawyers' confidential information constitutes issues on which individuals or legal entities have approached the lawyer, the essence of the consultation, advice, explanation and other information received by the lawyer in carrying out his or her professional duties. It was reported that the search resulted in

²⁴ «Lutsenko will tell Kyiv residents that a prostitute wants a place in their «conscience» // the Internet publication «Ukrainska Pravda», 20.05.2008 <http://www.pravda.com.ua/news/2008/5/20/76109.htm>

²⁵ Officers of the Central Department of the MIA have carried out a check of candidates running for office as Kyiv Mayor, or in the Kyiv City Council to ascertain possible involvement in criminal activities // MIA official website, 21.05.2008, <http://www.mvs.gov.ua/mvs/control/main/uk/publish/article/110121;jsessionid=207851BC99BA0D4B4DA94395BB2DD260>

²⁶ «Svitlana Shcherbyna: «When it happened, they telephoned and asked «How can a prostitute be teaching in a higher educational institution?» http://www.tovarish.com.ua/archive/1100/Tretia_pol/Svitlana_S.html A lesson for the Minister. The Pechersky District Court in Kyiv has recognized Yury Lutsenko's moral and professional inadequacy http://www.tovarish.com.ua/archive/1229/Urok_dlia_6871.html; Lutsenko fined five thousand UAH for allegations of prostitution <http://tsn.ua/ua/ukrayina/lutsenka-oshtrafuvali-na-5-tisyach-za-zvinuvachennya-v-prostitutitsiyi.html>

*the removal of a considerable number of documents and items which, according to the lawyers involved, contain information which they received while carrying out their professional duties and therefore contain private information from clients which constitutes lawyers' confidential information.*²⁷

6. VIDEO SURVEILLANCE

A problem concerning the right to privacy which became more acute in 2008 was the placing of closed circuit cameras in public places. One of the trends is for wide-scale position of these cameras which are used by police officers for surveillance. For example, it was reported that in Kyiv 36 cameras were established; in Rivne – 12; in Chernivtsi – 20; in Mukachevo in 2008 – 32, and by March 2009 already 62; in Lviv at the beginning of 2009 around 200 surveillance cameras were registered, some of these being positioned by particular individuals or organizations. Due to the lack of legislative regulation of this means of gathering information there is a risk of violation of people's right to privacy.

Changes are needed to Article 307 of the Civil Code which restricts privacy and establishes the presumption of a person's consent to being videoed in public places. This provision is not coordinated with the practice of the European Court of Human Rights.

According to European standards video surveillance may be carried out however it must comply with the following requirements:

Areas in which video surveillance is carried out should be systematically marked out;

An independent body at national level should be created to administer independent control over the establishment of surveillance, as well as over the storage and use of personal data.²⁸

There is no proper legislative regulation of video surveillance.

7. PRIVACY AND MEDICAL PROCEDURES

Within the context of the right to privacy there are also problems with compulsory medical procedures. For example, there is centralized vaccination of children and if a child has not had these vaccinations, he or she is not admitted to a school or kindergarten.

However the very procedure for vaccinations is not uncontroversial. For example, opponents of vaccinations cite domestic legislation asserting the need for such vaccinations only with the person's consent, and in the case of a child under the age of 15, with the consent of his or her parents. As far as children not being allowed to attend school, etc, they maintain that this is in contravention of the right to education enshrined in the Constitution. During the year this issue was raised on many occasions in the media. It became especially acute after the death of an eleven-year-old in Kramatorsk in May 2008 following vaccinations against measles and German measles. There were also reports of a considerable number of children who ended up in hospital after vaccinations.²⁹ After the scandal gained momentum and large numbers of parents began rejecting the «death vaccination», the Minister of Health Vasyl Kniazevych issued an Instruction suspending the vaccination.³⁰ However doctors soon began demanding that the vaccinations be carried out.

²⁷ «Lawyers in the Rivne region allege unlawful search and removal of documents» // 9 April 2008 <http://www.helsinki.org.ua/index.php?id=1207740775>

²⁸ European commission for democracy through law (Venice commission), Opinion «On video surveillance in public places by public authorities and the protection of human rights», Adopted by the Venice commission at its 70th plenary session (Venice, 16-17 March 2007), [http://www.venice.coe.int/docs/2007/CDL-AD\(2007\)014-e.asp](http://www.venice.coe.int/docs/2007/CDL-AD(2007)014-e.asp).

²⁹ «The Prosecutor General: an expert study has confirmed that schoolchild Tyshchenko died from vaccinations» // 19 September 2008 <http://unian.net/ukr/news/news-273851.htm> «The death of Anton Tyshchenko was directly linked to the vaccination – Prosecutor General http://ictv.ua/ukr/news_ukraine.php?news_id=118565;

³⁰ «№ Turn down vaccinations» // 19 May 2008 <http://novynar.com.ua/worldabus/27232>

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During the year some media outlets raised the issue of cases where testing of new medicines had been tested on people without their being given detailed information about possible side effects.³¹

THE CASE OF SOLOMAKHIN V. UKRAINE

In May 2008 the European Court of Human Rights issued a partial judgment as to admissibility in which it found admissible the applicant's allegation of a violation of his right to physical inviolability.³² The applicant asserts that as a result of a vaccination against diphtheria, despite there being medical factors against this, he developed a number of illnesses.

8. THE CASE OF SAVINY V. UKRAINE

In December 2008 the European Court of Human Rights issued its judgment in the case of *Saviny v. Ukraine*.³³

The Saviny couple lived in the city of Romny in a two-room flat without hot water or gas. Both have been blind since birth. They have 7 children. O.. born in 1991, M. born in 1992, Y.. born in 1993, P.. born in 1995, S. born in 1997, K.. born in 1998 and T., born in 2001. In 1997, O. was forcibly placed in the general education school-orphanage. His parents collected him at weekends and holidays. On several occasions the school administration complained to the municipal authorities that O. habitually ran away from school, begging. In February 1998 four of the children (M., Y., P., and S.) were taken into public care on account of the applicants' inability to provide them with adequate care and upbringing. The children were initially placed in various institutions but were then placed in one. P. was later adopted with the applicants' consent.

Between 1998 and 2004 representatives of the Municipal Juvenile Service and the Tutelage Board, in cooperation with several other municipal authorities, visited the applicants' flat on some ten occasions and drafted reports concerning the suitability of the living conditions for the upbringing of the children who remained in their care. According to these reports, the conditions were grossly unsatisfactory. On several occasions the couple were provided with support by the Society for the Blind, as well as by volunteers who also received a certain amount of financial and other aid from the State. The couple also asked the local authorities to connect them to gas, however they were official informed that their neighbours were categorically against this and believed that it would be dangerous since they were blind, and also that it was technically impossible to do. One of the applicants has been unemployed since the beginning of the 1990s and the State did not help him to find work. The other worked until retiring.

In July 2003 the Municipal Committee for Social Protection and Prevention of Juvenile Delinquency warned the applicants that they needed to improve the conditions in which their children were being brought up. In January 2004 the Romny Prosecutor initiated, at the request of the Juvenile Service, court proceedings for the placement of O, K. and T. in public care. In December 2004 the court had allowed the Prosecutor's Office application asserting that the parents were not looking after their children, that they were often hungry, dirty and at home alone, that they were living in terrible and unsanitary conditions. It was also stated that the children were suffering from first-stage anaemia.

³¹ http://profil-ua.com/index.phtml?action=view&art_id=386 , <http://novynar.com.ua/tech/31619>, http://eco-ua.org/index.php?item=articles&sub=3440&d_id=3

³² Partial decision as to the admissibility of Application № 24429/03 by Sergey Dmitriyevich Solomakhin against Ukraine <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=836362&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

³³ Case of *Saviny v. Ukraine* (Application № 39948/06), judgment <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=844453&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

The applicants appealed against this decision. They stated that the Family Code of Ukraine contained limited grounds for removal of children from their parents – evasion of child maintenance, cruelty, chronic alcoholism or drug addiction of parents, exploitation of children, involving them in begging and vagrancy. They insisted that they had never done any such things and that there was no proof that the conditions of their children's upbringing, albeit basic, were in fact dangerous. The applicants further explained that the fact that they could not provide the children with better conditions was only due to their blindness. In February 2005 the Sumy Regional Court of Appeal dismissed their appeal. It repeated the conclusions of the first-instance court that leaving the children with the applicants would endanger the children's life, health and moral upbringing. The applicants appealed in cassation, raising essentially the same arguments as in their previous appeal. On 22 March 2006 the Supreme Court of Ukraine dismissed the appeal in cassation. The applicants' children were not heard at any stage of the proceedings

The judgment was enforced on 23 June 2006. Eventually, K. was placed in a school in Romny, while O. and T. were placed in a school in Sumy (some one hundred kilometres from Romny). O. continued to run away from school

The couple lodged an application with the European Court of Human Rights. They complained that the court's judgment of 2 December 2004 infringed their right to respect for their family life as provided in Article 8 of the European Convention on Human Rights.

They alleged that the national authorities could have taken a less severe measure than taking their children away from them, and that the State could help them to raise their children themselves by providing them with adequate conditions. They also underlined that the children's opinion had not been taken into account during the trial.

The Government accepted that there had been interference with the applicants' right to respect for their family life as guaranteed by Article 8 § 1 of the Convention. Nevertheless, they maintained that it was in accordance with the law, namely Article 170 of the Family Code; pursued a legitimate aim of protection of the children's interests; and was not disproportionate.

The European Court of Human Rights found that there had been a violation of Article 8 of the Convention. It stressed that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life and that domestic measures hindering such enjoyment amount to an interference with the rights protected by Article 8. It also stressed that, notwithstanding a margin of appreciation enjoyed by the domestic authorities in deciding on placing a child into public care, severing family ties means cutting a child off from its roots, which can only be justified in very exceptional circumstances

«53. It is common ground that the decision to place O.S., K.S. and T.S. in public care constituted interference with the applicants' rights guaranteed by Article 8; that this interference was carried out in accordance with the law and pursued a legitimate aim of protecting the interests of the children. It remains to be examined whether this interference was «necessary in a democratic society».

54. In this regard the Court first notes that the applicants have generally agreed with the Government that it might have been beneficial for their children in material terms to be placed in special educational establishments, such as boarding schools, in light of the limited resources available to them to meet their daily needs. They disagreed, however, as to whether it was necessary to do so by way of imposition of a removal order, which restricted their ability to take children home outside school hours, such as for vacations and weekends.»

«56. In assessing, however, whether they were also sufficient, the Court doubts the adequacy of the requisite evidentiary basis for the finding that the children's living conditions were in fact dangerous to their life and health. It notes, in particular, that the custody proceedings instituted in January 2004 had not resulted in the children's removal from home until 23 June 2006, no interim measure having been sought and no actual harm to the children during this period having been recorded.

Furthermore, besides information about inspections of the place where the children were living and a document about two of the children suffering from first-stage anaemia, there was no other evidence, testimony from the children themselves, from neighbours, medical documents or paediatricians' opinions.

V. THE RIGHT TO PRIVACY

57. Further, there is no appearance that the judicial authorities analysed in any depth the extent to which the purported inadequacies of the children's upbringing were attributable to the applicants' irremediable incapacity to provide requisite care, as opposed to their financial difficulties and objective frustrations, which could have been overcome by targeted financial and social assistance and effective counselling.»

Thus no proof of the applicants' purported irresponsibility as parents was provided, nor was an analysis made of their attempts to improve their situation through appeals to the authorities. Nor was a study made of the scope and type of support provided to the couple, and the reasons why it had not helped.

The Court stressed that the State had not carried out its duty to respect family life, by not seeking other alternative measures to separating the children from their parents.

59. The Court also notes that at no stage of the proceedings were the children (including O. who was thirteen years of age when the first-instance proceedings were pending in December 2004) heard by the judges and that by way of implementation of the removal order not only were the children separated from their family of origin, they were also placed in different institutions. Two of them live in another city, away from Romny where their parents and siblings reside, which renders it difficult to maintain regular contact.

60. Given all these foregoing considerations, the Court concludes that although the reasons given by the national authorities for removal of the applicants' children were relevant, they were not sufficient to justify such a serious interference with the applicants' family life.

This judgment raises serious fundamental problems for the State system of care of children which is to a greater extent based on such severe measures as taking children away from their parents than on providing various forms of assistance.

9. RECOMMENDATIONS

1) Ratify the Council of Europe's Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, № 108.

2) Adopt a law «On personal data protection» complying with modern European standards for the protection of privacy. Legislation on automated processing of personal data must reflect the following principles:

- ◆ Different codes (databases of different authorities) must be used separately, and not allowing a single code for gathering all information about a person;
- ◆ A person must know what information is being gathered on any given database and have the right to change that information;
- ◆ The codes must be used only for those purposes for which they were created;
- ◆ Their use must be allowed for in the Law on personal data protection;
- ◆ Exchange of information gathered between the authorities must be clearly regulated and carried out on the basis of a court order with the person both notified and able to appeal against the actions.

3) The administrative practice of unlawful use on the taxpayer's identification number (code) for other purposes not envisaged by legislation should be stopped. The use of the concept «personal number», the use of which is not envisaged by any law should also be stopped.

4) Revoke Verkhovna Rada Resolution from 23 February 2007 № 719-V on amendments to Verkhovna Rada Resolution «On approving the provisions on a Ukrainian citizen's passport and birth certificate» № 2503-XII from 26.06.1992. Revoke also Cabinet of Ministers Resolution № 858 from 26 June 2007. «On approving a technical description and form for the passport of a Ukrainian citizen for travelling abroad and amendments to some CMU acts». The procedure for preparing and issuing passports must be clearly set out in law.

5) Revoke Cabinet of Ministers Resolution № 1169 from 26 September 2007 «On approving the Procedure for obtaining a court order to carry out measures which temporarily restrict human

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rights and the use of the information obtained». In implementation of the Separate Judgment of the District Administrative Court from 16 January 2009, the Cabinet of Ministers should draw up and submit to parliament a draft law setting out this procedure.

6) Remove Item 4.4.8 from the List of items which constitute a State secret «Information about statistical figures for investigative operations, counter-espionage or intelligence activities which make it possible to assess the number of operational forces and means which are applied in carrying out these activities, but do not disclose the targets of such measures».

7) Pass a law «On interception of telecommunications» which will allow for independent monitoring of the activities of the State Service for Special Communications and Protection of Information, MIA, SBU and other law enforcement agencies, in intercepting communications, publishing an annual report with depersonalized information regarding the interception of communications in the course of investigative operations and criminal investigations;

8) Amendments are needed to legislation to bring it into line with the case law of the European Court of Human Rights regarding interception of communications (wiretapping, tapping of mobile telephones, timing of calls, monitoring of the movement of mobile telephone users, surveillance of emails, monitoring of sites visited on the Internet, etc) with the following:

- Procedure for court warrants for such activities and the time limits they are valid for;
- A clear list of the crimes which can result in interception of messages;
- Restriction in the cases where the grounds for suspecting a person of having committed a serious crime have already been established by other means;
- Procedure for periodic review by the court of the warrant issued;
- Information to the person about communications having been intercepted after the procedure is over and a decision has been taken not to institute or to terminate criminal proceedings;
- The right of an individual to appeal against these actions and demand compensation if the actions of the authorities were unwarranted;
- Procedure for storage and later use of the data obtained.
- A mechanism for dealing with copies or material written out where the person accused was acquitted.

9) Establish procedure in criminal proceedings making it possible to appeal against the actions of law enforcement agencies in searching a person, his/her home or workplace, as well as providing the possibility of seeking redress if this procedure is infringed

10) Introduce a norm envisaging annual publication by the law enforcement agencies of the total number of court warrants for interception of information from communications channels and permits for interception of correspondence and secret searches.

11) Stop the intrusion of state executive bodies into the activities of those involved in providing Internet services by forcing them to install equipment for the interception of telecommunications.

12) The Ministry of Internal Affairs must stop the unwarranted collection of sensitive personal information about individuals (information regarding their political views, religious beliefs, sexual orientation, etc);

13) Change legislation on keeping adoption information secret even from the child involved. Exceptions should be made to the provisions of legislation which establish absolute confidentiality of adoption (Articles 226, 229 and 230 of the Family Code; Article 168 of the Criminal Code);

14) Pass a law and other normative legal acts protecting the rights of patients, in particular as regards compulsory medical procedure and confidentiality of information about a patient's condition

15) Amendments should be made to legislation and legal practice to eliminate the discrepancy between the compulsory nature of vaccinations in order that a child may attend children's institutions and the right to education for children whose parents have consciously refused to allow such vaccinations, especially where the vaccinations are contra-indicated for the child and could harm him or her.

16) Regulate at legislative level video surveillance in public places, the procedure for storage, access to and wiping of such video footage, marking places where there is such surveillance, and ways of control over such activities.

VI. FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION¹

1. OVERVIEW

The situation with freedom of thought, conscience and religion did change significantly in 2008. This section provides a general outline of the range of existing problems in safeguarding this freedom. To a considerable extent, most of the problems have been discussed in our previous annual reports. Since the situation remains virtually unchanged at the legislative level, and changes in administrative practice are also not major, the material from 2004-2007 can confidently still be used.²

Ukraine has done virtually nothing to implement the judgment handed down by the European Court of Human Rights in the Case of *Svyato-Mykhaylivska Parafiya v. Ukraine*.³ In this case the Court found a number of specific failings in Ukrainian legislation and administrative practice; infringements by the State of the principle of neutrality; violations of the right to religious association; unpredictability, inconsistency and lack of clarity of legislative acts, etc.

Following an appeal from the Svyato-Mykhaylivska Parafiya (a religious organization) of the Ukrainian Orthodox Church of the Kyiv Patriarchate «Church to mark one thousand years since the christening of Kyivan Rus» in the Darnytsky District of Kyiv, the Supreme Court issued a Resolution on 1 July 2008. Through a review in light of new circumstances (in this case the above-mentioned judgment handed down by the European Court of Human Rights) the Supreme Court revoked its own ruling from 5 July 2000 and sent the case for a new examination to the District Administrative Court in Kyiv. It instructed the court to review the case bearing in mind the European Court judgment. Nothing is yet known of the latter examination of this case.

No measures to eliminate the rights infringements pointed out by the European Court were eliminated.

In October 2008 the European Court of Human Rights entered into communication with the Ukrainian Government in three more cases over possible violation of Article 9 of the European Convention on Human Rights (freedom of thought and religion): *the Community of the Ukrainian Greek Catholic Church in the village of Korshiv v. Ukraine* (Application № 9557/04), *the Religious Community of the Svyato-Troitska Parish in the village of Mylostiv v. Ukraine* (Application № 39238/03) and the *Roman Catholic Community of St Clement in Sevastopol v. Ukraine* (Applica-

¹ Prepared by Volodymyr Yavorsky, UHHRU Executive Director.

² See «Human Rights in Ukraine – 2004» and for each subsequent year at: Available at: : <http://www.helsinki.org.ua/en/index.php?r=a2b3> and <http://www.khpg.org.ua/en/index.php?r=a2b4c12>,

³ Judgment of the European Court of Human Rights in the Case of *Svyato-Mykhaylivska Parafiya v. Ukraine* from 14 September 2007 In this case the Kyiv City State Administration had refused to register amendments to the articles of association of the Svyato-Mykhaylivska Parafiya which envisaged changing canonical subordination from the Moscow Patriarchate to the Kyiv Patriarchate. We should also add that the Head of this Parafiya in parallel stated that unlawful actions against him by the authorities had been started again, cf. «The Head of the Parafiya Council which won its case in the European Court is being persecuted by the Kyiv Tax Police // Religious Information Service of Ukraine <http://www.risu.org.ua/freedom/monitoring/article;17117/>.

tion № 22607/02).⁴ These cases involve the return of Church property and interference of the State in Church relations where the community is changing its subordination.

We should note the draft law tabled in parliament «On amendments to the Law of Ukraine «On freedom of conscience and religious organizations» (regarding preventing the activities of religious cults of a dangerous nature and totalitarian sects)⁵. According to the explanatory note, this draft law is directed against the activities of so called «religious cults of a destructive nature» which in the view of the author pose a real threat to human rights and civil liberties.

Among the main negative features of this draft law are an increase in the number of members needed for a religious community to gain legal entity status to 50 (against 10 at present); restriction of the right to exist of autonomous religious communities; the virtual negation of the right of a religious organization to withdraw from a religious association; restriction of the activities of a religious community; the proposal to designate in the name of the religious association the words «centre» or «board»; the imposition of an existence requirement for communities on Ukrainian territory in order for them to create a religious association; the introduction of a «list of elements of a religious cult» which only registered religious organizations are entitled to use; an increase in the timeframe for reviewing documents submitted for registration to not less than six months, and in some cases to twelve; the introduction of annual re-registration with a State body on religious affairs during the first ten years of activities of religious communities which do not belong to religious associations already registered in Ukraine; a ban on foreign nationals belonging to religious organizations and holding leading positions in them, etc.⁶

This draft law seriously restricts religious freedom and generally breaches a number of articles of the Constitution, the Civil Code, the Law «On the legal status of foreign nationals and stateless persons», the position of the Parliamentary Assembly of the Council of Europe, as expressed for example in its report from 5 October «On Ukraine's honouring of its obligations and commitments», as well as the European Convention for the Protection of Human Rights and Fundamental Freedoms». It was for tabling this and several other draft laws that National Deputy Gennady Moskal received the UHHRU anti-award «Thistle of the Year» for the most dangerous legislative initiative in the area of human rights.⁷

2. FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION: THE RIGHT TO BELIEVE

In general, legislation adequately defends this freedom and establishes many guarantees for safeguarding it. There are no provisions regarding compulsory support for religious organizations, forced membership in organizations or obstacles placed in the way of changing one's religion. There are provisions enabling people not to work on religious festivals, etc.

There is just one fundamental area where this freedom could potentially encounter unwarranted interference. This is in connection with alternative military service where the following infringements of international standards are observed:

- This right is granted only on the basis of religious views and not where a person is guided by moral or political convictions, for example, pacifist views;
- The right is granted only by members of officially registered religious organizations, although the Law does not oblige religious organizations to register;
- The right is granted solely to members of religious organizations stipulated in the Cabinet of Ministers Resolution which is of an overtly discriminatory nature;

⁴ <http://hrlawyers.khpg.org/index.php?r=a1b3>.

⁵ Registration № 2419 from 21.04.08; author – Gennady Moskal. Available in Ukrainian on the parliamentary website http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=32379.

⁶ Y. Reshetnikov: «Legislative safeguarding of freedom of conscience and the activities of religious organizations: situation, trends and problems // Religious Information Service of Ukraine 27.05.2008 <http://www.risu.org.ua/ukr/religion.and.society/analysis/>.

⁷ More on the Thistle of the Year anti-awards for 2008 at: <http://www.helsinki.org.ua/en/index.php?id=1229084701>.

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– During the procedure required to establish this right, a person must provide documents certifying that he belongs to a particular religious organization (involving the need to provide evidence of ones religious convictions and the possibility of these convictions being «checked»);

– The period for alternative service is twice as long as the usual period for military service which is also overtly discriminatory.

There is also a problem with choice of places for doing alternative service which is much too limited if one considers the positive experience of other European countries.

3. FREEDOM TO PRACTISE ONES RELIGION OR BELIEFS

3.1. FORMATION AND ACTIVITIES OF RELIGIOUS ORGANIZATIONS

Any collective practice of religious beliefs in Ukraine without the creation of a legal entity (religious organization) is extremely difficult. This is required for virtually any «religious activities», for leasing premises, for holding public services or inviting representatives of foreign religious figures; printing or circulating literature. At the same time, in order to do alternative military service, a person must demonstrate that he belongs to a registered organization included in the list of «organizations whose teachings do not permit the use of arms»

Although the legislators allowed for religious communities to exist without registration and without legal entity status, in practice registration is needed for any group of believers who wish to publicly exercise their faith in any way. Unregistered communities enjoy virtually no rights.

According to international standards, the right to create a religious organization is an inalienable part of the general right of association, and therefore a different system for registering civic and religious organizations, as is in place at present, can hardly be deemed necessary in a democratic society

The following infringements to freedom of religion are to be noted when registering religious organizations

1) Legislation sets out an exhaustive list of legal forms for religious organizations with a system of management established by law in advance.

This is a clear violation both of the rights of individuals to determine their own form of religious associations, as well as of the right to autonomy of the religious group itself, with the opportunity to independently determine its structure and run it being intrinsically linked with this right. Ukrainian legislation, for example, effectively prevents the formation of charismatic religious organizations since according to the law the highest body of any religious organization is the general assembly of believers, with this running counter to the view of many religions and faiths. The Church can also not be registered as a legal entity, but only as the executive body of an association of religious communities.

2) Double registration: the first involves a meticulous check of the faith's compliance with legislation (the articles of association of the religious organization), and the second – gaining legal entity status in the general procedure for all enterprises, institutions and organizations.

3) The time frame for registration is discriminatory with relation to other associations and clearly unwarranted. The law states that this is one month and in some cases can be extended to three months. However, in practice, the average period required for registration is, at best, 3-9 months.

4) Legislation does not set down clear grounds for turning down registration or liquidating a religious organization. It also fails to stipulate how detailed a refusal must be, although there should be clear indication of what the infringement is. Nor does legislation state how admissible inconsistencies between the articles of association of the religious organization and Ukrainian legislation are, whether they are simply textual discrepancies, or whether there is a significant inconsistency in the aims and activities of the organization which in practice will lead to infringements of legislation.

5) Legislation does not permit foreign nationals, even where they are permanently resident in the country, to found religious organizations. This is a particularly pertinent issue for national minorities.

Overall, as noted by the European Court of Human Rights in the case of *Svyato-Mykhaylivska Parafiya v. Ukraine* mentioned above, the law on freedom of conscience and religious organizations lacks consistency and foreseeability⁸ In this judgment, the Court also pointed out the first and fourth of the problems we have outlined here.

In total, according to figures from the State Committee on Nationalities and Religion⁹, on 1 January 2009 33,639 religious organizations, 85 centres, 255 boards (eparchies, diocese, etc), 340 missions, 74 brotherhoods and 31,257 religious communities were registered in the country.

However according to figures from the State Committee of Statistics in the Single State Register of Enterprises, Organizations and Institutions there is information about 21,425 religious organizations.

This difference is very easy to explain. From when double register was introduced for religious organizations several years ago organizations which were at that time already registered had to go through additional registration with the State Registrar and receive a certificate of State registration. These statistics show that 11,214 religious organizations have still not gone through this double registration. Therefore if parliament should pass the draft law¹⁰ which cancels registration of legal entities which have not undergone such re-registration, then all these organizations could cease to exist with all the corresponding property and other consequences. It will clearly not be possible to avoid numerous conflicts and violations of freedom of religion.

The following have the largest number of registered communities: Ukrainian Orthodox Church of the Moscow Patriarchate – 11 731, Ukrainian Orthodox Church of the Kyiv Patriarchate – 4 221, Ukrainian Autocephalous Orthodox Church – 1 219, Ukrainian Greek Catholic Church – 3 728, Roman Catholic Church – 1 064.¹¹

3.2. THE STATE'S POSITIVE DUTIES WITH REGARD TO PROTECTING THE PEACEFUL PRACTICE OF RELIGION FROM INCURSIONS BY OTHERS AND PROTECTION OF RELIGIOUS MINORITIES

According to Article 9 of the European Convention on Human Rights, and numerous norms of international law on the protection of national minorities, the State has a positive duty to safeguard the peaceful worship of all people, especially of religious minorities. The State must protect individual worshipers, collective public actions and church property. These standards require governments to introduce legislative and administrative measures to deter members of other religions from attacks or other obstacles to the peaceful exercising of ones religion or faith.

However these positive duties do not envisage the State providing help in practising religion, for example, via financial assistance, allocation of premises or other property, land sites etc. The government carries the latter tasks out at its own discretion however international standards require particular attention to be paid by the government to the rights of national minorities and for this to be carried out on a non-discriminatory basis.

The failure to fulfil these positive duties is one of the problems in the administrative practice of the authorities. Defending minorities is often an unpopular step in society. In many cases, therefore,

⁸ See paragraphs 130-131 of the judgment of the European Court of Human Rights in the case of *Svyato-Mykhaylivska Parafiya v. Ukraine* from 14 September 2007.

⁹ Official website of the State Committee on Nationalities and Religion http://www.scnm.gov.ua/control/uk/publish/category?cat_id=131554.

¹⁰ Draft law «On amendments to the Law of Ukraine «On State registration of legal entities and individual businesspeople» (on the procedure for suspending the authority of those involved in economic activities), Registration № 0913 from 23.11.07, presently with the Committee on Industrial and Regulatory Policy to be prepared for its second reading. It proposes to complete within short timeframes State registration of legal entities and individual businesspeople after which those legal entities which did not submit information for inclusion in the Single State Register on time will be considered to have ceased their existence, with all the ensuing legal consequences.

¹¹ More detail about this (in Ukrainian): A. Kholodny: «The Religious Network of Ukraine as of January 2009», 15 March 2009 <http://ukreligieznavstvo.wordpress.com/2009/03/15/релігійна-мережа-україни-на-січень-2009-р.>

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the authorities avoid fulfilling this duty due to their own discriminatory views or under the influence of dominant religious organizations

A particular problem is presented by the inadequate behaviour of the law enforcement agencies in protecting property linked with a religion. Vandal attacks on cemeteries are widespread. One should note the sudden high percentage (especially against the virtual lack of activity in this area by the law enforcement agencies in previous years) of crimes linked with vandalism which have been solved. Churches, synagogues, cemeteries and memorials have repeatedly suffered acts of vandalism.¹²

- ◆ Crimean police identified the offenders who painted satanist signs on gravestones at Muslim and Christian cemeteries in Marfivka village on 21 January and destroyed 124 gravestones at a Christian cemetery in Voykove village on 24 January. Both villages are located in the Lenine District, Crimea. Police officials declared that the vandals were alcoholics who had neither religious nor ethnic motivation to commit that crime.

- ◆ On 28 January 2008, swastikas and obscene words were discovered on windows and a fence outside and inside the yard of the Hased building in Kryvyj Rih.

- ◆ On 10 February 220 tombstones at a Muslim cemetery in Nyzhnyohirske, Crimea were destroyed. The Crimean Tatar Mejlis issued a statement describing the desecration as a premeditated incident. Mejlis leaders declared that the attackers were emboldened by the lax attitude of the local police to previous cases of vandalism..

- ◆ In late March 2008 vandals destroyed a crucifix and painted graffiti on the Armenian Cathedral in Lviv.

- ◆ On 3 March unidentified individuals painted swastikas and wrote insulting slogans on the burial site of Rabbi Levi Itskhak and on several graves at the Jewish cemetery in Berdychiv, Zhytomyr Region (oblast). Police arrested a suspect, and in June 2008 a Berdychiv court gave the offender an 18-month suspended sentence for the desecration.

- ◆ In April 2008 vandals in Zhytomyr set fire to a cemetery memorial to prominent spiritual leader Rabbi Aharon and painted antireligious symbols on the walls of the memorial. Law enforcement agencies arrested two teenagers who claimed they made the fire to keep warm but it accidentally spread to the memorial.

- ◆ On 24 April, 2008, vandals destroyed 11 gravestones at a Jewish cemetery in Bolgrad, Odessa Region.

- ◆ In mid-April 2008 police detained three secondary school students who damaged more than 100 gravestones at 2 Christian cemeteries in Dobropillya, Donetsk Region.

- ◆ In early May 2008 unidentified individuals painted Nazi symbols and damaged gravestones at a cemetery in Sevastopol..

- ◆ 2008, two men vandalized the sanctuary and damaged icons at the Dormition Church of the UOC-MP's St. Nickolas Monastery in the Korop District, Chernihiv Oblast, and injured two monastery staff who tried to stop the desecration. One attacker was detained

Another problem is the lack of legislative and administrative measures from the authorities to reduce intolerant, untruthful publications in the media with regard to religious minorities and to counter religious enmity.

3.3. THE ORGANIZATION AND HOLDING OF RELIGIOUS PEACEFUL GATHERINGS

The Law on Freedom of Conscience and Religious Organizations runs counter to Article 39 of the Ukrainian Constitution in imposing a permission-based procedure for holding religious peaceful gatherings. In practice, holding public religious peaceful events is fraught with an even greater number of problems based on discrimination, intolerance and arbitrary interpretation of legislation.

The Ukrainian Greek Catholic Church [UGCC] complained that in May 2008 members of the Ukrainian Orthodox Church of the Moscow Patriarchate [UOC MP] in Bila Tserkva had tried to ob-

¹² Unless otherwise stated, the examples are from the US State Department' International Religious Freedom Report 2008 <http://www.state.gov/g/drl/rls/irf/2008/108477.htm> .

struct the ceremony blessing the Cross on the site allocated for the construction of the first UGCC Church in the city. The UGCC believe that local supporters of UOC MP viewed the future construction of the church as an example of «Catholic expansion». Prominent representatives of UOC MP informed UGCC that the protest had taken place without the consent of the UOC MP leadership. Law enforcement agencies and other authorities did not defend the UGCC representatives.

3.4. THE RIGHTS OF FOREIGN NATIONALS AND STATELESS PERSONS

Ukrainian legislation continues to substantially restrict freedom of worship for foreign nationals and stateless persons. This is reflected in their not being able to found religious organizations, or engage in preaching work or other religious activities. These restrictions even apply in the case of people permanently resident in Ukraine. Furthermore foreign nationals may engage in preaching activities only at the official invitation of a registered religious organization (although their registration is not compulsory) and permission from the State authorities on religious affairs.

The lack of a permit entails administrative liability for foreign nationals (a fine), and for religious organizations – a warning, then in future possible forced closure.

This situation became more difficult during 2008. The local Departments on Religious Affairs became strict in demanding that foreign preachers have a special religious visa. Although Ukraine has a visa-free system for nationals of many countries, the local Departments did not issue permits for holding religious peaceful gatherings with the involvement of foreign nationals unless the latter had special visas, and also refused to give permits for their preaching activities. An analysis of such cases suggests that these refusals more likely served as a formal pretext for the authorities to ban the activities of religious organizations that they didn't like.

According to government information during the period covered by this report, not one foreign religious figure was refused a visa. Mormons consider that the law does not clearly set out regulations on missionary work and that they had certain problems with local officials who restricted where they could carry out their missionary activities.¹³

During 2008 the State Committee on Nationalities and Religion informed of the activities of 783 foreign priests and other religious figures, this being around 2% of the overall number. 3,710 people were invited to Ukraine in 2008 to conduct religious services and engage in other religious activities.

4. THE STATE AND RELIGIOUS ORGANIZATIONS

4.1. THE PRINCIPLE OF INVIOABILITY AND NEUTRALITY

The constitutional principle of separation is based on the principle of pluralism of thought and entails the impossibility of merging the State and religion.¹⁴

The principle of neutrality demands that the State show no bias towards existing religions or faiths. This principle is closely linked with the above principle and follows from the separation of State and religious organizations. One of the key approaches when assessing the actions of the authorities from this point of view is adherence to the principles of non-discriminatory, unbiased and equal attitudes to all religious organizations.

State support for certain churches is not a violation of these principles unless it establishes universal rules binding all to provide such support or look favourably on these religious organizations.

Adherence to these principles is one of the greatest problems in the authorities' administrative practice.

¹³ US State Department' International Religious Freedom Report 2008 <http://www.state.gov/g/drl/rls/irf/2008/108477.htm>.

¹⁴ More on this can be found, for example, in «Court defence of human rights: Case law of the European Court of Human Rights in the context of western legal tradition» – Kyiv: Referat, 2006, pp. 392-393.

VI. FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

This is in the first instance linked with the fact that the authorities, fighting for the support of the electorate, always show a favourable attitude to the dominant religion. This has taken on new proportions in recent years. Virtually all top management in the executive branch of power, the Speaker of Parliament and other high-ranking public officials publicly support one or other religious organization.

Clearly this patronage gives the informal message that these dominant religious organizations have more rights. This is graphically reflected in situations involving property issues, for example, allocation of sites of land to construct places of worship or the return of religious property confiscated under Soviet rule. In such situations, this favourable attitude assumes a practical dimension. Positive decisions on these issues, with few exceptions, are received only by the dominant religious organizations. It should be noted that in this context it is religious organizations which are most widespread in a given area (region) that are dominant. Different religious organizations, usually the Ukrainian Orthodox Church under the Moscow Patriarchate or under the Kyiv Patriarchate (UOC KP), are dominant in different areas

Crimean Muslims turned to President Yushchenko asking that he intervene in the situation over the construction of the Soborna [Assembly] Mosque in Simferopol. Throughout 2008 the Simferopol City Council refused to allocate the Spiritual Directorate of Muslims of the Crimea a specific land site to build a mosque, The City Council suddenly took this stand in January 2008, despite the fact that the Spiritual Directorate had submitted all applications and documents for permission to build on Yaltynska St more than three years earlier, this entailing considerable expense and effort. All had seemed in order under the sudden about-turn by the City Council in January. The Mayor Gennady Bebenko claimed that the City Council was simply listening to the will of most residents of the city, however the decision was appealed against by the Crimean Prosecutor, criticized by the Crimean Head of Police, and three courts confirmed the original site for the Mosque.¹⁵

Problems also arise between religious organizations and law enforcement agencies.

On 14 July 2008 the Council of Evangelical Protestant Churches [CEPC] sent a second appeal to the Prime Minister Y. Tymoshenko, as well as to the Minister of Internal Affairs Y. Lutsenko and individual National Deputies. In it they point to the incomplete and biased nature of the investigation into unlawful and rough behaviour from police officers towards religious ministers and believers of Ukraine's Protestant churches. The appeal was prompted by what the Leaders of CEPC call a negative trend in the activity of the law enforcement agencies. This is demonstrated by the inadequate investigation into the rough search in August 2007 by armed criminal police officers and the «Berkut» Special Forces Unit during a religious service at the House of Worship of the Church of Christians of the Evangelical Faith «Living Water» in Yevpatoriya; the fabrication of a criminal investigation by Donetsk Regional MIA Investigators and subsequent charges laid against the presbyter of the Ukrainian Christian Evangelical Church S.Zaitseva, which is receiving the overly active support of the Donetsk Prosecutor's Office. It is seen also in the threats and the danger posed to the life of religious ministers by a police officer using firearms in November 2007 during the forced eviction of the orphanage «Drop of God's Blessing» [«Word of Life»] from municipal premises from the Darnytsa district in Kyiv.¹⁶

Another constant problem is seen in the support given by the authorities to one of the parties in a religious dispute linked with an internal schism in the religious organization.

¹⁵ More information about this can be found in «Crimean Muslims begin protest over obstruction in building a Mosque in Simferopol» <http://www.khpg.org.ua/en/index.php?id=1201185461>; Crimean Prosecutor protests against the actions of the Simferopol City Council <http://www.khpg.org.ua/en/index.php?id=1201393439> «Muslims win their court case for the Soborna Mosque» <http://www.khpg.org.ua/en/index.php?id=1207126763> For the last events during the year, see «Spiritual Directorate of the Muslims of the Crimea condemns Supreme Court ruling on Soborna Mosque» <http://www.khpg.org.ua/en/index.php?id=1230676352&w=Soborna>, <http://www.radiosvoboda.org/Content/Article/1113594.html>.

¹⁶ «Call from Council of Evangelical Protestant Churches to protect believers from police officers' arbitrary behaviour» <http://www.helsinki.org.ua/index.php?print=1216119108> and first appeal in English <http://www.helsinki.org.ua/en/index.php?id=1198756658>.

The State authorities often take sides in such conflict which violates the principle of neutrality and Article 9 of the European Convention on Human Rights.

It was precisely the violation of this principle which led to Ukraine's losing the case mentioned above in the European Court of Human Rights.

There are a particularly large number of violations of this principle at local level.

There are still problems with the return of places of worship nationalized by the Soviet regime

4.2. THE RIGHTS OF PARENTS WITH REGARD TO THE RELIGIOUS EDUCATION OF THEIR CHILDREN AND THE PRINCIPLE OF STATE NEUTRALITY

According to international standards, religious education in schools and higher educational institutions can be introduced however such courses should be the same and based on the principles of objectivity, non-discrimination and impartiality. They cannot therefore include only the views of one religion or faith. The State must respect the right of parents to determine their children's religious upbringing.¹⁷

In various regions of the country courses in Christian Ethics and other subjects of a moral and religious direction are being introduced with varying degrees of interest from parents, students and the public, depth and quality of teaching and preparation of teachers.

At present these subjects are optional and studied at the wish of parents, which is in keeping with international standards. However this is not the case in all cities.

In the West of the country there is a clear trend towards compulsory studies of only Christian denominations. Virtually all textbooks in this are one-sided and do not comply with the principle of impartiality. On the other hand, they have aroused a wave of indignation from representatives of the Church since they are built on a symbiosis of Christian denominations, and are not fully coordinated with the teachings of these Churches.

Furthermore, throughout virtually the entire country there is a shortage of teachers of this subject. Often graduates of seminaries and religious educational institutions are invited to teach such courses. It is difficult to believe that a person who has graduated from such an institution will teach the course with objectivity and impartiality.

It should be noted that the President's Decree from 2005 on introducing into the State school curriculum a course on «Ethics of faith» did not have any significant result. This decree received the backing of the four main Christian hierarchs however on a national scale its introduction was unsystematic and was even further slowed down by objections from the Jewish and Muslim communities against the fact that such courses were to be based on Christian postulates.

The members of the All-Ukrainian Council of Churches and Religious Organizations continued to call for changes and additions to the law allowing private educational institutions, in addition to the secular curriculum, to teach students the religious values of their religious organization founders. In June 2008 the Ministry of Education and Science supported this initiative. The Ministry and representatives of religious organizations agreed to hold further consultations in order to determine the procedure for implementing the initiative.

Later a Public Council for Cooperation with the Churches and Religious Organizations attached to the Ministry of Education and Science was created.¹⁸ Nothing is known about its further activities.

5. RECOMMENDATIONS

1) Ukrainian legislation should be brought into conformity with the demands of Articles 9 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

¹⁷ More detail can be found in the Toledo guiding principles on teaching about religions and beliefs in public schools, prepared by the ODIHR advisory council of experts on freedom of religion or belief, OSCE 2007.

¹⁸ Ministry of Education Order from 20 October 2008 № 941.

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in the light of the court case law of the European Court of Human Rights, in particular, as regards ensuring the neutrality of the State, the possibility for a religious community to receive legal entity status and to freely practice their religion.. For this it would be desirable to apply the «Guidelines for Review of Legislation Pertaining to Religion or Belief» prepared by the OSCE / ODIHR and the Venice Commission in 2004¹⁹

In drawing up amendments to legislation the following changes are needed:

– the focus should be moved away from checking out organizations at registration stage to monitoring their activity: accordingly shortening and simplifying the registration of religious organizations, making the procedure at least analogous with the registration of civic associations;

– discrimination must be eliminated when registering the articles of association of religious communities and the grounds clearly defined for refusing to register or for cancelling the registration of such articles of association;

– norms must be removed from legislation which impose a structure and system of management on religious organizations. These issues must be regulated exclusively by the articles of association of the organization;

– the permission-based procedure for holding religious peaceful gatherings must be abolished;

– restrictions on the religious activities of foreign nationals and stateless persons must be abolished, including allowing such people who are permanently resident in Ukraine to found religious organizations;

2) State bodies should not interfere in internal Church affairs, and should clearly observe the principle of neutrality, in particular, as regards the creation of a single Local Orthodox Church., nor should they defend one of the sides in internal Church conflicts;

3) Effective mechanisms are needed for avoiding discrimination on religious grounds, particularly in the penal system, the social sphere and in the area of labour relations. It is also vital to make adjustments to legislation on taxation of religious organizations in order to remove discrimination against non-Christian organizations (for example, on taxing VAT, defining the term «religious services», etc);

4) Law enforcement agencies must continue to react swiftly and appropriately to cases of incitement to religious hostility and vandalism;

5) In order to eliminate discriminatory administrative practice and conflict between churches, clear legal norms should be passed stipulating the grounds, procedure and time periods for returning church property. It would also be expedient to draw up a detailed plan for returning religious property with these procedures and the time taken for each object defined. Where it is impossible to return such property, provision of some compensation should be stipulated, in particular, for the construction of new buildings of worship or allocation of land sites;

6) Local authorities should review legislative acts they have passed which establish discriminatory provisions, and also additional limitations, not foreseen by the law, on freedom of religion when holding peaceful gatherings, renting premises, allocating land and returning religious buildings. General principles should also be clearly outlined for the allocation of sites for building places of worship

7) Permanent joint Commissions with representatives of both religious organizations and of the government should be created in order to resolve issues of mutual concern (property, cultural monuments, the family, education, etc).

8) Religious education in schools and higher education institutions may be introduced however the courses must be the same and built on the principles of objectivity, non-discrimination and impartiality. Such courses must not therefore only include the teachings of one religion or faith. The introduction of such education should meet OSCE and Council of Europe standards, and the judgments of the European Court of Human Rights.

¹⁹ In English: <http://www.osce.org/item/13600.html> In Ukrainian: Freedom of Religious and Worship in Ukraine within the context of compliance with European standards / Edited by Volodymyr Yavorsky / Ukrainian Helsinki Human Rights Union and the Centre for Legal and Political Studies «SIM». Kharkiv: Folio, 2005. Available on the UHHRU website at: www.helsinki.org.ua.

VII. THE RIGHT OF ACCESS TO INFORMATION¹

There were no particular changes in 2008 to legislation and practice regarding access to information. All the problems with freedom of information identified in the *Human Rights in Ukraine* reports from 2004-2007 were also seen in 2008. As in previous years, human rights organizations systematically requested necessary information and often received refusals, fob-offs, or quite simply heard nothing at all. Refusals to provide data were often explained as being because the information was classified as confidential.

2008 saw the end of the first stage of a civic campaign against unlawful classifying of information. In March the Cabinet of Ministers, at the initiative of the Ministry of Justice, took the decision to remove the unlawful stamp restricting access «Not to be printed» from 1,410 Government acts issued between 1991 and 2005. The Ministry of Justice declassified 1,015 documents, and gave the others the stamp «For official use only» [DSK]. Analysis of the normative documents revealed shows that they included a certain number on defence issues. However with regard to most documents serious suspicions arise regarding the justification for there having been kept secret, as well as with respect to the legality of the actions envisaged in them. Such documents can be divided into four groups: 1) corrupt activities; 2) various benefits and privileges for high-ranking officials; 3) behind the scenes political deals; 4) future plans for the development of various areas of the economy or other documents which pertain to State investments. The question is entirely clear and simple: if there was nothing untoward in these acts, why were they concealed?

The civic campaign against unlawful classifying of information needs to be continued. The President's Secretariat is still refusing to make public at least the names of normative acts stamped «Not to be published» passed up till 2005 (42 out of 44 Presidential acts adopted with this stamp in 2005 have been declassified, with those remaining being labelled «For official use only»). Therefore one of the tasks of this campaign is to compel the President's Secretariat to declassify the documents concealed through this unlawful stamp. Another task is to force the Cabinet of Ministers to reveal the names of acts issued from 2005 onwards which carry the stamp «For official use only». At present we know only the data they were passed and the number of the document which makes it impossible to carry out proper public control. Together with the lack of a List of Items of Information constituting confidential information held by the State [literally, «which is the State's possession – *translator*], this makes it impossible to foresee whether specific information should be on restricted access.

Back on 27 November 1998 the Cabinet of Ministers passed Resolution № 1893 approving Instructions on rules of procedure for working with documents holding confidential information held by the State. It is precisely these documents which were stamped «For official use only» and they could be accessed only by those allowed access to secret documents pursuant to the Law «On State secrets». It is ironical that the Resolution was published in the «Government Herald» on 10 December, the 50th anniversary of the adoption of the Universal Declaration of Human Rights. We would

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note that the stamp «For official use only» set out in such an Instruction remains unlawful since Article 34 of the Constitution states that restrictions on freedom of information must be established by law, not by an instruction, that is, a normative act of the Cabinet of Ministers.

Item 2 of this Resolution stated that all State authorities and bodies of local self-government, enterprises and organizations of all types of property were within the space of 6 months to draw up lists of such information in their possession. The Instruction does not specify who determines which particular items of information are confidential, and on the basis of what criteria. Almost 10 years have elapsed since this Instruction was issued and yet it is still not known whether such Lists have been created, and if they have, where they have been made public. Normative-legal acts with the stamp «For official use only», passed by central authorities have appeared in computerized legal systems without names, only the number and date that they were passed. At the same time, the Code of Administrative Offences contains a norm on administrative punishment for divulging such information, and Article 330 of the Criminal Code envisages criminal liability for passing it on to citizens of other countries. Cases are known where administrative penalties for disclosure of such information have been applied. Yet it is impossible to determine which specific items are to be considered confidential information held by the State. At present a journalist, having received some information, cannot be certain that the latter is on open access, and should, strictly speaking, receive permission for its publication in the relevant State authority in whose possession, use or at whose disposal the item of information should be. This effectively means the introduction of censorship which is prohibited by Article 15 of the Ukrainian Constitution.

A State List of Items of confidential Information held by the State is therefore needed, but has yet to be created. We thus have the paradoxical situation where we do not have access to official documents providing a list of items of information which are confidential, in other words, we can't know what it is that we are not supposed to know.

In view of this, the Kharkiv Human Rights Protection Group together with the civic organization «Maidan» Alliance decided to investigate which central authorities have lists of information stamped «For official use only». At the beginning of 2008 they sent information requests to 80 central authorities as given on the official website of the Cabinet of Ministers², to the Cabinet of Ministers itself, (the Verkhovna Rada, the President's Secretariat, the State Department of Affairs, as well as 27 regional State administrations (oblast administrations, the Kyiv City State Administration, the Sevastopol City State Administration and the Government of the Autonomous Republic of the Crimea). The respondents were asked to provide a list of items of confidential information held by the State.

The process of obtaining lists of confidential information was interesting. None of the addressees observed Article 33 of the Law «On information» which makes it obligatory to send the person requesting the information written notification within 10 days that the information will be provided, or an explanation as to why it will not. Out of 27 regional (oblast) State bodies, lists were sent by 19. The remaining 8 either failed to respond at all or gave far-fetched grounds for refusing to provide the information. With regard to those administrations which failed to provide information, appeals were sent to the President's Secretariat asking for assistance in receiving the information. Responses were received from all 8 regional administrations after they were sent this appeal from the Secretariat with the note on it «Control». As a result, out of all regional bodies of power only the Zaporizhya Regional Administration, as represented by its Deputy Head Roman Dryhnych, refused (three times) to provide the information requested. This administration has classified the very List of items of confidential information «For official use only». The Zaporizhya Administration was sent a request to remove this stamp or, if that were not possible, to explain the reasons for it not being possible (in contrast to all other regional administrations). It was also asked to give the date and number of the decision to use the stamp «For official use only». It responded by refusing to remove the stamp, but failed to provide reasons.

² Government website www.kmu.gov.ua.

Out of 84 central authorities, lists with responses to the first information request were received from only 45 ministries and departments. 38 State bodies were sent a repeat request, and in some cases we approached them three times asking that they adhere to the norms of the law and warning that we would lodge an administrative suit with the courts if they failed to do so. As a result, 70 State bodies provided lists they had put together and 14 refused. The Cabinet of Ministers, the National Space Agency and the Zaporizhya Regional Administration informed that the List of items of confidential information was itself confidential information and was therefore not provided. The remaining 11 bodies, this being the State Committee for Television and Radio Broadcasting; the Prosecutor General's Office; the Ministry of Health; the State Tax Administration; the Accounting Chamber; the Ministry of Agricultural Policy; the Ministry of Transport and Communications; the Ministry of Fuel and Energy; the State Committee on Consumer Standards; the National Bank; the State Department of Affairs (the latter also refused to provide a full and up-to-date text of the Regulations «On State management of affairs», affirmed through a decree issued by President Kuchma with the illegal stamp «Not to be published, and the relevant information request asking to see this document was sent).

Various reasons were given for turning down the information requests: reference to Article 37 of the Law «On information»; the assertion that the person seeking the information did not have legal grounds for receiving these lists, etc. At the same time, it should be noted that the lists of items of confidential information in force in the Prosecutor General's Office, the Ministry of Fuel and Energy and the Ministry of Agricultural Policy are available on the computer legal system «Liga. Zakon» [«League Law»].

We would note that some central authorities still do not have Lists of items of confidential information and replied that the list was in the process of being drawn up. This was stated, for example, by the Ministry of Finance and the State Department on Communications and Informatization. They provided their lists in spring 2009.

Claims were lodged with the District Administrative Court in Kyiv against 12 of the above listed bodies (besides the Ministry of Fuel and Energy and Ministry of Agricultural Policy whose lists are available³) On receiving a court summons, the Ministry of Transport and Communications immediately provided its list This leaves 11 law suits current. The court joined 9 claims together, and considered those against the Prosecutor General's Office and the National Bank separately. In March a decision was passed changing jurisdiction – according to the place of residence of the claimant, registered in the Chernihiv region. The claims were therefore lodged against to the Chernihiv Administrative Court and are awaiting consideration.

It remains necessary to analyze the lists of items of confidential information received and check how justified and lawful it is to add particular items to these lists using a three-tier test, and also to draw up a general list of items of information which the authorities classify as «For official use only». However even a superficial survey of the material received gives grounds for the following conclusions:

1) There is no single State approach with regard to whether confidential information is made public or not.

2) The criteria for restricting access to confidential information are not understandable.

3) Some data which specific bodies have restricted access to are of public importance, and therefore access must in no way be impeded. We can cite just a few examples.

♦ *The State Department on Nationality and Religion classifies the following as «For official use only»: 1) information regarding ethnic and political problems caused by separatist, xenophobic, chauvinist and other destabilizing factors; 2) material concerning conflict over language and measures to regulate it; 3) information about measures to support the Ukrainian Diaspora in neighbouring countries where there are historically territorial claims and possible conflict on those grounds.*

The Ministry of the Economy stamps the following information as «for official use only»:

³ The grounds for the claim against the Prosecutor General's Office whose list is also available can be found at: <http://www.khpg.org/index.php?id=1214326358&w=%C7%E0%F5%E0%F0%EE%E2>

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- ◆ *on the results of checks of the State Committee on the State Material Reserve by controlling bodies;*

- ◆ *on the results of tenders to sell material assets of the State reserve;*

- ◆ *on the economic situation in CIS countries.*

The State Committee on Land Resources classifies the following information as for official use only:

- ◆ *material from inter-State negotiations on issues regarding the State border; technical documentation on delimitation and demarcation of the State border; plans for moving the line of the State border;*

- ◆ *books recording the number of lands (text and graphic parts);*

- ◆ *books recording the quality of lands (text and graphic parts).*

The State Property Fund considers the following to be confidential information: problem issues related to the presence of the Black Sea Fleet of the Russian Federation on Ukrainian territory.

The Pension Fund lists information about the financial condition and financial and economic activities of the Pension Fund and its offices; information about the material, technical and information provisions.

- ◆ *The High Council of Justice classified as for official use only information about disciplinary offences by judges and about specific infringements of legislation by judges this having been received and collected by the Council during checks.*

4) There is no coordination regarding which information needs restricted access. For example, the number of items on the lists drawn up by regional administrations ranges from 18 (Ivano-Frankivsk and Kyiv Regional Administrations) to 136 (Kirovohrad region).

5) Some instances where access to information is restricted are clearly unlawful such as inclusion in the List of information regarding infringements of the Law «On information» (Donetsk Regional Administration) and the possibility for heads of regional administrations as they wish to classify as «For official information only» items of information beyond the scope of those on the list passed (the Ternopil and Chernihiv Regional Administrations), and others.

Some responses require separate commentary. For example, analysing the answers from the Anti-Monopoly Committee and the Department of the Traffic Police of the MIA, we came to the conclusion that some officials do not always understand the difference between information which constitutes a State secret and information which they classify as confidential on the basis of internal instructions. In response to an information request, the Department of the Traffic Police stated that the classification of documents and information as confidential is carried out in accordance with the Law «On State secrets».

Even such a superficial analysis of the situation regarding access to information stamped «For official use only» shows that no state bodies are guided in issues of restriction of access to information by the well-known principle of freedom of information «The information is classified as secret, not the document». They all use the stamp «For official use only» for the document as a whole when even a small part of it needs restricted access. This unacceptable situation needs to be rectified and access to the open part of any document containing information on restricted access needs to be ensured. Those open parts of normative legal acts must be made public and input into computer legal systems, just like totally open normative legal acts.

We would note that the stamp «For official use only» is used by the authorities fairly frequently. For example, in 2008 the central authorities adopted 96 normative documents with this stamp. This included 27 resolutions and instructions issued by the Cabinet of Ministers; 23 by SBU [the Security Service]; 22 by the National Commission for Regulation of the Electricity Industry; 7 by the Department for State Protection; 5 by the State Committee of Statistics. The President, Foreign Intelligence Service, Ministry of Transport and Communications, the Administration of the State Border Guard Service, the Administration of the State Service for Special Communications and Protection of Information all issued two each. The Ministry of Internal Affairs, the State Department for the Execution of Sentences, and the Ministry for Emergencies issued one each.

In summing up, we should note that the stamp «For official use only», the grounds and time-frame for its use must be stipulated by law. The law should also envisage the creation, running and procedure for making public of a List of such items of information. In our view it would be better

for the purpose of designating information, to use the term «official secret, and not «confidential information, the definition of which indicates that what is involved is information which bellows to individuals or nongovernmental legal entities.

The current Law «On information» from 2 October 1992 has exhausted its potential and no longer meets the needs of socio-political and civic life. It diverges significantly from European standards for ensuring access of the public to government and other official information; it does not provide the appropriate legal and logistical safeguards for such access and is not particularly in keeping with the case law of the European Court of Human Rights with regard to Article 10 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. All of this requires work on drawing up and introducing new legal approaches; developing contemporary safeguards for public information meeting European demands; serious modifications to the existing legal paradigm for ensuring freedom of speech and the right to information in general.

At the same time we do not have sufficient grounds for totally rejecting the 1992 Law «On information». At one stage a number of extended provisions were added to this law on the legal definition of censorship, the prohibition of direct and indirect censorship, as well as a number of important guarantees for the protection of the professional status of journalists. To some extent this was as a result of the killing of Georgy Gongadze, the practice of using devastating law suits against newspapers, numerous cases of repression against journalists in CIS countries, etc.

It is clear that Ukrainian society would not at the present time agree to the prospect of losing only recently gained guarantees of freedom of speech and political expression of their will, the norms on an extended definition and on the prohibition of censorship, etc. The adoption of only one, narrow procedural law on access to public information cancelling out the imperfect, however important Law «On information» could adversely affect the situation with freedom of speech in Ukraine. Bearing these circumstances in mind, it would be advisable to draw up two draft laws: one on amendments and additions to the Law «On information» containing norms of material law, retaining existing legal links and coordinated with related legislation (the Law «On State secrets», the List of Items of Information which constitute a State Secret; the Laws ««On Printed Mass Communication Media (the Press)»; «On Television and Radio Broadcasting», «On the procedure for media coverage of the activities of public authorities and bodies of local self-government in Ukraine», etc) and a purely procedural draft law «On access to information».

In 2006 civic organizations finished drawing up the relevant draft laws. The Centre for Political and Legal Reform [CPLR] prepared a draft Law «On access to public information» and the Kharkiv Human Rights Protection Group – a draft law «On amendments to the Law «On information», which was coordinated with the CPLR draft law. These draft laws were tabled in the Verkhovna Rada by National Deputy Andriy Shevchenko.⁴

In drawing up the draft laws, the following documents were used as methodological base: the Universal Declaration of Human Rights (1948), Article 19; the International Convention on Civil and Political Rights (1968), Article 19; the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Article 10; the US Law «On freedom of information» (1968); the model Hungarian Law on Protection of Information (The Law on Personal Data Protection and Access to Information of Public Interest, № LXIII, 1992 p.; the model law on freedom of information drawn up by the international organization Article 19; a number of judgments from the European Court of Human Rights on the application of Article 10 of the European Convention on Human Rights; the 1997 UNESCO Sofia Declaration; the 1995 Johannesburg Principles on National Security, Freedom of Expression and Access to Information; Principles of legislation on freedom of information (the right of the public to know, drawn up by the international organization Article 19; Recommendation of the Committee of Ministers of the Council of Europe № R(94)13 on media pluralism and diversity of media content; the Recommendation of the Committee of Ministers of the Council of Europe № R(99) 15 on media coverage of election campaigns; the

⁴ cf. (in Ukrainian): http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=33015 and http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=35230.

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Recommendation of the Committee of Ministers of the Council of Europe № R(2000) 23 on independence of regulatory bodies in the field of television and radio broadcasting; the Recommendation of the Committee of Ministers of the Council of Europe № R(2000) 13 on European policy regarding access to archives; the Recommendation of the Committee of Ministers of the Council of Europe № R(2000)7 on the right of journalists to not divulge their sources of information; the Recommendation of the Committee of Ministers of the Council of Europe № R(2002) 2 on access to official documents, as well as special documents and material.

RECOMMENDATIONS

All recommendations on improving access to information in the annual Human Rights in Ukraine reports from 2004 to 2007 remain current.

1) Declassify all normative legal acts stamped «Not to be published» and scrutinize documents classified as «for official use only» in order to establish whether their classified status is well-founded...

2) Adopt a new law on information which would guarantee the access to information in government bodies and bodies of local self-government on the basis of the Recommendations of the Committee of Ministers of the Council of Europe № R 19 (1981), REC 2 (2002), 13 (2000) of the UN/ECE Convention on access to information, public participation in decision-making and access to justice in environmental matters (the Aarhus Convention); as well as other international standards on freedom of information..

3) Review the norms of Article 15 of the Law «On state secrets» so as to allow for only a specific text containing a state secret to be classified, and not the entire document.

4) Analyze the «The List of items of information that constitute State secrets» in order to decide whether the classification is warranted, applying the three-tier test of the European Court of Human Rights for determining whether there is «damage» and «impact on public interests», as well as Article 47-1 of the Law «On information».

5) Revoke the Presidential Decree № 493 from 21.05.1998. «On amendments to some Decrees of the President of Ukraine on the state registration of normative legal acts».

6) Register all normative legal acts issued by the Prosecutor's Office with the Ministry of Justice.

7) Create an open register of all normative acts of the Prosecutor's Office and an open database of normative acts pertaining to citizens' rights and duties

8) . Create the conditions enabling members of territorial communities to see all decisions passed by bodies of local self-government (depending on the conditions, in the most efficient manner). Thus, for example, where possible, to create websites of bodies of local self-government with mandatory posting of a full register as well as the actual texts of all decisions passed.

9) Ensure the publication and open access to all decisions passed by local administrations (at the level of regions, as well as the cities of Kyiv and Sevastopol).

10) Taking into consideration the case law of the European Court of Human Rights and principles of legislation on the freedom of information, develop an educational course on international standards of access to information and practice of their application in Ukraine, and carry out training for judges of local and appeal courts of all 27 regions of Ukraine and for public officials who work in press services and public relations departments of government bodies and bodies of local self-government.

11) Run training courses for state officials on the provisions of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters.

12) Representatives of the mass media, human rights and other civic organizations should monitor the efficiency of active and passive access to information at central and local levels, as well as using the courts more actively against the inaction of state officials with regard to the providing of information and refusals to provide information.

VIII. FREEDOM OF EXPRESSION¹

1. OVERVIEW

After 2004 there was a considerable easing in pressure on the media and journalists from the authorities. From 2006 this pressure began to increase again, however the level of freedom of expression is still considerably higher than that up to 2004. Over the last two years the situation has remained practically unchanged.

The main challenges of the last year were:

- Disproportionate and unwarranted restrictions of freedom of expression in order to protect public morality without clear and foreseeable legal regulation;
- An increase in administrative pressure on journalists from private media outlets seen in numerous dismissals, pay «in envelopes», unofficial employment of journalists and a considerable number of violations of labour legislation with regard to journalists used by media outlet owners in order to push for controlled editorial policy, especially on political issues;
- Lack of transparency as to media owners which makes it impossible to achieve the proper level of media pluralism;
- A significant amount of material in the media paid for but not marked as advertising. The situation reaches an absurd level when in some news broadcasts most items have been paid for.

Independence from the authorities has not proved a guarantee of media independence. There is still no separation of editorial policy from media owners this making the media outlet too dependent on the wishes of its owners, with these exerting more and more control over editorial policy since virtually all of them are themselves politicians.

The situation has not been improved by the gradual transformation of a certain part of the media into a profit-making business. Financial independent has not resulted in editorial independence.

Another growing problem is the inclusion of paid material or as it is commonly called «jeansa» on television. In their advertising pricelists, the media directly indicate the cost of placing such material which is dependent on the rating of the programme, and on how long the material is. Such services include the placement of an article, news items, a one-sided journalist investigation or television film. A variation on this is invitations of so-called «guests» into the studio. Politicians or businesspeople are often invited who lobby their interests for a fee to the television and radio organizations, rather than people who can contribute additional information to a public discussion. All such information is presented without any indication that it is advertising or paid material, with this misleading the audience.

Under such conditions one can only speak of a certain degree of press freedom. There are considerable problems with freedom of speech due to the lack of access to the media in order to express points of view since such access is sometimes available virtually entirely for payment or in accordance with the media owners' instructions. In a considerable number of media outlets there are also lists of topics not allowed to be covered, bans on criticism of certain people, with this being explained by, or called «editorial policy» and dictated by the media owners.

¹ Prepared by UHHRU Executive Director Volodymyr Yavorsky.

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The media's function in a democratic country is thus being distorted, and there are all too seldom many-sided discussions in the media on socially-important topics. There is more often an imitation of such discussion where, for example, the majority of so-called experts and politicians invited come to the programme on a paying basis, and the discussion is at a low professional level, or even primitive level. Moreover the viewer is not aware that s/he is effectively being shown paid political advertising, and not socially important discussion.

This situation could be changed through the creation of public broadcasting however the political will for this from the President, the government and parliament is clearly lacking

Journalists feel safer than before, although attacks on journalists are frequent and the investigations into them usually lead nowhere. The police have begun more often detaining journalists during peaceful demonstrations.

Journalists are also under economic pressure from the administration of the media outlets. Many of them work and are paid unofficially, and are not protected by labour law. Therefore, for example, if they speak out openly against the media outlet's management they risk remaining without pay for at least the last month.

Journalists have yet to organize themselves. Ethical mechanisms are virtually not functioning. Independent trade unions are, as a rule, few and poorly developed.

2. COMPULSORY STATE REGISTRATION OF MEDIA OUTLETS AND OF PUBLISHING ACTIVITIES

2.1. THE PRINTED PRESS

Registration of printed media outlets remains mandatory which, UHHRU considers is an infringement of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. There is still liability for circulating media outlets without State registration.

In 2008 the Ministry of Justice registered (re-registered) 1,115 printed media outlets with circulation nationwide or abroad (against 1,331 in 2007) and 14 information agencies (against 24).

Territorial offices of the Ministry registered or re-registered 1,273 publications with local circulation (against 1,393 in 2007). Of these 952 (against 962) were exclusively newspapers, while 321 (against 311) were of a journal nature.²

In the view of the Ministry of Justice, the following can be highlighted among the main issues arising in the process of State registration:

- ◆ Lack of clarity as to the registering body's control functions where a media outlet founder or co-founder infringes norms of the Law «On Printed Mass Communication Media (the Press)»;
- ◆ The registering body is not properly provided with control copies, as required by Articles 16 and 33 of this Law;
- ◆ Media founders (co-founders) failing to submit in the legally stipulated timeframe to the registering body their certificates on State registration of the print media outlet which has been found invalid or out of date;
- ◆ The lack of clarity as to the timeframe and lack of places for holding control copies of the publication, etc.

We consider that the obligation to send the controlling body free of charge one copy of each issue of the media outlet does not fully comply with international principles of freedom of speech.

There are often court disputes over registration of printed media outlets.

Back in 2007 following a suit lodged by the Publishing House Independent Media against the Ministry of Justice, the District Administrative Court in Kyiv revoked the refusal to register the «Ukrainian publication of the journal Good Housekeeping Домашній очаг». The Ministry of Justice asserted that the publication could be only with the name in Ukrainian, and that the proposed title was therefore in

² Information on the main results of the work of the Ministry of Justice and its territorial bodies in 2008 and tasks to increase the efficiency of its work in 2009 <http://www.minjust.gov.ua/>.

breach of the law on language. The court found that the name of the publication and the language of publication are different elements of the publication, and also that there was no requirement in the law on the printed media regarding the language of the publication's name. It found 2.2.3 of Article 2 of the Regulations on Registration (the name of the publication (in the language or languages which it will be published in) as regards restricting the name of the publication to only the language in which it will be published to not comply with the law on the printed media.

*Ukraine's Higher Administrative Court on 18 February 2008 turned the page on a case involving a law suit by the **Editorial Board of the newspaper «Soroka»** against the Republic Committee on Information of the Autonomous Republic of the Crimea which on 22 November 2005 had issued a certificate of State registration of the printed media outlet – the advertising newspaper «Soroka-Krym». The Editorial Board asserted that the registered advertising newspaper «Soroka-Krym» was similar to the symbol for «Soroka» goods and services registered by the Editorial Board of «Soroka». Earlier, in 2006, a first instance court and court of appeal refused to allow the claim. The authorities asserted that registration had been carried out on the basis of Article 20 of the Law «On Printed Mass Communication Media (the Press)»; which contains a list of grounds for refusing to register a publication. It does not include infringement of intellectual property rights. The Higher Administrative Court agreed with this, stating that the issue by the State Department of Intellectual Property of the Ministry of Education and Science of a certificate of registration of the trade and services mark giving ownership of this mark to the Editorial Board of the newspaper «Soroka» up till 07.03.2013 did not constitute grounds for a refusal to register the newspaper «Soroka-Krym»*

In accordance with Item 14 of the Plan of Measures to fulfil the Objectives³, set out in the Law «On the fundamental principles of development of the information society in Ukraine for the period from 2007 to 2015», the Minister of Justice was appointed the main author of a draft Law «On amendments to the Law of Ukraine. On 25 November 2008 a roundtable was held to discuss issues around registration and the activities of the printed media, as well as to create a working group to draw up the above-named draft law. It is anticipated that the passing of this law will resolve problems with State registration, including changing permission-based registration.

On 10 December 2008 the Ministry of Justice opened up access to the Register of Printed Media Outlets.⁴ Now anybody has the right to see information about printed media outlets contained in the Register on the Ministry's website, by searching under or in order to find out the name of the founders, the type or name of publication, the series and number of the certificate, the date of State registration and the registering body.

2.2. TELEVISION AND RADIO BROADCASTING

All television and radio broadcasting organizations must register with the National Television and Radio Broadcasting Council of Ukraine. Even those which only produce audiovisual production without circulating it themselves or having a broadcasting licence need to have registration. Furthermore, any type of broadcaster of information, satellite, digital, cable and wire needs registration this not being in line with international standards

As of 31 December 2008 the State Register of Television and Radio Broadcasting Organizations held information about 1,610 television and radio companies (hereafter TRC) and providers of information, broken down into 1513 TRC and providers of programme services and 97 providers of information. Of the 1513, 97 were State-owned, 376 – municipal and 1,101 other forms of ownership.

In 2008 63 TRC were removed from the State Register of Television and Radio Broadcasting Organizations. There were 87 TRC than in 2007. .

Last year the National Television and Radio Broadcasting Council passed 19 decisions regarding State registration. As of 31 December 2008 it had issued 579 licences, this including re-licensing. They can be broken down as follows:

³ Adopted by Cabinet of Ministers Instruction № 653 from 15 August 2007.

⁴ Ministry of Justice Order № 2018/5 «On amendments to the Provisions on the State Register of Printed Media Outlets and Information Agencies» from 21 November 2008

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- 1) 391 licences for broadcasting (of which 199 were re-licensing);
 - ◆ Satellite – 38 (of which 9 were re-licensing);
 - ◆ Air – 229 (of which 163 were re-licensing);
 - ◆ Cable – 42 (of which 10 were re-licensing);
 - ◆ Wire – 72 (of which 17 were re-licensing);
 - ◆ Multi-channel – 10;

- 2) 188 licences for providers of programme services (of which 56 were re-licensing).

In accordance with Article 37 of the Law «On television and radio broadcasting, during 2008 the National Television and Radio Broadcasting Council passed 53 decisions on **cancelling** licences for broadcasting and providers of programme services. Of these:

- ◆ 49 were at the wish of the TRC;
- ◆ 3 were because they had not broadcast for a year;
- ◆ 1 was due to cancellation of State registration.⁵

The District Administrative Court in Kyiv on 5 March 2008 revoked the decision of the National Television and Radio Broadcasting Council which had removed the licence of the National Radio Broadcasting Company of Ukraine [NRBCU] to broadcast on certain channels.⁶ The Broadcasting Council had ascertained that for more than a year NRBCU had not broadcast on all the frequencies it had been allocated. It therefore decided to revoke NRBCU's licence on the basis of the norm of the Law on Television and Radio Broadcasting, according to which a licence is cancelled if the licensee does not begin broadcasting within a year of the licence being issued. The Broadcasting Council interpreted this norm broadly as meaning that the lack of broadcasting for a year could serve as grounds for revoking a licence. The Court stated that in a case where the TRC had begun broadcasting during the stipulated period, but had later temporarily suspended broadcasts due to some kind of circumstances, including through the cessation of restriction of public financing, Item «a» of Article 37 § 3 of the Law on Television and Radio Broadcasting did not apply.

2.3. PUBLISHING

All those engaged in publishing activities must have State registration. Furthermore, only enterprises may be publishers, not civic religious or charitable organizations.

3. THE RIGHTS OF JOURNALISTS AND THE MEDIA

Information on recorded offences⁷

	2002	2003	2004	2005	2006	2007	2008
Journalists killed or missing	3	4	0	0	0	0	1
Arrests and detentions	1	2	8	2	3	1	5
Beatings, assault, intimidation	23	34	47	16	29	13	29
Obstruction in carrying out professional duties, censorship	46	27	52	14	31	23	18

⁵ Report of the National Television and Broadcasting Council for 2008, www.nrada.gov.ua.

⁶ The Court revoked paragraph 3 of the decision issued by the National Television and Broadcasting Council № 1706 from 28 November 2007 – annulling Licence № 0500 from 11 December 2002 with regard to broadcasting on the frequencies indicated in Appendix № 3 to the licence, removing from Appendix № 3 the frequencies which were not being used; paragraph 4 of the decision № 1706 from 28 November 2007 – annulling Licence № 0500 from 11 December 2002 with regard to broadcasting on the frequencies indicated in Appendix № 3 to the licence, removing from Appendix № 3 the frequencies which were not being used, and announcing a competition to receive a licence for broadcasting; paragraph 5 of the decision issued by the National Television and Broadcasting Council № 1706 from 28 November 2007 – in accordance with Item «b» of Article 59 § 1 of the Law on Television and Radio Broadcasting to oblige the National Radio Broadcasting Company of Ukraine to submit documents for making the relevant amendments to their licence.

⁷ Based on data from many years of monitoring by the Institute for Mass Information: <http://www.imi.org.ua>

3.1. KILLINGS, BEATINGS, THREATS AND OTHER FORMS OF VIOLATION AGAINST JOURNALISTS

Information about victims of crimes among media employees⁸

	Victims of crimes			From which they died		
	2006	2007	2008	2006	2007	2008
Media employees	92	46	47	1	0	1

Last year did not bring the desired progress in the Gongadze investigation. There were no results in the search for those who ordered the killing and those who organized it. The verdict with respect to the men who carried out the murder was handed down in March 2008 however on this the investigation reached a dead end, with the organizer of the crime being declared in his absence Oleksy Pukrach who has for years been in hiding. Other witnesses who could point to those who really ordered the killing were not named in court. The lawyers for the men convicted lodged an appeal in April however in July this was turned down by the Supreme Court which left the three sentences against those who carried out the murder unchanged.

No journalists were imprisoned in connection with carrying out their professional activities.

The following are details concerning attacks on journalists.⁹

On 26 February the rear window in the car owned by Director of the Odessa office of the newspaper «Today» [«Segodnya»] **Alyona Chuhunnikova** was smashed. Ms Chuhunnikova believes that this and previous attacks, as well as a number of phone calls with threats, are linked to the publication of a number of high-profile pieces in the newspaper. This included a road accident in which one of the drivers was the son of the Deputy Head of the Odessa Regional Council, and the abduction of a baby from a maternity unit. The «Today» editorial office demanded that the law enforcement agencies carry out an investigation.

Journalist from «Gazeta po-kyevsky» Andriy Mannuk was detained on 15 March by police offices with excessive use of physical force during a peaceful protest against the building of a high-rise residential block on the land of the Zhovtneva Hospital in Kyiv. The ambulance diagnosed Andriy Mannuk as having concussion and suspected chest injuries inflicted by the police. The journalist lodged a complaint with the Prosecutor's Office, however there is no news of any results of the investigation.

In Nova Kakhovka the **Head of the Bureau of Journalist Investigations «Kakhovsky Base» Serhiy Tsyhyla** was attacked. According to Serhiy, the assailant attacked him on 16 March at 8 in the morning when he was walking into the entrance to his apartment block. «I had been walking my dog. If it hadn't been for the dog, I don't know if I'd be alive now. In the hospital I had six stitches. I have a broken nose, concussion, two teeth were knocked out, and they suspect two ribs may be fractured.» The journalist is certain that this attack is linked with his professional activities. He is the author of a number of texts which paint the Mayor and his people in unflattering terms. He believes that the catalyst for the attack could have been material published in № 11 of the newspaper «Deloviye novosti» [«Business news»] from 12 March 2008. «After that publication I was unofficially warned that «for such bulldog behaviour» I could soon expect big problems. My wife and I also received a number of phone calls with threats.»

Two days before the attack the journalist reported the threats to the police. Immediately after the attack he also turned to the police. Despite this the criminal investigation was only initiated

⁸ According to Ministry of Internal Affairs [MIA] data posted on its website: <http://mvs.gov.ua/mvs/control/main/uk/publish/categ@ory/img/commxon/uk/publish/article/170319>

⁹ From Institute for Mass Information material unless otherwise indicated

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under Article 296 of the Criminal Code – hooliganism. There has been no information about the results of the investigation.

In Donetsk on 16 May officers of the Special Unit «Grifon» beat up **journalist from the newspaper «Ostriv» Ihor Nezhurko**. He was at a court hearing in the Voroshylovsky District Court. The hearing was supposed to be open however the judge ordered that the courtroom be vacated. After the journalist tried to find out what the reason was for the ban, officers of the Special Unit «Grifon», following instructions from the judge, took him into the waiting room and beat him. As a result of the beating, he had concussion, bleeding and was taken by ambulance unconscious to the nearest injury unit. After receiving emergency aid, he was refused hospital care since he wasn't registered in Donetsk. His colleagues took him home to Horlivka where his condition worsened. During the beating one of the «Grifon» officers took his mobile away. In June the Prosecutor for the Kyivsky District in Donetsk initiated a criminal investigation against an employee of a Special Unit over exceeding his duties.

The Prosecutor's Office in Kyiv on 19 May terminated the criminal investigation into the incident between a filming crew from the television channel STB and then National Deputy from the Party of the Regions, Oleh Kalashnikov. «I can inform that the criminal investigation unit of the Kyiv Prosecutor's Office closed the criminal case in which you were recognized as a victim due to the lack of elements of a crime», it says in the investigator's decision handed to the victim, journalist Novosad. However Novosad believes that the investigation was biased. «I saw how the investigator running our case was prejudiced against us. There were cases when he refused to add testimony to the case, proof from witnesses confirming our version of the incident. On the basis of this I came to the conclusion that he wanted to close the case as quickly as possible.», Novosad explains. The decision was dated 10 April 2008 however Novosad received it only coming up to 19 May. The National Commission on the affirmation of freedom of speech and development of the information sphere under the President expressed concern over the termination of the criminal investigation into the case of the assault on the STB filming crew, known as the «Kalashnikov case». Previously, on 12 July 2006, a group of people from the Party of the Regions, including Kalashnikov, obstructed the work of a television team from STB outside the Verkhovna Rada. They forcibly removed a video cassette and the journalists were beaten. On 14 July the Pechersky District Prosecutor's Office initiated a criminal investigation over obstruction of journalists' legitimate professional activities.

On 16 September in Donetsk *correspondent of the newspaper «Ostriv» and Deputy Head of the Donetsk Independent Media Trade Union Maxim Abramovsky and his colleague Olena Mykhailova* were assaulted. The journalists had been videoing at the exit from Donetsk as part of their own investigation. In their video footage they had police officers right on the bridge stopping and checking drivers' documents, this being violation of the road code. Maxim Abramovsky recounts how, having noticed the journalists, the police officers asked to see their ID. They were shown the journalists' professional ID, as well as the identification document for an assistant to a National Deputy [MP]. In response to a request to identify themselves, the police came out with a stream of foul language and threats of physical violence. Maxim Abramovsky's ID was taken away. All of this was videoed, and the journalists warned the people of their responsibility and demanded that they stop insulting them. Instead, they heard only the threat «I'll shoot you». Maxim Abramovsky says that a man in plain clothes got out of one of the cars at the place of the incident and demanded that they hand over the video camera. After they refused to do so, this man struck the journalist and began suffocating him. The police officers addressed blows at the journalist's head and at the video camera. They finally grabbed it off him, returning it a little later broken and with the film removed. Olena Mykhailova explains that she tried to call other police units. «When they started effectively suffocating Maxim I tried to dial 02 [i.e. emergency – translator]. But they began twisting my arm and trying to get the phone away.»

After a police unit did after all arrive at the scene, the journalists made a formal statement and gave evidence. In the station, Maxim Abramovsky and Olena Mykhailova saw both the police officers and man in plain clothes involved in the conflict. «We were prevented from carrying out formal identification, although I directly pointed to them», Maxim recounts.

Maxim Abramovsky ended up in hospital and a criminal investigation into the incident was not initiated. The results of the check carried out by the police are, Maxim Abramovsky says, with the Prosecutor's Office.

In Kyiv on 2 October, in a scuffle during a protest against the seizure of Recording House on Pervomaisk St, journalists were hurt. The security guards who had seized the building, hurled stones and boards at the protesters who were trying to break down the fencing put up. Ihor Lutsenko, Chief Editor of the website «Financier» and an activist of the initiative «Preserve old Kyiv» was assaulted by three guards who grabbed the video camera with which he had been filming what was happening. **Volodymyr Honchar** from the UNIAN Information Agency also received serious injuries. According to the agency's Picture Editor Iryna Timofeeva, Volodymyr had injuries to his legs. Press photographer for the newspaper «Kommersant» **Oleksandr Techynsky** also suffered a broken arm during the scuffle. According to the victim, the police who were present during the incident, did nothing to stop the journalists being assaulted.

Correspondent for the information programme «TCN» on TV Channel «1 + 1» Zhan Novoseltsev received threats at the end of November. The anonymous threats began after a feature on the programme about corruption in the law enforcement agencies. The Head of the Department of Information and Socio-Political Broadcasting on «1 + 1», Natalya Katerynchuk asked the Prosecutor General's Office and the Head of the Security Service [SBU] to temporarily provide the journalist with a personal guard.

Her appeal states: «The author of the project, Zhan Novoseltsev in his reports talks about those who have unlawfully been imprisoned, or who say that they're guilty after being tortured by police officers, about stories of punishment without a crime and shocking details about things that don't usually find their way into police reports and official statistics of the Ministry of Internal Affairs. Obviously far from everybody was thrilled at the idea of such a project. That's in the first place those who are afraid of being punished for crimes which had up to then not been uncovered due to protection from their police uniform». According to Zhan Novoseltsev, the threats began the day after the first feature was shown. «I don't understand who it could be. However the threats come from several sources. Firstly, the people who took part in the feature have been clearly given to understand that «you're done for, and so is your journalist.» Secondly, my wife was phoned from an unknown number. They repeated the threats together with foul language. For that reason the management decided to play safe», the journalist explains. He says that during work on the parts of the series conflict situations have arisen which could lead to threats against him.

3.2. ARRESTS AND DETENTION OF JOURNALISTS

On 25 May 2008, during the early elections for Kyiv Mayor and City Council Deputies, journalists from the newspaper of the All-Ukrainian Association [VO] «Svoboda» **Taras Bondar** and **Mykola Kindzersky** were detained by police officers near polling station № 53. «The journalists who came to carry out their professional duties by following the voting and preparing a report for our publication had not even managed to get to the building when the police officers felt an irresistible urge to take them off to the section for establishing identity», the Chief Editor of the newspaper Halyna Myts recounts. She says that the journalists showed their ID, however this had no effect on the police and the Head of the polling station had supposedly said that represents of the publication VO «Svoboda» [which is also a political party – translator] should be taken as far as possible from where the voting was taking place. The journalists were kept in the police station to check their identity for three hours.

On 14 July journalist from the *Internet Publication «Ukrainska Pravda» Serhiy Leshchenko* was forcibly taken to the Prosecutor General's Office for questioning. In the evening, following over 7 hours of questioning, he was allowed to leave with an undertaking to return for more questioning at 9 a.m. on 16 July. He was taken to the interrogation by force since he had not come after receiving two summonses. The questioning was over an interview he took of the National Deputy David Zhvania.¹⁰, which concerned the poisoning attempt on Viktor Yushchenko. However the journalist

¹⁰ <http://pravda.com.ua/news/2008/7/7/78459.htm>. Information in English can be found at: <http://www.khpg.org.ua/en/index.php?id=1216084696>

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asserted that the questions were about many publications. The President's Secretariat issued a statement condemning the forced questioning of the journalist.

In Poltava on 15 October the *Editor of the local newspaper «Private Matter»*, Anatoly Banny was detained by the police. Banny had tried to photograph the detention by a patrol unit of activists of the youth organization «Tryzub». The police, according to Anatoly Banny, tried to grab his camera away from him and threw him to the ground, putting handcuffs on him and taking him to the patrol car. The journalist spent two hours in the police station where they tested him for alcohol. The doctor confirmed that he was sober, following which he was released.

Journalist from «Ukrainska Pravda» Vitaly Selyk was detained near the Kyiv City State Administration building where he had decided to cover a protest over an increase in prices for public transport.

Selyk was detained on Sunday near the Kyiv City Administration building when he decided to follow the protest action against the increase in the fares on public transport.

Having arrived at the place where the protest was taking place he saw two police cars hit each other and clapped. He was detained by a police officer. Selyk was taken by the arm however he tried to break free, saying that he would come without being led. It was for this that the journalist was held in custody for 24 hours, under Article 185 of the Code of Administrative Offences (refusing to comply with the lawful demand of a police officer).

Employees of the Security Service [SBU] on 28 November took *journalist from the website «Daily.ua», Nazar Tsapko* in their car in an unknown direction. He was not even given the opportunity to ring and say where he was being taken. Shortly afterwards the Head of the SBU V. Nalycvaichenko confirmed that the journalist was being questioned by the SBU over the publication on the website of a document about a sale of weapons by Ukraine.

3.3. PROPORTIONALITY OF PUNISHMENT FOR ABUSE OF FREEDOM OF SPEECH

After a spurt of law suits against the media in 2006, there has been a fall in these. The reduction, moreover, is not only in suits filed, but in claims allowed.

Information about suits in law suits defending honour, dignity and business reputation against media outlets¹¹

№	Indicator	2003	2004	2005	2006	2007	2008	
1.	Under examination	— ¹²	—	753	926	719	737	
2.	Proceedings into the case concluded	627	514	441	605	490	494	
2.1	including	With a ruling issued	308	250	246	356	265	281
2.1.1		Including where the claim was allowed	187	158	150	193	168	165
2.2		Termination of proceedings in the case	118	158	—	—	67	—
2.3		Case left without examination	151	141	—	—	150	—
2.4	Passed to another court	50	34	—	—	8	—	
3.	Amounts in UAH of compensation for material or moral damage asked for	71 247 890	20 315 264	—	—	39 511 170	—	
4.	Amounts in UAH of compensation for material or moral damage awarded.	4 534 785	591 591	—	—	636 562	—	

¹¹ Data from the State Judicial Administration for various years

¹² «—» — means that we lack full information.

It is important to point out that these statistics do not fully reflect the situation as regards the amount of moral compensation which media outlets have been ordered to pay. It does not include the court costs which the court orders the media outlet (respondent) to pay if it allows the claim. To these courts are added, among other things, State duty which can be a large amount. For example, a claimant may lodge a suit claiming a large amount. The suit is allowed, however the claim for moral damages could be turned down or significantly reduced. Nonetheless the size of the State duty from 1 to 10% of the size of the claim is still liable for payment by the respondent, this effectively being a new form of penalty or punishment.

According to data from the Association of Media Lawyers, overall from 1998 to 2008 according to an analysis of 738 court rulings, only 25% of claimants demanded retraction of information, while 70% demanded not only retraction, but also compensation for moral damages, and 1.37% that the media outlet's issue be suspended

Only 7% had demanded compensation between 1 – 1,700 UAH, while 68.7% wanted between 1,700-170,000 UAH, and another 25% hoped to receive more than 170,000 UAH. Most claims for big amounts are allowed in the years following elections, and the most «greedy» claimants are politicians and public officials making up 48.8%¹³

The following are some examples of law suits.

On 24 September the Kyiv Court of Appeal partly changed the ruling issued by the Desnyansky District Court over the civil suit brought by Yury Sidorenko, Head of the Consulting Council of the consortium SSAPS [Single State Automated Passport System] against the company «Blitz-Inform» the editorial board of the newspaper «Business» and its journalist Maxim Birovash.¹⁴ The court totally turned down the claimant's demand for moral compensation to the sum of 22 million UAH from «Blitz-Inform», and 5 thousand UAH each from Mr Birovash and the former Editor of the newspaper, Serhiy Kobyshchev. It did, however, uphold the part of the original ruling regarding retraction and prohibition on using the photography of the claimant. The court also ordered the claimant to pay 1 million 250 thousand UAH in connection with the appeal submitted by «Blitz-Inform». The Desnyansky District Court passed its ruling on 23 May 2008, after Yury Sidorenko filed a suit against «Blitz-Inform» for 46 million UAH damages in November 2007, and also paid duty of 4.6 million UAH. Maxim Birovash had published his journalist's investigation into Ukraine's passport system in «Business»¹⁵ The National Union of Journalists put the judge of the Desnyansky Court who passed the ruling at Number one in their list of public officials who were «enemies of Ukrainian journalism» in 2008.¹⁶ The publication and journalist have lodged a cassation appeal against the ruling of the Court of Appeal.

The Head of the Kharkiv Regional Appeal Court Mykhailo Borodin took the TRC «For a» to court over a live broadcast on 25 July 2008 on the television channel AT TRC «Fora» in the press centre «Freedom Square» of a press conference given by National Deputy Yury Karamzin. A recording of the same broadcast was repeated 4 times, on 26, 27, 28, 29 July. The case was examined in the same Kharkiv region, that is, by a judge with regard to whom the Court of Appeal judge who is the claimant has considerable levers of influence. According to the Law «On the Judiciary», the Head of a Court of Appeal has controlling powers as regards all general jurisdiction judges in the region. On 1 September 2008 the Dzherzhynsky District Court in Kharkiv, after examining the claim, ordered the seizure of the property and liquid assets belonging to AT TRC up to 100 thousand UAH. The first instance court had ordered AT TRC «For a» to pay **74 985 UAH 33 kopecks**¹⁷

¹³ «Their hypnosis is our fear» // <http://www.telekritika.ua/media-corp/prava/2008-06-06/38854>
A slightly abridged version is available in English here: <http://www.khpg.org.ua/en/index.php?id=1212763363>

¹⁴ We mentioned this case in last year's report as one of the most flagrant violations of freedom of speech.

¹⁵ Court revokes massive compensation award against a newspaper and journalist // KHPG website <http://www.khpg.org.ua/en/index.php?id=1222284680>

¹⁶ National Union of Journalists names enemies of journalism <http://www.khpg.org.ua/en/index.php?id=1241074877>

¹⁷ The compensation claim and the respondent's comments are at <http://maydan.tv/articles/r271/p2> and <http://www.maydan.tv/articles/r270/p2/>.

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Ihor Kalyetnyk, National Deputy (Communist Party faction) and Head of the Verkhovna Rada Committee on Fighting Organized Crime and Corruption, and Hryhory Kalyetnyk, former Head of the Vinnytsa Regional Administration lodged 8 suits against the Vinnytsa newspaper «33 Kanal» over value judgments expressed in the newspaper about the former and present activities of these politicians, as well as letters from the newspaper's staff to the Speaker of Parliament and National Deputies over pressure on the publication. The total amount demanded in moral damages came to 710 thousand UAH. One of the claims for 270 thousand UAH was allowed by a local court. Later the Kyiv Court of Appeal upheld the ruling, however reduced the amount to 150 thousand UAH.¹⁸

The Head of the Okhtyrsky District Court in the Sumy region, Mykola Veres filed a suit against the newspaper «Panorama» and journalists D. Lytovchenko and O. Vesna, demanding 300 thousand UAH compensation for the publication «By lawlessness» which describes conflict between the Head of the Court and a Deputy of the Sumy City Council Mr. Baidak. Information in the newspaper was based on statements made by Mr Baidak to the police. The claimant behaved arrogantly, stated during the hearing that «he'll deal with the journalists without the court», and also demanded a ban on circulating any information about him. The first instance and appellate courts rejected the claim however the Supreme Court has sent it back for a new examination.¹⁹

Television and radio broadcasting

Overall in 2008 the National Television and Radio Broadcasting Council of Ukraine carried out 398 checks into the activities of television and radio companies [TRC], of which 203 were scheduled and 198 unscheduled. This means that 25% of all TRC in the country were subjected to checks.

As a result of the review of these checks at a meeting of the Broadcasting Council, 118 TRC received warnings, and applications were submitted to the court to cancel broadcasting licences for 5 TRC (three in Sumy and two in Kyiv).²⁰

The most typical infringements identified were:

- ◆ Failure to adhere to the licence conditions regarding specific items of the programme concept framework (44 TRC);
- ◆ Breaching advertising legislation (25 TRC);
- ◆ Insufficient programme of their own or domestic production (16 TRC);
- ◆ Failure to adhere to the licence conditions regarding the language of programmes (16 TRC)
- ◆ Breaches of legislation on protection of public morality (2 TRC)
- ◆ Other infringements (6 TRC);

The most typical infringements of licensing conditions, licence requirements and legislation found in the activities of providers of programme services:

- Failure to adhere to the licence conditions regarding «general concept framework for programmes to be broadcast» (57 TRC);
- Lack of agreements on the right to circulate programmes (5 TRC);
- Not ensuring that subscribers get the full range of programmes (13 TRC);
- Broadcasting foreign programmes whose content is not adapted to the requirements set out in Ukrainian legislation (13 TRC)..

3.4. CENSORSHIP

We cite here several examples of interference by the National Television and Radio Broadcasting Council of Ukraine [the Broadcasting Council] in editorial policy of TRC, and censorship of certain programmes. The issue of censorship for the purpose of protecting public morality is con-

¹⁸ National Union of Journalists names enemies of journalism <http://www.khpg.org.ua/en/index.php?id=1241074877>

¹⁹ Ibid.

²⁰ Report of the National Television and Broadcasting Council for 2008, www.nrada.gov.ua.

sidered further down. The examples clearly demonstrate the methods and means of administrative influence on the content of programmes carried out by the regulatory body.

In February 2008 a number of civic organizations, associations of parties and particular viewers sent an appeal to the Broadcasting Council regarding the showing on certain television companies of the film «Moment of Truth» which claims that some representatives of the authorities and Ukrainian politicians are encouraging the spread of fascist ideology in Ukraine. The Broadcasting Council set out to obtain expert opinions on the accuracy of the historical facts and the legitimacy of the assertions contained in the film, as well as on the film's compliance with legislation on protection of public morality and on whether there are legitimate grounds for showing it on television. It approached the History Institute of the Ukrainian Academy of Sciences, the National Expert Committee for the Protection of Public Morality, the Ukrainian Institute of National Remembrance and the Security Service [SBU]. Those State bodies found that the film «Moment of Truth» was lacking in objectivity, biased, partisan and that it contained elements in breach of Ukrainian legislation. In its conclusion, the National Expert Committee for the Protection of Public Morality stated that in accordance with Article 2 of the Law «On the Protection of Public Morality», it is prohibited in Ukraine to produce and circulate material which propagates war, national or religious enmity, fascism and neo-fascism, denigrates or offends a nation or individual, propagates disrespect for national and religious places of significance. On the basis of these conclusions the Broadcasting Council recommended that Ukrainian TRC **refrain from broadcasting** the film «Moment of Truth».

In June 2008 two Kharkiv television companies showed the film «Empire of Good». In analyzing the content of the film, the Broadcasting Council found that in the audiovisual material used regarding people linked with the Orange Revolution, there were attempts to discredit the present Ukrainian government and accuse it of conspiring with the former US President who was claimed to have provided moral, political and financial support to certain political forces. The Broadcasting Council pointed out that the viewer was offered only one view of events and facts which infringes the norms of editorial policy with regard to ensuring accuracy, objectivity, lack of bias and balance of information circulated by the TRC. The Broadcasting Council recommended that the television channels **refrain from broadcasting the film** «Empire of Good», produced outside Ukraine since its content «could arouse negative publicity and sharpen conflict within society, as well as being viewed as a negative step towards a country with which our country has diplomatic relations».²¹ A strange reason for restricting freedom of expression. .

On 22 November 2008 the Broadcasting Council carried out a check of programme content of TRC in accordance with Presidential Decree № 856/2008 from 25 September 2008 «On measures linked with Remembrance Day for Victims of Holodomor²² and the Rules on Television and Radio Broadcasting on Days of Mourning and Remembrance Days, passed by the Broadcasting Council. The results of the monitoring of nationwide, regional and local TRC showed that virtually all companies had made changes, bearing in mind the general mood of that day, and had also prepared their own projects in which the events which led to the genocide of the Ukrainian people were condemned.²³

The Industrial Television Committee appealed in the administrative court against the above-mentioned Rules of Broadcasting. The District Administrative Court found unlawful in total the decision of the Broadcasting Council № 1101 from 11 June 2008 «On approving Rules on Television and Radio Broadcasting on Days of Mourning and Remembrance Days, and also banned the Broadcasting Council from applying them in legal relations regulating the activities of television and radio broadcasting organizations.²⁴

²¹ Ibid.

²² In fact the word is Holodomor in the plural, since the famines in the early 1920s and soon after WWII are also seen as having been manmade. Since the terrible crime of Holodomor 1932-1933 is finally becoming known, it seems better to restrict the use of the word in English [translator]

²³ Ibid.

²⁴ The ruling of the District Administrative Court in Kyiv is available in Ukrainian on the ITK website http://www.itk.org.ua/index.php?option=com_content&task=view&id=280&Itemid=37.

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4. RESTRICTIONS OF FREEDOM OF EXPRESSION OF VIEWS IN PROTECTION OF PUBLIC MORALITY

The very existence of a separate State controlling body – the National Expert Commission for the Protection of Public Morality [hereinafter NEC or the National Commission), whose activity is directed solely at protecting public morality is not in keeping with democratic principles. In our view, the existence of such a body institutionalizes State censorship, the boundaries of which are not clearly defined and will be steadily broadened. At the present time one observes significant infringements of standards of freedom of speech due to the ever increasing activity of this State body.

Of concern must be the fact that «public morality» and «national security» are being equated, this being a potential source of serious restrictions on freedom of speech. The following is a highly contentious argument from a NEC decision from 23 June 2008.

«To state that the issue of protection of public morality and the of the moral health of civic society, prevention of propaganda of racial and national enmity, fascism and neo-fascism, disrespect for national and religious places of significance, insulting a nation or person on the basis of nationality, propaganda of drug addiction, alcoholism, smoking, as well as fighting denigration of the honour and dignity of the individual, and fighting the spread of pornography and violence are the constitutional duty of the State and a component part of the protection of Ukraine's national security».

This quote, as no other, demonstrates the scale of the activity of the Commission for the Protection of Public Morality and the serious threat it poses for rights and freedoms.

NEC's activities are generating considerable discussion over restriction of freedom of expression. At a meeting of the Verkhovna Rada Committee on Freedom of Speech and Information, Deputies considered the issue of NEC decisions and Broadcasting Council recommendations²⁵ regarding certain popular programmes. After a lengthy discussion involving National Deputies, representatives of television channels and the Head of NEC Vasyl Kostytsky, the members of the Committee on Freedom of Speech unanimously agreed a decision This «draws the attention of the National Expert Commission and the National Television and Broadcasting Council to the fact that their decisions and recommendations addressed to television and radio broadcasting companies with lists of programmes that the Commission considers should be avoided contain the hallmarks of interference in the editorial policy of television companies which is unacceptable from the point of view of safeguarding the constitutional principle of freedom of speech and current legislation regulating legal relations in the information sphere.»²⁶

According to the European Convention on Human Rights and case law of the European Court of Human Rights any restriction on freedom of expression for the purpose of protecting public morality should be imposed solely on the basis of law and must be that necessary in a democratic society. As we will see from the following, legislation is lacking in clarity and foreseeability, and NEC's decisions are not proportionate to the objective set.

4.1. QUALITY AND CLARITY OF LEGAL REGULATION

The term «in accordance with the law» means the accessibility of such a law and compliance with the criterion of quality. It should be in keeping with the principle of the rule of law, and should have sufficiently clear formulations. This clarity should enable people to draw well-founded predictions given certain circumstances of the consequences which a particular action could have and to accordingly modify their behaviour. This requirement does not envisage absolute certainty which would totally exclude any possibility of interpreting the law when applying it. Nonetheless, it demands a certain level of foreseeability which varies depending on the content of a given law, the sphere it is aimed at, and on the number and status of people for whom it is intended.

²⁵ Cf. the Internet publication «Telekritika», <http://www.telekritika.ua/news/2009-01-19/43196>.

²⁶ Committee on Freedom of Speech and Information speaks out against interference in editorial freedom <http://www.khpg.org/en/index.php?id=1232621060>.

If we apply these criteria, then it becomes apparent that the Law on the protection of public morality does not comply with the Convention on Human Rights.

The definitions of the terms in the law do not stand up to criticism. For example, the law defines products as of a pornographic, erotic or sexual nature. The definitions, however, do not provide clear criteria enabling one to choose a particular category.

For example, production of a pornographic nature – is any material objects, items, printed, audio- or video production, including advertising, reports and material, the products of the mass media, electronic forms of information the content of which is the detailed presentation of anatomical or physiological details of sexual acts, or which contain information of a pornographic nature. That is, if one removes what the word «production» means, then from this definition it turns out that production of a pornographic nature is production that contains information of a pornographic nature. The definition is thus tautological and does not give clear and foreseeable criteria making it possible to decide what fits that category.

The definition of production of a sexual nature is basically the same.

According to Article 2 of the Law «the criteria for adding production to that which is of a pornographic nature, are determined by a specially authorized executive body in the sphere of culture and art». The single such body is the Ministry of Culture and Science. Despite this being in breach of this norm of the Law and in excess of its authority, NEC passed a Decision on 20 February 2007 which approves «Criteria for classifying as pornographic or erotic production printed, audiovisual, electronic or other products, including advertising, as well as messages and material transmitted or received through communication channels». In further breach of legislation, this normative act was not registered with the Ministry of Justice although it directly pertains to observance of human rights.

On 11 November 2008, NEC adopted in its first reading a new version of these criteria.

It is not only the illegality of adopting these criteria which is baffling, but their content. For example, among formal and substantive elements of pornography, we find the following:

- The lack of plot, intrigue, context, character or mood in a work;
- The use of a pseudonym;
- imib;
- a purely conventional link between different scenes and episodes;
- the use of non-standard vocabulary.

However no less confusion is generated by the numerous value judgments in a law on the protection of public morality which in no way enables a person to predict how specific behaviour will be assessed.

For example, Article 2 of the Law on the Protection of Public Morality prohibits the production and circulation of products which:

- propagate ignorance, disrespect to ones parents;
- propagate religious hatred, blasphemy.

Overall it would not be possible for anyone to predict whether his or her behaviour would be deemed in breach of this Law. We therefore consider that the Law on the Protection of Public Morality does not meet the criteria of quality and requires clearer regulation to be in line with the requirements of the European Convention on Human Rights.

It should also be noted that the Law on the Protection of Public Morality envisages mandatory licensing for the circulation of production of an erotic or sexual nature, yet to this day no such licensing has been introduced.

In May 2008 a draft law «On amendments and additions to the Criminal Code of Ukraine (on the protection of public morality)» was tabled in parliament.²⁷ This proposes establishing liability for violations of the Law on the Protection of Public Morality, the running of events of an erotic or sexual nature, or sale of erotic or sexual publications, as well as the sale of any other products which harm public morality.

²⁷ Draft Law № 1340 from 15.05.2008, author – National Deputy Gennady Moskal

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This law through its lack of terminological clarity gives enormous scope for restriction of freedom of speech through the application of serious criminal penalties. The parliamentary profile committee is proposing that the draft law be passed in its first reading, however there have not yet been hearings in parliament.

4.2. DISCRIMINATION IN LEGAL REGULATION

In accordance with the Criteria of Pornography passed by the Commission for the Protection of Public Morality²⁸, the characteristics of pornography are said to include images of *abnormal or deviant* forms of sexual relations, namely:

– *Homosexual relations* close up, in full view, with demonstration of aroused genitals and intercourse. This includes in publications, where their special homosexual focus is not warned about in the publication's details and on the cover (packaging) as an item with a sexual focus for a special audience;

– Demonstrate sexual relations with people who show clear signs of disability, defects and developmental anomalies, or clearly suffer from somatic or psychological illnesses.

According to these criteria any production is deemed pornography and banned for production and circulation which, in our view, is a demonstration of discrimination on the grounds of gender, sexual orientation, views and a person's physical or psychological condition.

It was for this reason that circulation of the single national media outlet of the civic organization of gays and lesbians «Our World» was banned, and its Editor and the Head of the organization prosecuted for distributing pornography.

4.3. APPOINTMENT OF MEMBERS OF THE NATIONAL COMMISSION

Parliament on 20 November 2003 passed the Law «On the Protection of Public Morality», however for a whole year nothing further happened.

This was linked, in the first instance, with the impossibility, according to law, of forming an expert and controlling extra-departmental State body in the sphere of protection of public morality – the National Expert Commission of Ukraine for the Protection of Public Morality. According to Article 18 of this law the makeup of this Commission should be approved by the Cabinet of Ministers *at the submission* of the Head of the Commission, however the Head of the Commission was *to be elected by the members of the Commission*. It was not possible to fulfil both these conditions when creating the Commission.

Despite this failing in the law, the Cabinet of Ministers in its Instruction № 862 from 17 November 2004 approved the makeup of the National Commission. At the same time, through Cabinet of Ministers Instruction № 1550 from 17 November 2004 it approved the Provisions on the National Commission, as well as setting a top limit of 90 employees.

After minor changes to the makeup of the Commission, the Cabinet of Ministers with Instruction № 294 from 27 July 2005 again approved the basic makeup of the Commission, however with the same Instruction Yury Boiko was appointed Head of the Commission. Thus, in breach of the Law, the Instruction appointed both members of the Commission and its Head.

However in practice the Commission still did not work and meetings were virtually not held.

With Resolution № 97 from 1 February 2006 the Cabinet of Ministers again changed the Head of the Commission, this time appointing Natalya Sumska. Soon afterwards, with Instruction № 614 from 5 April 2006, the Cabinet of Ministers once again approved a new makeup of the Commission, although the old makeup was virtually not changed. According to members of the Commission, one meeting was held at which no specific decisions were taken.

Resolution № 1012 from 26 July 2006 dismissed Natalya Sumska from her position as Head of the Commission.

²⁸ NEC Decision № 1 from 20 February 2007.

However after a certain amount of time the Cabinet of Ministers, through a new Instruction, revoked the previous two changes to the makeup of the National Commission, with the members now effectively those who were in the original makeup back in 2004. This was done since these two Instructions of the Cabinet of Ministers were supposedly adopted with violation of Article 18 of the Law «On the Protection of Public Morality».²⁹ Yury Boiko once again headed the Commission.

Later the makeup of the Commission changed more than once due to the formation of a new government and new representatives of the ministries, as well as for other reasons. At the same time the Head of the Commission also changed with Oleksandr Kurdinov, who had worked in the State Committee for Television and Radio Broadcasting being appointed on 5 December 2007.³⁰

However the government changed yet again with this leading to another makeup of the Commission between adopted.³¹ At virtually the same time, on 25 June 2008, Vasyl Kostytsky was appointed Head of the Commission.³²

Such constant changes explain the low level of public activity of the National Commission.

Thus, although the National Commission is made up of representatives of the authorities, journalists, writers, actors, etc, the criteria and procedure for choosing members are unknown. We would also note that the actual procedure for appointing the Head of the Commission is in breach of the Law «On the Protection of Public Morality».

The Resolutions appointing members of the Commission are also effectively unlawful. On the one hand such appointments have not been made upon the submission of the Head of the Commission as required by law. On the other, according to the Law, the term of office is 5 years, although as we see, membership has normally lasted one or two years.

4.4. THE POWERS OF THE NATIONAL COMMISSION

The National Commission has the following main controlling and regulatory powers:

- carrying out assessments of any products, works and events to ascertain whether they comply with the Law «On the Protection of Public Morality» (the Law);
- carrying out checks of compliance with the Law.

Where the National Commission gives a negative conclusion regarding products, works and events, their circulation or running is prohibited altogether or permitted given adherence to reasonably strict conditions. It is not clear from the Law whether the opinion must be formalized in a Commission Decision. In practice, the absolute majority of opinions are given by employees of the Commission and are not approved through Commission Decisions. Thus, the members of the Commission do not have any impact at all on these opinions.

In accordance with Article 17 § 3 of the Law, and Article 10 of the Provisions on the National Expert Commission of Ukraine for the Protection of Public Morality, the Commission's Decisions **must be enforced**. The Decisions are passed by a majority vote at the Commission's meetings.

Failure to enforce a National Commission Decision can lead to disciplinary and criminal liability, and the National Commission can *also initiate the revoking of licences* of those involved in economic activity who violate the law on protection of public morality (Article 19 of the Law).

Moreover, all products which, according to the National Commission's conclusion, do not meet the requirements of the Law, or whose circulation takes place without such a conclusion, *are liable to be removed from sale*.

²⁹ Cabinet of Ministers Instruction № 614- «Issues of the National Expert Commission of Ukraine for the Protection of Public Morality».from 8 August 2007

³⁰ Cabinet of Ministers Instruction from 10 October 2007 № 855 «On changes to the makeup of the National Expert Commission of Ukraine for the Protection of Public Morality» from 5 December 2007 N. 1095 «On the makeup of the National Expert Commission of Ukraine for the Protection of Public Morality»

³¹ Cabinet of Ministers Instruction from 11 June 2008 № 835 «On approving the makeup of the National Expert Commission of Ukraine for the Protection of Public Morality»

³² Cabinet of Ministers Instruction from 25 June 2008 № 865 «On appointing V.V. Kostytsky Head of the National Expert Commission of Ukraine for the Protection of Public Morality»

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In order to exercise its powers, the National Commission has the right without a court order to demand documents and products from the authorities or individuals / entities involved in economic activity. This even exceeds the authority of the law enforcement agencies which must receive a court order to carry out the same actions.

4.5. CENSORSHIP

According to the Law «On the Protection of Public Morality», without a preliminary positive conclusion from the National Commission the following are prohibited:

- the holding of any visual performances of a sexual or erotic nature by individuals or legal entities;
- the sale and distribution of printed production of a sexual or erotic nature;
- the sale or hire to the public of production of electronic media of a sexual nature, production and audio or video cassettes with recordings of a sexual or erotic nature;
- public demonstrations of cinema, audio or video production of a sexual or erotic nature.

Bearing in mind that the criteria for placing production in these categories are obviously neither clear nor foreseeable, it is extremely difficult to fulfil this condition.

Prior control over the issue of information and production is obvious censorship.

This requirement of the Law is thus in direct breach of Article 15 of the Constitution and Article 45-1 of the Law on Information which both directly prohibit censorship as is any requirement to agree the content of information in advance with a body of power.

4.6. COMPLIANCE OF THE RESTRICTIONS WITH THE CRITERION OF BEING THAT «NECESSARY IN A DEMOCRATIC COUNTRY»

According to Article 10 of the European Convention on Human Rights, freedom of expression may be restricted for the purpose of protecting public morality however such interference must be «necessary in a democratic society». The State has wide discretionary powers with regard to needs and necessary of such restriction. However such decisions must be proportionate, that is the possibility of alternative measures must definitely be assessed, as well as the seriousness of the sanctions leading to such a decision.

Criminal persecution of the leader of the organization of gays and lesbians «Our World» for publishing his own newspaper can hardly meet the criterion of proportionality. Not only has the publication been deemed pornographic effectively only for the images of homosexual relations in accordance with the criteria of pornography, but he faces imprisonment for this.

It will also be difficult to assess actions of the authorities involving prohibition or repressive actions when a person circulates a work with the use of certain restrictions in access for minors. For example, the above-mentioned publication of an organization of gays and lesbians was circulated only in a closed envelope and on subscription and was not freely sold.

4.7. THE PROBLEM OF APPEALING AGAINST THE ACTIONS OF THE NATIONAL COMMISSION

Problems are encountered if one wishes to appeal against a National Commission Decision or expert conclusion.

On the one hand, for an unknown reason and in breach of the Law, the courts regard the expert conclusions are recommendatory, and therefore not able to be revoked by a court. The problem is exacerbated by the fact that these conclusions are not confirmed through Commission Decisions, and it is therefore not clear whether they are Decisions which can be appealed against. If they are not Decisions, then the question arises of who is the relevant respondent in such a case. In other words, there are problems in a legal sense, with filing a law suit, where the respondent is the National Commission although as a collective body this did not take any decision.

However a greater problem is the lack of clarity in the Law «On the Protection of Public Morality».

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Pursuant to Article 20 of this Law, the expert conclusions of the Commission may be appealed against in civil proceedings. On the basis of this, administrative courts refuse to consider such cases, despite the fact that the appeal is against the actions of a State body. Civil courts have also refused to accept such applications because the dispute involves the sphere of public law, and appeals against the actions of State bodies of power should come under administrative proceedings.

It is because of this that no Decision of the National Commission has been appealed against in the courts, although the first such suits were filed back in 2007.

4.8. OVERVIEW OF THE ACTIVITIES OF THE NATIONAL EXPERT COMMISSION FOR THE PROTECTION OF PUBLIC MORALITY

There is no annual information provided on the activities of the National Commission. A considerable number of Commission Decisions are also unavailable, while the expert opinions are not available to the public at all.

Combined table of activities of NEC experts (1 June 2006. – 31 December 2007)³³

Type of product	Number of items
DVDs, CDs and videos	3155
Printed media (journals, newspapers, books, brochures, leaflets, etc)	491
Advertising (clips and external advertising)	29
TV programmes	33
Production of a sexual nature	516
Specially designated places	70
Systems for collecting information (hard disks)	7
Content from mobile telephones	2765
Computer games	46
Internet sites	6
photographs	88
Shows and other visual events	6

Just in that year and a half the National Commission issued 864 conclusions, the absolute majority of which were not reviewed at National Commission meetings and not confirmed in the form of Commission Decisions.

During the same period, the National Commission initiated 68 checks of specially designated areas for the sale of production of a sexual nature and the holding of visual events, and 799 prophylactic raids were carried out.

In 2007, on the basis of National Commission conclusions, 131 criminal investigations were initiated under Article 300 of the Criminal Code (selling production propagating a cult of violence and brutality) and Article 301 (selling pornography), this being 33.7% more than for the analogous period in 2006.

In November-December 2007 the National Commission carried out monitoring of the media regarding «the issue of violence and cruelty in children's environment, *propagating smoking*, child pornography, *homosexuality*, the results of checks by the law enforcement agencies of observance of current legislation on the protection of public morality». For example, during a week (20-27 November 2007) information was provided regarding checks carried out by the Prosecutor's Offices in the Rivne, Sumy and Ivano-Frankivsk regions regarding adherence to the Law «On the Protection

³³ The work of the National Expert Commission for the Protection of Public Morality within the system of safeguarding the information security of the country (M. Boiko). NEC website: <http://moral.gov.ua/>

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of Public Morality». As a result of these checks, the Ivano-Frankivsk Regional Prosecutor's Office initiated 4 criminal investigations, issued 57 documents of Prosecutor reaction which set out the demand that those responsible be brought to answer in accordance with the law. In the Rivne region, on the basis of a National Commission conclusion, a criminal investigation was initiated over the distribution of the Tarantino film «Hostel-2» which it is asserted propagates a cult of brutality and violence, and an investigation is underway over the posting on the Internet of an amateur video made by Rivne teenagers who call themselves the «Rivne dopes».³⁴

The following are some National Commission Decisions

Following monitoring of TV channels, the Commission states that it established that the series «Matryoshka dolls from the cover» of the soap opera «Happy together», broadcast on «Novy kanal» is, in accordance with Article 1 of the Law «On the Protection of Public Morality», production of an erotic nature, and violates the requirements of Article 7 § 4 of this Law. The National Commission therefore decided to inform the management of «Novy Kanal» that in accordance with the said Law, the use of an image of minors in production of a sexual or erotic nature is prohibited. Over the infringements identified, it also decided to approach the Ministry of Culture and Tourism with the request to use the means envisaged in legislation to prevent the violation by the TRC of current legislation on the protection of public morality. This series of the soap opera was banned.³⁵

The National Commission passed a decision regarding the need to carry out monitoring of the printed media sent to public libraries to check that they comply with legislation on the protection of public morality. In order to carry this out, it was decided to approach the Ministry of Culture and Tourism suggesting joint monitoring of material reaching libraries under the jurisdiction of regional Departments of Culture and Tourism, to the Central Department of Culture and Art of the Kyiv City State Administration, the Department of Culture and Tourism of the Sevastopol City Administration and the Ministry of Culture and Art of the Crimea.³⁶

The National Commission checked three programmes shown at various times from early morning on specific days: «Material evidence», «Witness» and «The most notorious Ukrainian maniacs», and found infringements of legislation on the protection of public morality, namely:

- many features talking about various murders, with documentary film of the mutilated bodies of victims;

- they contain detailed descriptions of crimes committed;

- no special indicators for this category of programme³⁷.

In order to observe the requirements of the Law «On the Protection of Public Morality», the National Commission decided to find that the information contained in these programmes:

- could harm the physical, intellectual and spiritual development of minors, young people;

- may be used to commit crimes which in their content would copy or be similar to those shown in the programmes;

- violates legislation on the protection of public morality, namely Article 62 § 2 of the Law «On television and radio broadcasting», and Article 2 § 2 of the Law «On the Protection of Public Morality».³⁸

In another case an advertisement for the computer technology «Impression S.T.A.L.K.E.R.» contained the image of a young man holding an automatic rifle which NEC considered, to be pro-

³⁴ Monitoring of the media with regard to the situation with public morality <http://moral.gov.ua/>.

³⁵ Decision of the National Expert Commission for the Protection of Public Morality from 18 December 2008 <http://moral.gov.ua/>. «The National Commission has banned one of the series of «Happy together» because of erotica // <http://korrespondent.net/ukraine/events/752364/print>.

³⁶ Decision of the National Expert Commission for the Protection of Public Morality from 27 January 2007 <http://moral.gov.ua/>

³⁷ Such programme indicators have not, in fact, been designated and there is a system of indicators only for films, and not for all programmes.

³⁸ NEC Decision № 3 from 23 October 2008, <http://moral.gov.ua/>

hibited under Article 20 § 4.1 of the Law «On advertising».³⁹ The advertisement was banned solely on the grounds of the automatic rifle.

As we see from these examples, in its decisions NEC does not indicate its arguments as to why one or other work breaches the law on the protection of public morality. It confines itself to merely stating the fact of non-compliance which provides too broad a scope for interpretation. In these decisions there is often even no mention of the relevant expert opinions on which the decisions were supposed to be based. This situation makes it possible to ban or restrict circulation of a work effectively at one's own whim or discretion. Another problem together with this is the difficulty of appealing against such a decision since it is unclear what arguments were used to reach the decision.

In the absolute majority of cases the NEC Decision is passed with the individuals or legal entity that it pertains to being invited, meaning that they do not know what is being discussed and what NEC's arguments are, and cannot present their point of view in response to the Commission's arguments.

For example, when the novel by Oles Ulyanenko «The Woman of his dream» was found to be pornographic, and therefore banned, no arguments were given in the letter to the author about what made the work pornographic. When the author asked, he was sent NEC Conclusion № 32E from 2 February 2009. However this conclusion was not approved by a NEC Decision, but only by the Acting Head of NEC A. Polok. In this conclusion it is stated that «if a work contains even one episode which falls under the definition of pornographic, the entire publication receives this assessment.» Later the conclusion asserts that:

«Furthermore there are episodes in the work where the main aim is to depict in flagrant and naturalist manner the act of sexual intercourse of the character with anatomical details of sexual organs, oral-genital, oral-anal, petting, fisting, masturbatory or ejaculatory actions (for example, pp. 8-11 of the manuscript) and the description of the characters satisfying his lust. Moreover the artistic mastery, linguistic skills of the author could arouse lower instincts in the reader, which gives grounds for declaring it pornographic.»

This is NEC's entire argumentation which is in full, together with two other works, contained on 4 pages of a conclusion where a significant part is citing legislation.

Clearly the given decision is lacking in argumentation, and yet the work of a laureate of the prestigious Shevchenko Prize in general concerned with the consequences of moral degradation of society, remains banned.

4.9. THE ACTIVITY OF THE NATIONAL TELEVISION AND BROADCASTING COUNCIL REGARDING THE PROTECTION OF PUBLIC MORALITY

Carrying out control over the programme content of Ukraine's television and radio broadcasting organizations, the Broadcasting Council has on many occasions established the presence of programmes whose content has elements suggesting infringement of legislation on the protection of public morality. All programmes identified have been passed by the Broadcasting Council to the National Expert Commission on the Protection of Public Morality with the request to provide an additional opinion regarding their content. If violations of the Law «On the Protection of Public Morality» have been confirmed, the Broadcasting Council has considered these cases at meetings, using the appropriate measures within the boundaries of its powers with respect to the TRC.

During 2008 the Broadcasting Council sent over 20 applications to NEC asking for the latter's assessment as to whether the content of programmes broadcast on national, regional and local TRC complied with the norms of current legislation.

It requested, for example, NEC assessments regarding compliance with legislation on public morality of the following television programmes, etc

- ◆ TRC «Kyiv» – advertising clips presented as social advertising,
- ◆ ICTV – the programmes «Naked and funny», and four others, one film and a soapbox opera

³⁹ NEC Decision № 6 from 7 October 2008, <http://moral.gov.ua/>.

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- ◆ Inter – a concert by Russian show producer and comedian Maxim Galkin «We're together again»; two films and a programme;
- ◆ M1 – the programme «Weather»; a video clip and the cartoon the Simpsons;
- ◆ HTH four programmes, including «Witness» and «The most notorious Ukrainian Maniacs»
- ◆ Novy Kanal – the programme Camera Club and television soap «Happy together»
- ◆ TRC «Studio 1+1» – a film and ad for crisps «Sancho»
- ◆ CITI – the programme «Secret life of women. Porno»
- ◆ K 1 – the film «Wild Orchids»;
- ◆ «Musical television» – the musical serials «Southern Park» and «Beavis and Bathead»⁴⁰

5. RECOMMENDATIONS

1) Implement a programme for reforming State-owned media outlets by changing their system of management and financing in accordance with the recommendations of the Council of Europe and OSCE. The best example of such reform is the introduction of public TV and radio broadcasting on the basis of UT-1 National Television Channel and the First National Radio Channel. The process of privatization must be accelerated.

2) Abolish the procedure for permission-based registration of printed media outlets which is not in line with Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁴¹

3) Extend those with the right to engage in publishing activities from enterprises to all forms of legal entities. For this amendments are needed to the law on publishing.

4) Draw up and introduce the appropriate legislation and programmes of self-regulation for journalists and media outlets in order to reduce the spread of material which is paid for or produced on commission with infringements of journalist standards of objectivity and balanced presentation of information.

5) Abolish the laws «On the procedure for media coverage of the activities of public authorities and bodies of local self-government in Ukraine» and «On government support for the media and social protection for journalists», allowing for the cancellation of particular benefits for journalists of State media outlets, and to ensure that they have the same rights as journalists on private media outlets.

6) It would be advisable to review legislation on the elections in order to ensure free discussion in the media about candidates, their weak and strong points and various aspects of their political programme and activities. For this the understanding of advertising and campaigning should be more clearly defined.

7) Paid sponsorship of news items should be prohibited by law

8) Review the possibility of adopting and developing a law on journalists' rights, using preparatory work carried out by the State Committee on Television and Radio Broadcasting and draft law № 9175 from 27 February 2006 «On protection of journalists' professional activities». This issue is of practical importance since, for example, the rights of journalists working for television and radio companies are not defined at all..

9) Introduce amendments to the Law on Television and Radio Broadcasting in order to bring it into line with standards of the Council of Europe, OSCE and the European Union, as well as the recently ratified European Convention on Transboundary Television..

10) Introduce amendments to legislation making it possible to identify the real owner of a media outlet, especially of television channels and radio stations; to introduce effective control over

⁴⁰ Report of the National Television and Broadcasting Council for 2008, www.nrada.gov.ua.

⁴¹ More detail on this can be found in the Special Report by the OSCE Representative on Freedom of the Media Miklos Harazhti «Media registration in the OSCE region: observations and recommendations from 29 March 2006 <http://www.osce.org/fom/>

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the concentration of media outlets in the hands of one owner or members of his or her family; to introduce anti-monopoly restrictions for the information market in compliance with recommendations of the Council of Europe (for example, Recommendation № R (94, (13), OSCE and the European Union; to introduce necessary procedure for punishing those who infringe legislation on the concentration of the media.

11) 3 Ensure quick and transparent investigation into all reports of violence and deaths of journalists, as well as into cases of interference in journalists' activities.

12) Disband the State Committee on Television and Radio Broadcasting during an overall consideration of Draft amendments to the Constitution of Ukraine. Control also needs to be heightened over the use of funds by this government agency due to numerous cases of abuse. The system, for example, of ordering State-funded television and radio programmes, book publications, films and other services needs to be made more transparent.

13) Pass a new version of the Law «On protection of public morality» which sets out clearer grounds for restricting freedom of expression of views in order to protect public morals, dissolve the National Expert Commission on the Protection of Public Morality, passing some of its powers to other State bodies, as well as removing preliminary control over the distribution of films, etc (censorship).

IX. FREEDOM OF PEACEFUL ASSEMBLY¹

According to the Ministry of Internal Affairs (MIA), the number of mass gatherings fell in 2008 as compared with 2007. However, monitoring of the right to peaceful assembly which the «Respublica» Institute has been carrying out over several years found that the number of violations of this right by the authorities and bodies of local self-government increased in 2008.

1. GENERAL FEATURES OF PEACEFUL GATHERINGS

The reduction in the number of peaceful gatherings and of those participating (by 25.6% and 30.5% respectively) was due to a drop in the number of political meetings (this falling by 86.4%, with the number of participants – by 91.4%, i.e. almost 11 times lower!) However such statistics in no way reflect a reduction in civic and political activity. It is just that 2007 saw snap parliamentary elections, and in spring of that year different political forces organized mass events (mainly in Kyiv) «for» or «against» the President's Decrees dissolving the Verkhovna Rada, while in autumn the same political forces held mass actions in all regions as part of the election campaign.

In 2008 there were only a few local election campaigns (the largest of which was the early elections in Kyiv for Mayor and City Council in May). As a rule, people took part in the above-mentioned political gatherings for a certain amount of money from the organizers (according to reports in the press, from 50 to 100 UAH for a «working» day), while some rally participants manage to take part in events of different, sometimes ideologically opposite political forces. Therefore a reduction in the number of political meetings cannot be taken as an indicator of a fall in Ukrainians' civic activity.

It is the number of meetings of a socio-economic nature organized by members of the public to defend their interests without the involvement of political parties which can provide an indication of how active Ukrainian citizens are. The number of such events in 2008 was 11.7% up on the previous year, although the number of participants decreased by 40.1%

It is typical that the Crimea and Kyiv take the lead both for political and socio-economic events. This is because the capital is where institutes of power to which protesters direct their demands are concentrated. The level of civic activity in the Crimea is the result of protest actions by the Crimean Tatars who are protesting against the behaviour of the authorities and demand observance of their socio-economic rights as repatriants (for example, for what they consider a just division of land and property). On the other hand, it is traditionally the western regions of Ukraine which take the lead in the number of religious events.

The following table gives figures from the MIA Department of Public Safety, for the number of gatherings in 2008 and of their participants, broken down into regions and types of gatherings (the Department's classifications).

¹ By Volodymyr Chemerys, Institute «Respublica», member of the UHHRU Board.

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Types of peaceful assembly according to information from the MIA Department of Public Safety

Region (where not otherwise indicated, the region (oblast) is referred to	Total number of events	Number of participants	Number of police officers	political	Number of participants B	socio-economic	Number of participants
The Crimea	28053	2 407343	96 953	2036	46 186	21 527	169708
Vinnitsa	10177	4 376260	30 870	63	28 500	96	20 000
Volyn	4 547	1 080651	10 280	8	1 354	28	4 430
Dnipropetrovsk	5 014	4 421479	47 530	113	75 790	170	56 535
Donetsk	4 805	2 897695	47 650	107	60 448	31	10 555
Zhytomyr	3 982	977 018	13 204	16	1 500	16	1 988
Transcarpathian	5 079	2 523203	16 046	24	43 346	29	3 779
Zaporizhya	3 275	2 155072	21 433	188	148 612	14	4 470
Ivano-Frankivsk	4 536	2 418 960	10 094	146	65 860	7	2 560
Kyiv region	7 643	3 061676	34 307	162	18 185	943	43 390
City of Kyiv	8 592	3 257604	185378	1711	1 214244	4 259	105355
Kirovohrad	1 404	560 108	8 338	47	9 270	19	2 495
Luhansk	4 251	2 027528	38 224	222	151 211	93	8 696
Lviv	12865	8010 269	47026	50	35 258	73	8 568
Mykolaiv	3 015	813 998	15 970	256	16 035	14	546
Odessa	2 417	3 696025	45 286	126	35 795	104	33842
Poltava	3 428	2 236001	17 992	70	15 779	35	3 973
Rivne	3 313	1 513397	10 584	134	84 102	25	2 312
City of Sevastopol	210	552 285	11 093	63	28 950	35	2 510
Sumy	1 333	659 863	12 461	42	19 485	9	3 770
Ternopil	9 261	4 243547	19 143	14	21 060	13	2 156
Kharkiv	3 504	3 233748	59 762	89	50 989	124	25 176
Kherson	1 797	911 801	13 857	18	11 985	67	9 073
Khmelnysky	6 500	1 555 508	11 555	74	38 497	28	5 111
Cherkasy	7 519	1 899 116	18 757	457	50 071	49	8 582
Chernihiv	4 006	1 811 563	21 907	26	5 176	24	2 167
Chernivtsi	3 205	1 429255	13 571	46	22 759	20	10 411
TOTAL	153 731	64 730 973	879 271	6 308	2 300 447	27 852	552 158
2007	206 495	93 109 597	940 265	46 530	26 870 800	24 945	921 335
%	- 25,6	- 30,5	- 6,5	-86,4	- 91,4	11,7	- 40,1

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Sport	Number of participants	Religious	Number of participants	Cultural events, shows, etc	Number of participants	others	Number of participants
220	195 621	1 326	757 527	1295	669 990	1649	568 311
603	130 000	5 550	1 310250	1617	1 818000	2248	1 069510
63	43 620	3 046	508 480	158	142 840	1244	379 927
98	297 700	4 110	3 323355	389	633 371	134	34 728
70	471 510	2 874	1 582540	374	616 180	1349	156 462
35	14 490	2 972	702 000	64	47 000	879	210 040
759	234 415	3 757	1 832430	256	205 675	254	203 558
31	136 080	2 477	1 417250	413	292 810	152	155 850
54	54 090	4 066	2 035500	65	197 700	198	63 250
142	43 005	4 317	2 073746	1699	845 385	380	37 965
228	384698	513	946 744	327	497 244	1554	109 319
53	79 890	733	187 870	311	212 425	241	68 158
256	278 670	603	368 717	1810	902 165	1267	318069
116	255 989	11606	7 111438	430	557 810	590	41 206
71	45 875	995	262 605	383	148 325	1296	340 612
23	120 530	1 001	2 050602	259	561 970	904	893 286
43	140 291	2 699	852 910	274	980 900	307	242 148
104	92 020	2 355	836 040	486	190 260	209	308 663
4	10 900	10	36 180	76	454 410	22	19 335
27	82 780	1 031	389 580	92	117 088	132	47 160
242	95 515	6 649	3 214411	299	413 600	2044	496 805
93	426 290	2 217	1 538810	394	969 480	587	223 003
131	21 453	1 028	336 205	171	369 950	382	163 135
24	85 100	4 697	1 045 180	1 471	312 660	206	68 960
124	59 948	3 175	1 039 132	224	87 570	3 490	653 813
36	118 700	2 142	759 580	203	650 964	1 575	274 976
59	36 860	2 045	1 051990	245	238 490	790	68 745
3 709	3 956 040	77 994	37 571 072	13 785	13 134 262	24 083	7 216 994
2 686	3 541 016	94 200	40 891 021	11 885	12 887 924	26 249	7 997 501
38,1	11,7	- 17,2	- 8,1	16,0	1,9	- 8,3	-9,8

2. LEGAL REGULATION OF THE RIGHT TO PEACEFUL ASSEMBLY

During 2007, not one legal act was passed to regulate freedom of assembly. Thus, just as previously, the right to peaceful assembly is solely regulated by Article 39 of Ukraine's Constitution which establishes a notification-based system, while also stipulating that the right of peaceful assembly can only be restricted by the court and only under certain circumstances.

At the same time the practice continues whereby bodies of local self-government pass «Regulations» stipulating how the right of peaceful assembly should be exercised in a given city. Such Regulations have been quashed by courts or cancelled by local councils in Kyiv, Lviv, Sumy and other cities. However in some cities, for example, Kharkiv, Kherson, Zaporizhyya, similar Regulations remain in force despite the fact that they are in direct breach of the Constitution.

In 2007 human rights defenders managed to achieve a court ruling revoking the most draconian of any such regulations passed by bodies of local self-government in Dnipropetrovsk² It is important that the court ruling stated that bodies of local self-government cannot (in accordance with Article 92 of the Constitution) pass any decisions which regulate the exercising of civil rights. Yet by 10 April 2008, despite the Constitution and the court ruling, the Dnipropetrovsk City Executive Committee adopted new «Provisions» which repeat many of the unconstitutional features of those revoked by the court.

In May the Cabinet of Ministers submitted to parliament a draft law «On the procedure for organizing and holding peaceful gatherings»³. The draft law was drawn up by the Ministry of Justice, taking into account numerous comments from the public and Council of Europe experts⁴. The text was changed many times and as a result the version which reached parliament significantly narrows the present scope of freedom of peaceful assembly and worsens the situation. For example, in breach of the Constitution, the Cabinet of Ministers draft law prohibits the holding of peaceful gatherings if the local authorities have not been notified, and introduces the concept of an «authorized body of State power» which, without court order and effectively at its own discretion, receives the power to «suspend» meetings. The draft law also establishes grounds in addition to those in Article 39 of the Constitution for restricting freedom of assembly via a court order.

Thus the version of the draft law which reached parliament runs counter to the recommendations of the Council of Europe Venice Commission and human rights organizations, for example, UHHRU.

3. COURT PRACTICE REGARDING RESTRICTION OF FREEDOM OF PEACEFUL ASSEMBLY

The unconstitutionality of the above-mentioned «Regulations» is to some extent compensated for by the fact that they are not necessarily enforced. For example, the city authorities in Dnipropetrovsk did not once in 2008 ban any rallies or demonstrations on the basis of their new Regulations adopted on 10 April 2008. Other bodies of local self-government and local authorities, in applying to the court to have peaceful gatherings banned, argued for this not on the basis of items of their own Regulations, but on the basis of Article 39 § 2 of the Constitution, i.e. suggesting that the gatherings were a «threat» to national security and to citizens' rights and health. Or they cited the invalid Decree of the Presidium of the Supreme Soviet of the USSR of 28 July 1988 «On the procedure for the organization of meetings, political rallies, street events and demonstrations in the USSR» which is not valid in Ukraine.

As a rule the courts allowed applications from the authorities and banned gatherings. Moreover in several cases they effectively created free zones, separate from the Constitution, liquidating the

² Draft law № 2450 from 6 May 2008 http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=32431.

³ Cf. «European commission for democracy through law (Venice commission) joint opinion on the draft law on peaceful assemblies in Ukraine», <http://www.helsinki.org.ua/en/index.php?id=1162206184>.

⁴ A video of these events can be viewed at: <http://www.youtube.com/watch?v=-jThHiPCcH0>.

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right to peaceful assembly and prohibiting anybody from holding any actions for a considerable period.

For example, on 27 June the Uzhhorod City-District Court banned until the end of the summer (until 31 August this year) rallies outside the Transcarpathian Regional Administration.

The court allowed an application from the City Prosecutor Oleksandr Stratyuk who referred in his application to the above-mentioned Decree of the Presidium of the Supreme Soviet of the USSR. The Prosecutor apparently lodged the application with the court at the request of the management of the Transcarpathian Regional Administration who claimed that a tent city on the square outside their building erected by the «Astreya» Association of Pensioners on 4 June was disturbing their work. It is typical that the several dozen protesters were carrying posters with slogans like «Baloha's mates behind bars», «Baloha, give the people back their stolen land» and «We demand the dismissal of the heads of the criminalized law enforcement structures». Viktor Baloha is the former Governor of the Transcarpathian region, and presently the Head of the President's Secretariat.

On 3 July the District Administrative Court, in response to an application from the Kominternivsk District Administration in the Odessa region, banned opponents of Ukraine's joining NATO, from holding any protest actions near the settlement Chornomorske for a month (while Sea Breeze military training was underway). When the anti-NATO protesters did not comply with the court order, on 7 July they were manhandled by police officers led by the Deputy Head of the Police for the Odessa region and the Head of the Department for Public Safety. Several protesters, including women, were hospitalized and several detained. However the local court on 9 July 2008 did not find grounds for bringing administrative proceedings against those detained, and they were released. The anti-NATO protests, organized by the Progressive Socialist Party (Natalya Vitrenko's party) continued, as however did the Sea Breeze exercises. It is symptomatic that the meetings in support of NATO, organized at the same time in Odessa, did not arouse protest from the local authorities, police or courts.

One should also mention a number of bans during 2008 by the District Administrative Court in Kyiv of gatherings in the capital.

For example, the court on several occasions allowed applications from the Kyiv City State Administration [KCSA] and banned protests by angry investors in the company «Elite Centre» which carried off perhaps the most flagrant building scam to date in Ukraine. The court problems of these people may be explained by the fact that the protests were planned near the President's Secretariat or near the KCSA building.

The same court on 21 November, following an application from the KCSA, banned a march by opponents of the socio-economic policy of Kyiv Mayor Leonid Chernovetsky.

The court also banned events planned by several organizations for 22 November to mark the events of November and December 2004 (the «Orange Revolution»). The court justified the ban on the grounds that on that day in the centre of Kyiv other events were planned in accordance with the Presidential Decree which proclaimed 22 November Remembrance Day for the Victims of Holodomor 1932-1933.

We must therefore state that as before, on issues involving freedom of assembly, the court remains dependent on the local and national authorities. In 2008 there was no improvement in the attitude of the local authorities and the courts to the right of citizens to peaceful assembly.

4. POLICE BEHAVIOUR DURING PEACEFUL GATHERINGS

A new Cabinet of Ministers was formed, following early elections, in December 2007. The post of Minister of Internal Affairs was once again filled by Yury Lutsenko, and his Deputy on issues of public safety became Oleksandr Savchenko, known for his crushing of «Ukraine without Kuchma» protest actions from 2000 to 2001. Compared with the positive trends in the attitude to freedom of assembly seen in 2007 under Minister of Internal Affairs Vasyl Tsushko and his Deputy Vasyl

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Fatkhutdinov, in 2008 there was an increase in violations of citizens' right to peaceful assembly by Internal Affairs structures.

Analysis of police behaviour during peaceful gatherings indicates at least four types of violations of the right to peaceful assembly and provisions of Ukrainian legislation.

4.1. UNLAWFUL USE OF FORCE

There were very many cases where the police or private security firms with total lack of action from the police applied force and special means against participants in peaceful gatherings.

◆ On 16 March the police used force and detained around 10 picketers protesting against construction work on the territory of the Zhovtneva Hospital in Kyiv. They were freed only after the former First Deputy Minister of the MIA Gennady Moskal interceded, using very strong language.⁵

◆ On 7 June the police, after a protest action had ended, detained 9 protesters against construction work at 14 Umanska St. There were plans to initiate a criminal investigation against them under Article 296 of the Criminal Code («Hooliganism»), however following the intervention of human rights activists and the Human Rights Ombudsperson Nina Karpachova, they were all released;

◆ On 2 October on Pervomaiska St in Kyiv a security firm used force against people protesting over what they consider illegal building work;.

◆ On 17 October the police broke up a protest action in the Crimea against distribution of land sites, and in Kyiv against the seizure of the premises of a civic organization; 27 people were detained;

◆ On 18 October the police in Kyiv used force to stop a march by supporters of the Ukrainian Resistance Army [UPA] which had been banned by the court. 142 people were detained, and tear gas was used.⁶

◆ On 9 November the police broke up a protest against an increase in the cost of travelling on the Kyiv metro; 11 people were detained;⁷

The police also used force against football fans of the teams «Dnipro» in Oleksandriya, «Arsenal» in Lviv, «Shakhtar» in Donetsk and «Metalurg» in Zaporizhyya. Hundreds of people were detained and beaten.

Bearing in mind that we have listed only the most prominent events, a clear trend emerges – throughout the year, though especially during the last months law enforcement officers began reacting more brutally to citizens' gatherings.

With regard to some of the events mentioned above, checks were carried out as to whether police behaviour had been lawful by either the police themselves or the Prosecutor's office (in response to demands from the public). Only in the case of the incident on Pervomaiska St. did the internal investigation undertaken by the Central MIA Department in Kyiv find that there had been infringements by police officers. 15 officers faced disciplinary proceedings, and the security firm lost its licence. No criminal proceedings were initiated. In the other cases, police officers from the MIA Department of Public Safety did not find any infringements in the actions of their colleagues from the Department of Public Safety. Following on from them, the Prosecutor's office, using material from the internal police investigation, found no grounds for Prosecutor's reaction.

⁵ Confirmation has been found of the use by «Berkut» of gas against UPA supporters // Internet publication «Korrespondent.net» 22 October 2008, <http://korrespondent.net/ukraine/events/623158/?p=3&mode=DESC>, as well as information on this at: <http://korrespondent.net/ukraine/events/620934>, <http://korrespondent.net/ukraine/events/619196>. A video clip can be viewed at: <http://korrespondent.net/video/ukraine/623049>. Information about the ban at: <https://www.helsinki.org.ua/index.php?id=1223979834>.

⁶ A video of these events can be viewed at: <http://www.youtube.com/watch?v=Mp7C5Naix4>.

⁷ Journalist imprisoned for 24 hours for clapping, 10 November 2008, <http://www.khpg.org/en/index.php?id=1226323919>

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However such response, or more accurately, lack of response, does not mean that the police behaviour was lawful, and that it does not require assessment from human rights groups. At the end of the day the authorities always justify the actions of their enforcement bodies.

So when exactly, according to Ukrainian legislation, do the police have the right to apply force against demonstrators? Article 12 of the Law «On the police», entitled «Conditions and limits of application of measures of physical influence, special means and firearms» states the following:

«The police have the right to apply measures of physical influence, special means and firearms in cases and according to rules of procedure foreseen by this Law.

The use of force, special means and firearms must be preceded by a warning of the intention to use them if circumstances allow. Force, special means and firearms are used without warning if there is a direct threat to the life or health of members of the public or police officers.»

From the cases described above, the police did not identify themselves and did not warn of their intentions during the events of 16 March, 7 June, 17 October, 9 November and in all incidents involving football matches. Furthermore, on 17 October police officers refused to speak with the protesters when the latter tried to find out what exactly it was that the police wanted. In other cases (on Pervomaiska St and near the Zhovtneva Hospital) police officers did not stop the use of force against demonstrators by security firm employees or «unidentified individuals» whose actions directly fall under the definition in Article 296 of the Criminal Code – group hooliganism.

With regard to people detained, police officers drew up protocols under Article 185 of the Code of Administrative Offences (persistent failure to obey the lawful demands of a police officer). Yet what kind of failure to obey can be in question at all if these demands, lawful or not, were not even expressed aloud?

The fact that the use of force by the police and detention of participants of peaceful actions were unlawful is confirmed by the following.

No charges were brought against those taking part in the protest of 17 October (27 people) nor was any protocol drawn up, and all were released from the Holosiyivsky District Police Station within an hour. Furthermore, officers from the special unit «Berkut» who actually carried out the detentions refused to write reports about infringements by the protesters. Later when the case became publicized the police management decided to fabricate protocols under Article 185 since otherwise it would follow that the people had been detained without any grounds. Protocols were thus drawn up and passed to the court with respect to 10 protesters, (none of those detained has any information regarding administrative proceedings brought against them and who these 10 people are is not known). Due to infringements of legislation on drawing up protocols, the court returned them to the district police station, and it is not known what happened to the protocols later.

Thus police officers acted in breach of legislation during the detention and drawing up of protocols, yet this failed to elicit an appropriate response from either the MIA management or from the Prosecutor's office.

While detaining those protesting against the price increases on 9 November, police officers clearly recalled their previous mistakes and drew up protocols under Article 185 of the Code of Administrative Offences. Then 12 people (11 detained and a journalist from the Internet publication «Ukrainska Pravda» who was not detained), at the ruling of the Shevchenkivsky District Court in Kyiv received from 1 to 3 days administrative arrest. A characteristic feature of this court hearing was the refusal by the court to listen to the testimony of witnesses to the incident. The only evidence, it transpired, for the court was the police protocol.

However it would have been worth listening to the witnesses. The judges would have learned that on both 9 November, and 17 October, most of those who had protocols drawn up were people who did not take part in the protests but were simply nearby. For example, on 17 October the police detained an employee of the civic organization «Union of small and medium-sized privatized enterprises» who was unfortunate enough during the protest action to be working in his office which was next to where the protest was taking place.

4.2. INACTION

During peaceful gatherings the police are obliged to ensure public order and stop the actions of those who obstruct the gathering or even use force against its participants. However the police on several occasions simply watched provocations or attacks on members of the gathering. This was the case many times in Odessa at rallies of extreme rightwing groups against the erection of a monument to Catherine the Great and at other public events in the South of the country. On 27 November unidentified individuals used force against demonstrators protesting against building work on the territory of the Zhovtneva Hospital in Kyiv. The police simply watched in silence.

4.3. UNLAWFUL STOPPING OF PEACEFUL GATHERINGS

What is involved in the final analysis is not only the unlawful use of force by police officers, but also their violation of freedom of peaceful assembly, as guaranteed by Article 39 of Ukraine's Constitution and Article 11 of the European Convention on the Protection of Human Rights and Fundamental Freedoms. The Constitution stipulates that only the courts may restrict freedom of assembly. In all the above-mentioned cases there were no court orders restricting or banning meetings or demonstrations. There was also no real risk of crimes or mass disturbances. The police therefore in breaking up protest actions and thus stopping them without the appropriate court order acted in breach of the Constitution and Article 11 of the European Convention on Human Rights.

Furthermore, on 18 October the police demanded that the UPA supporters taking part in the demonstration change the route which they had notified the Kyiv City State Administration of in advance, although neither KCSA nor the court had made any objection. The demands of the police were clearly unlawful since in this way the organizers were being asked to break the rules of holding a meeting by acting in breach of the information provided about it.

On 22 July a representative of SBU [the Security Service], together with the local police, obstructed an anti-NATO demonstration in the town of Henichesk in the Kherson region. Notification of the demonstration had been provided in the proper manner and there had been no court ban. Yet the demonstration did not take place due to flagrant interference by the enforcement bodies, for example, in detaining one of the protest organizers, freed short afterwards following the intervention by human rights organizations without any charges being laid by either the MIA or the SBU.

4.4. UNLAWFUL COUNTERING OF JOURNALISTS' ACTIVITY

Last, but not least, during these cases of gatherings being broken up and people detained, the police, representatives of a regime which has declared its commitment to freedom of speech, showed the most «attention» to journalists. It was futile to show police officers their journalist ID and wear journalist badges. On 17 October 8 journalists were detained, and on 9 November – three, all carrying out their professional duties at a protest action. On 2 October one journalist ended up with a broken arm.

A journalist from «Ukrainska Pravda» Vitaly Selyk has been placed under custodial arrest for 24 hours accused of resisting the police (Article 185 of the Code of Administrative Offences). Selyk was detained on Sunday near the Kyiv City Administration building when he decided to follow the protest action against the increase in the fares on public transport. Having arrived at the place where the protest was taking place he saw two police cars hit each other and clapped. He was arrested by a police officer.⁸

Taking into account the above, one can assert that in the actions of the police in unlawfully dispersing protest actions and detaining protesters, there are elements of the crimes set down in Articles 340 (unlawful obstruction of meetings and demonstrations), 170 (obstruction of the law-

⁸ Draft law № 2450 from 6 May 2008 http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=32431.

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ful activities of citizens' associations) and 365 (exceeding ones power or duties) of the Criminal Code.

In all cases mentioned in this unit, the gatherings were of a largely social and not political nature. And in all cases the police were on the side of the authorities or the builders.

5. THE POLICE AND THE PUBLIC

Unlike 2007 when at the suggestion and with the participation of the public, the MIA carried out investigations into infringements of freedom of peaceful assembly, in 2008 all such suggestions were ignored by the MIA management. This was even when a decision to investigate the incidents of October and November was taken by the MIA Public Council.

In addition in 2008 the MIA management ignored the «Method guidelines on safeguarding public order during mass-scale events and actions», drawn up in 2007 by the Department of Public Safety together with members of the MIA Public Council. Instead, in 2008, « Method guidelines. Theoretical and organizational principles for preventing and stopping group infringements of public order and mass riots» were passed with the content being based not on how the police should protect the rights of citizens to peaceful assembly, but how to counter protest actions.

At the beginning of 2009 the MIA carried out police training exercises in the Crimea again not on the subject of how the Internal Affairs bodies should safeguard citizens' rights, but on how to use teargas and light and noise grenades.

6. RECOMMENDATIONS

1) Pass by Order of the Minister of the MIA and register with the Ministry of Justice «Method guidelines on safeguarding public order during mass-scale events and actions» drawn up in cooperation with members of civic organizations.

2) Set up MIA commissions with the participation of members of the public to investigate incidents during peaceful assembly which involved the police. The results of such commissions should be made public.

3) Carry out training of officers from special units and patrol squads of law enforcement agencies in the following: ensuring public order during peaceful gatherings; protecting those participating in peaceful gatherings; the grounds and conditions for using special means and physical force; ensuring independent control over how they use their authority during peaceful gatherings.

4) Translate into Ukrainian the Judgments of the European Court of Human Rights on Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms pertaining to the freedom of peaceful assembly and provide copies of these translations to all district administrative courts, the Higher Administrative Court and the Supreme Court.

5) Taking into account case law of the European Court of Human Rights, prepare and run a training course for judges of local and appeal courts of all 27 regions of Ukraine as to applying Article 11 of the European Convention for the Protection of Human Rights in court practice with regard to applications from the authorities to ban peaceful gatherings.

6) The Supreme Court should summarize court rulings in cases involving restrictions on the right of peaceful gatherings and demonstrations.

7) Pass the draft law on holding peaceful gatherings drawn up by Ukrainian human rights organizations in which the case law of the European Convention for the Protection of Human Rights and the positive practices in democratic countries are taken into consideration. It should be borne

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in mind that the draft law of the Cabinet of Ministers № 2450 from 6 May 2008⁹ does not comply with international standards¹⁰ and the Constitution..

8) Bodies of local self-government and public authorities (in particular in Kharkiv, Kherson, Zaporizhya and Poltava) should revoke any Regulations on rules and procedure for holding peaceful gatherings and using «small architectural forms» and bring other decisions into compliance with the Ukrainian Constitution and Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Prosecutor's Office of Ukraine should appeal through court procedure such decisions of local authorities where the latter have failed to respond.

9) The Human Rights Ombudsperson should pay more attention to infringements by local authorities and law enforcement agencies of the right to peaceful assembly.

10) Organizers of peaceful gatherings are advised to use court procedure to complain against any rulings by first instance courts restricting freedom of peaceful gatherings, and also against illegal actions of law enforcement bodies.

⁹ «European commission for democracy through law (Venice commission) joint opinion on the draft law on peaceful assemblies in Ukraine», <http://www.helsinki.org.ua/en/index.php?id=1162206184>.

¹⁰ By Volodymyr Yavorsky, UHHRU Executive Director.

X. FREEDOM OF ASSOCIATION¹

1. OVERVIEW

There were no major changes in the situation with freedom of association in 2008. Current legislation on associations, passed in the main at the beginning of the 1990s, has long failed to meet modern conditions, the needs of civic society as well as international standards, in particular, Article 11 of the European Convention on Human Rights.

In April 2008 the European Court of Human Rights issued its Judgment in the Case of *Koretskyy and Others v. Ukraine*², in which it found that Ukraine had violated the applicants' right of association. The Court found that Ukraine's law on citizens' associations did not meet the quality requirements demanded by the European Convention on Human Rights, and that certain restrictions were not necessary in a democratic society.

The following provisions and administrative practice, for example, unwarrantedly restrict freedom of association:

- Restrictions regarding the aim in creating an association;
- Restrictions on possible legal forms of association and legally stipulated in advance means of management and structure of the association though the implementation of the mandatory principle of «democratic management»;
- Restrictions on many forms of associations' activities;
- Restrictions on the territorial activities of associations (territorial status of an association);
- Discriminatory and excessively complicated procedure for registration of associations;
- Restrictions on membership and taking on volunteers due to a broad interpretation of the mandatory principle of equality of all members of the association;
- Restrictions on business activity and on using the profits received for the activity of the association as per articles of association.

However positive moves are apparent, linked with the completion of a draft law «On civic organizations»³ drawn up by the Ministry of Justice together with a working group which included members of the public. The draft law prepared is a significant step towards ensuring freedom of association and on the whole complies with international standards. The Ministry of Justice submitted it to the Cabinet of Ministers on 10 October 2008 (letter № 9138-0-4-08-18) and it was approved at a meeting of the latter on 22 October with comments taken into consideration. It was later reworked in the Ministry of Justice and on 31 October once again submitted to the Cabinet of

¹ Judgment from the European Court of Human Rights from 3 April 2008 in the case of *Koretskyy and Others v. Ukraine* (Application № 40269/02) available at: <http://www.echr.coe.int/ECHR/EN/Header/Case->. See also preliminary comments on the case in «Human Rights in Ukraine» – 2006 after the case was declared admissible

² The new name and version of the current law «On citizens' associations».

³ Draft Law № 3371 from 14 November 2008 «On civic organizations», http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=33677.

Ministers, which tabled it for consideration in the Verkhovna Rada.⁴ Although it requires certain insignificant changes and amendments, the bill is basically ready to be passed, however there is little knowledge of it and understanding of its provisions among members of the public. . The Supreme Court also lacks knowledge and understanding of it, judging by the opinion⁵ it published on the draft law where the majority of points run counter to the case law of the European Court of Human Rights.

2. FORMATION OF ASSOCIATIONS

One of the most serious problems remains the considerable obstacles which the State puts in the way of those creating associations. These obstacles are to a large degree artificial, being the result of numerous clashes in legislation and do not comply with European human rights standards.

The timescale for registration when it comes to most associations (charitable, religious, international civic organizations, etc) is discriminatory. Such discrimination is fixed at a legislative level, but is exacerbated in practice. For example, a profit-making enterprise is registered within 14 days by virtually all bodies and can begin functioning. The period of registration for a civic organization may stretch from one month to nine. This is due to numerous cases where the authorities fail to meet time limits, to double State registration and to complicated procedure for receiving non-profit making status, with the latter making it possible for an organization to not have income taxed (this takes between one and two months). Difficulties with procedure for civic formations, with these being more complicated than for business structures, prompted the Ministry of Justice to prepare for the Cabinet of Ministers an initiative on simplifying the procedure for registering associations of citizens and other civic formations. The draft Law «On amendments to some laws regarding registration of legal entities» was submitted by the Ministry to the Cabinet of Ministers on 8 January 2009. The draft law proposes to replace the system of various registering bodies (executive committees, State administrations) with a single registering authority – offices of the Ministry of Justice, with single timeframes also proposed for all registration procedures. This draft law is extremely progressive and could resolve many problems with registration of organizations

However difficulties with registration of organizations are not only to be attributed to the exceptionally bureaucratized procedure for registration in the Ministry of Justice and its territorial offices. Many problems arise at the next stage – registration of the organizations in the State Tax Administration and inclusion in the Register of non-profit making organizations in order to receive concessionary tax and reporting status

The District Administrative Court in Kyiv on 24 March 2008 issued a ruling allowing a claim brought by the Credit Union «NSPU» against the State Tax Inspectorate in the Pechersky District of Kyiv, and revoking Decision № 206/15-02 from 6 December 2007 which refused to add the Union to the Register of Non-profit-making Organizations (Institutions). In this case the tax officials refused to grant the Credit Union non-profit making organization status on the grounds that the source of its income was supposedly wider than that stipulated by the law on taxation of the profits of businesses. However the court found that the tax officials were not authorized to check the articles of association of legal entities, and that their duty lay in formally determining compliance of the articles of association with the demands of the law on taxation of the profits of businesses. However in practice instances remain widespread where the tax officials broaden the range of grounds for granting non-profit making status.

The bodies which register organizations (the Ministry of Justice, its local departments and bodies of local self-government) systematically interfere in the internal management of organizations during registration

⁴ Supreme Court website , <http://www.scourt.gov.ua/clients/vs.nsf/81b1cba59140111fc2256bf7004f9cd3/3b26d10016aedbd3c2257535004885c6?OpenDocument>.

⁵ Judgment from the European Court of Human Rights in the case of *Koretskyy and Others v. Ukraine* .

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Legislation is not sufficiently clear in defining either the degree to which failure of the charter to comply with legislation is admissible, or clear grounds for refusing to legalize the organization. This gives huge scope for manipulation by the authorities which many of them use. We should add that discrepancies in the articles of association have no relation to the real activities of the organizations involved, and the checking of the articles is therefore of a purely formal nature.

An important problem remains the inability to create different types of associations as one chooses. One cannot, for example, create associations of legal entities and individuals, associations of citizens' associations and other types of organizations, such as charities, associations of charities or charities founded in accordance with a will, and others.

Perhaps the greatest problem for human rights organizations remains the constitutional provision that a civic organization may only be involved in defending the rights of its own members. This provision is reflected in the Law on Citizens' Association and leads to considerable restrictions on their activities. It effectively prohibits organizations formed for the benefit of the public since charities are not entitled to engage in human rights protection at all. This is one of the most common grounds for refusing to register an organization. It should be noted that on the grounds on provisions in the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Ministry of Justice has removed these restrictions in its draft law on civic organizations.

There are still considerable restrictions on types of activities which associations can engage in. Areas of activity, such as publishing, expert assessments and many others, not clearly permitted by laws, are not available to associations. This restriction has been found by the European Court of Human Rights to not comply with Article 11 of the European Convention.⁶

Another problem is the maintenance of an association's territorial status with this limiting the association's activities exclusively to the place where it is registered – a village, city, district of a city, district of a region, etc. There are no such restrictions on profit-making organizations this being yet more evidence of discrimination of restricting legislation against associations. This restriction was also found to violate Article 11 of the European Convention by the Court in Strasbourg.⁷

Major restrictions remain on the creation of associations by foreign nationals or stateless persons, even when these are legally and permanently resident in Ukraine. They may not, for example, form trade unions or religious organizations. Among other things, this is not in line with the European Convention on the Legal Status of Migrant Workers which Ukraine has ratified. That recognizes the right of foreign nationals to create civic organizations except organizations created to protect their economic and social rights, not counting political parties and trade unions. A draft law has, however, been registered in parliament proposing amendments to legislation in connection with ratification of this agreement.

There is still no full register of all citizens' associations. Effectively only exact information about legalization is available where this has involved the Ministry of Justice, however there is only approximate information regarding local associations. The Ministry of Justice decided not to create only a register of civic associations, but rather a register of legalized civic formations, with open access to this information: political parties and their structures, civic and charitable organizations, courts of arbitration, etc. In an Order from 19 December 2008 № 2226/5, the Ministry of Justice approved Regulations on a Single Register for civic formations. The Minister is planning that technical work on implementing the Single Register will be completed by 31 March 2009. Unimpeded provision of information from the Register in response to requests from individuals and legal entities is envisaged from 1 October 2009.

⁶ Ibid.

⁷ Information as of 1 January 2009 generalized from that provided by the Ministry of Justice www.minjust.gov.ua. The information is, moreover, fairly contradictory. There are, for example, discrepancies in information releases from the press centre for different periods, as well as in information from the reports on the work of the Ministry of Justice over recent years

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According to figures from the Ministry of Justice the number of registrations, with inclusion in the Single State Register of Citizens' Associations and Charitable Organizations fell in 2008 by 29.9%.

During 2008 the Ministry of Justice legalized 237 civic organizations (in 2007 – 277), and also registered (noted) amendments made to the articles of association of 322 civic formations (against 336 a year earlier), registered the symbols of 28 (against 37) civic formations, and 10 (against 18) permanently functioning courts of arbitration, 52 (against 82) charitable organizations and 20 (against 4) political parties.

In 2008 territorial offices of the Ministry of Justice legalized over 2.5 thousand local citizens' associations (about the same as in 2007) and over 1,000 (against 900) branches of all-Ukrainian and international civic organizations. They registered over 700 local charities (around 700 in 2007), approximately 5 thousand (around 2.3 thousand) structures of political parties, and legalized via written notification of creation 13 thousand (against over 4.5 thousand) primary centres of political parties.

Statistics of associations' registration

Type of association	2005	2006	2007	2008	Total registered
Political parties	24	12	4	20	160
Structural branches of political parties	around 99 700	around 20 400	over 3 200	around 5 000	around 160 000
All-Ukrainian charities	67	86	82	52	1 002
Local charities	over 700	over 400	400	over 700	over 4 700
Civic associations with all-Ukrainian status	181	265	277	237	2 772
Local civic association	over 2 400	over 1 600	over 1 500	over 2 500	more than 24 500
All-Ukrainian trade unions legalized by the Ministry of Justice	4	4	11	no informa- tion	113
All-Ukrainian associations of trade unions legalized by the Ministry of Justice	1	1	0	no informa- tion	14

According to information from the State Committee of Statistics, obtained from the Single State Register of Businesses, Organizations and Institutions (SSRBOI), the number of organizations with legal entity status is absolutely at variance with Ministry of Justice figures. For example, as of 1 January 2009 the SSRBOI had registered 16,719 parties and their branches, 59,321 civic organizations, 21,425 religious organizations and 11,660 charities.⁸

In 2008 Central Departments of Justice refused to legalize over 800 civic formations, and territorial offices of the Ministry turned down over 400 civic formations. The largest numbers of refusals during 2008 were issued by the Central Departments for the Cherkasy, Donetsk, Dnipropetrovsk, Kyiv and Odessa regions, the city of Kyiv and the Crimea.

There is no information as to the reasons for such refusals.

A separate problem is with the formation of trade unions, the legalization of which encounters certain artificial administrative obstructions.

Many problems also arise when registering religious organizations, and this receives separate attention in the section «Freedom of thought, conscience and religion».

⁸ Number of subjects of SSRBOI according to their field of economics, and their organizational legal forms, as of 1 January 2009, reports from the State Department of Statistics http://www.ukrstat.gov.ua/operativ/operativ2009/edrpoj/edrpoj_u/opfg/arh_ks_za_opf09.htm.

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3. CHECKS ON THE ACTIVITIES OF ASSOCIATIONS

During 2008, the Ministry of Justice in implementation of its controlling duties, checked the adherence to their articles of association of 65 civic organizations legalized from 1995-1996 (against 9 in 2007). Territorial offices of the Ministry checked activities as per their articles of association of around 7.3 thousand civic associations (against 6.5 thousand in 2007). Around 730 warnings were issued (against around 550 in 2007). These activities were carried out most actively by the main departments of justice in the Kyiv, Lviv, Cherkasy, Donetsk and Odessa region, the Central Department of the Ministry of Justice for the Crimea, the Zhytomyr and Kherson regions.

In 2008 the existence of structural creations was checked of the following political parties: «Great Ukraine», «European Party of Ukraine»; «Party of Humanists of Ukraine»; «Political Association «Direct Action». According to the results of the checks, standard failings were uncovered regarding observance of legislation, the provisions of their articles of association. The heads of the political parties were sent recommendations on eliminating the infringements.

During the last two years the Ministry of Justice, in the course of checks as to whether political parties are observing the demands of their own acts of association with regard to formation of delegations for higher managerial bodies (congresses, conferences), has uncovered failures in the activities of 18 political parties (10 in 2008 and 8 in 2007).

The forms of reporting for associations to state bodies of statistics have become stricter. From 1 January 2008 the central statutory bodies of legalized civic organizations must by 10 March of each year submit extended reports to the statistics offices according to where the organizations are located. Besides information about the number of members, branches, and also use of funding, civic organizations must indicate how many meetings, seminars, training courses or other measures were carried out in accordance with the objectives of their articles of association⁹

4. TEMPORARY BAN ON TYPES OF ACTIVITIES AND THE LIQUIDATION OF ASSOCIATIONS

On 6 November the Kharkiv District Administrative Court, on the basis of material from the SBU [Security Service] allowed the application of the Kharkiv Regional Prosecutor to forcibly dissolve the Kharkiv regional civic organization «Eurasian Youth Union»¹⁰ No official reason was given. In an interview with the Head of the SBU it was stated that the action was «on the basis of investigative material which we collected and submitted.»

It is interesting that despite its non-recognition of Ukraine's independence, this organization did not call to violence or other unlawful means of changing the territorial system. It spoke out only for a change in the system which clearly does not contravene legislation.

In 2007 the activities of this organization were temporarily suspended as we discussed in more detail in last year's Report. Then effectively the Union's activities was banned on the formal grounds of non-observance of the territorial restriction of the activities of a civic organization, specifically for holding a picket of the SBU in Kyiv although according to legislation the organization was entitled to act only in the Kharkiv region.

Such grounds for suspending an organization are a clear violation of freedom of association, as has already been confirmed in the Case of *Koretskyy and others v. Ukraine*.

⁹ Order of the State Committee of Statistics № 365 from 01.10.2007 «On approving instructions regarding filling in the forms of state statistical surveillance № 1-civic organization, «Report on the activities of civic organizations» // Legislation for organizations and civic society. Electronic bulletin № 10, October 2007 <http://www.ucipr.kiev.ua>.

¹⁰ Court passes ruling on forced dissolution of the Kharkiv civic organization «Eurasian Youth Union» // Notification from the SBU Press Centre from 7 November 2008 http://www.sbu.gov.ua/sbu/control/uk/publish/printable_article?art_id=82834.

Previously, on the basis of material from SBU, a court in December 2006 banned the activities of the Sevastopol youth organization «Proryv» [«Breakthrough»] and in November 2007 the Donetsk Court of Appeal upheld the ruling of the Donetsk District Administrative Court regarding the forced dissolution of the organization «Donetsk Republic».

The leadership of SBU also regrets that it does not have more power to suspend the activities of organizations which it does not like:

«If, say, the Progressive Socialist Party of Ukraine is holding so called actions against Ukraine's foreign policy course, these protest actions, radical in their nature, are effectively behaving like parasites on our democratic laws. We should certainly not persecute people or organizations for their words. However in a normal law-based society organizations are well aware that it is unacceptable to destabilize and destroy one's own country, abusing freedom of speech. Obviously that is the sign of the high level of legal culture of party leaders and the heads of civic organizations.

We do not have the powers which we had under Soviet legislation. We don't have the right to persecute nongovernmental organizations or work with political parties. At the same time all the destructive anti-Ukrainian activities are presently concentrated under the protection of parties or organizations. That is our problem. We therefore resort to prophylactic, explanatory measures, although it's long time that the fiscal authorities carry out a thorough check of the sources of income and spending in those political associations. For example, why there's always a cynical assurance of cash in the «protest actions» they organize.»¹¹.

Such calls to check activities permitted by law, like the «mythical» prophylactic measures with regard to activities not prohibited by law and carried out in accordance with the law, cannot but arouse concern.

5. PARTICIPATION IN ASSOCIATIONS: JOINING, SANCTIONS FOR PARTICIPATION, FORCED MEMBERSHIP

There were no cases recorded during the year of forced membership in associations or of sanctions for participating.

However problems do exist with regard to membership of trade unions, with the heads of independent or newly formed trade unions experiencing persecution.

6. RECOMMENDATIONS¹²

1. Change the current law «On citizens' associations» by passing a law «On civic associations»¹³, which should be in line with the requirements of the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Recommendations of the Committee of Ministers of the member states of the Council of Europe «On the legal status of nongovernmental organizations in Europe» (CM/Rec(2007)14). The following, among other measures, are needed:

– Make the registration procedure cheaper, quicker and non-discriminatory as compared with profit-making organizations.

– Abolish double registration of civic organizations by concentrating all registration functions on the Ministry of Justice and its local departments, and also cancel double payment for registration

¹¹ Valentin Nalyvaichenko: «Time to de-KGB-ize the country» // The newspaper Silski Visti» № 48 and 49, 20 and 24 April, respectively http://www.sbu.gov.ua/sbu/control/uk/publish/printable_article?art_id=78253.

¹² Some of these recommendations, as well as their more extensive presentation, are contained in the Strategy for promoting the development of civic society through a strategy of promotion by State executive bodies approved by Cabinet of Ministers Instruction № 105-I from 21 November 2007..

¹³ Draft Law № 3371 from 14 November 2008 «On civic organizations», http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=33677

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via the introduction of a single registration fee. This is already in fact allowed for in the draft law drawn up by the Ministry of Justice and submitted for consideration to the Cabinet of Ministers;

- Remove restrictions on types of activities for associations.
 - Recognize the right of civic organizations to not only defend the rights and interests of their own members, but also allow them to engage in any activities helping other individuals or society as a whole;
 - abolish territorial restrictions on associations' activities (the all-Ukrainian status may remain, however it should not lead to a restrict of the territory of local associations, while the procedure for gaining all-Ukrainian status should be voluntary.
 - Provide the possibility of creating different forms of associations (associations of legal entities and individuals, associations of citizens' associations and other types of organizations, for example, charities, etc)
 - Abolish the obligation for local branches of civic organizations to register (we are not speaking of associations and unions of civic associations where the members are independently legalized citizens' associations);
 - Recognize the right of civic organizations to engage in economic activities without the purpose of receiving and dividing between the founders of the profits, but rather directed the profits towards fulfilling activities as per the articles of association
2. Introduce amendments to the Law on publishing activities in order to enable non-profit making organizations, and not only businesses, to establish publishing houses.
 3. Introduce amendments to the law on charities and charity activities in order to:
 - harmonize the procedure for their registration with civic associations and other legislation, and also abolish double registration;
 - Cancel territorial restrictions over the activities of charitable organizations;
 - Make it possible to create other forms of charities, for example, funds (including those created in accordance with a will.
 4. Remove Article 186-5 which establishes liability for the activity of unregistered civic organizations from the Code of Administrative Offences.
 5. Sign and ratify the Convention on recognizing the legal rights of an international nongovernmental organization (ETS № 124), which came into force on 1 January 1991.
 6. Bring legislation, in particular the law on citizens' associations, on freedom of conscience and religious organizations with norms with the European Convention on the Legal Status of Labour Migrants, ratified by parliament in April 2007.
 7. Abolish the practice of licensing social services which are provided by non-profit making organizations, and not from State or local authority budgets. Involve nongovernmental non-profit making organizations in providing social services paid for by the State and local budgets
 8. Legislate the conditions of State assistance to nongovernmental non-profit making organizations, for example, stipulating the criteria for such assistance and the procedure for receiving it. Make the procedure for providing and using State funding directed at civic associations for carrying out State programmes competitive and open.
 9. Stimulate charitable or other non-profit-making activity by providing tax incentives solely on condition that charitable or other socially significant activity is carried out, and not by virtue of having created a specific type of organization which may not even provide such services.
 10. Ensure the functioning and accessibility of registers of citizens' associations, charities, religious organizations, trade unions and other associations.

XI. FREEDOM OF MOVEMENT AND PLACE OF RESIDENCE¹

There were no significant changes as regards observance of the right to freedom of movement in 2008. The changeover from the system of «propiska» to one of registration continues to cause problems with a lot of procedure still not agreed. There are problems with the issue of both internal passport, and that for travel abroad, with this restricting freedom of movement. The difficulties encountered by homeless people still remain unresolved although there is some progress on this issue.

1. FREEDOM OF MOVEMENT

Due to the drawn-out nature of many criminal investigations which can sometimes drag on for many years, there has long been a problem with the use of signed undertakings not to abscond as a preventive measure. The person is unable to go outside the administrative territorial unit where s/he is registered. The longer such investigations last, the more difficult it becomes to justify the State's interference in the individual's freedom of movement.

For example, Mr. H. in the Cherkasy region is accused of causing medium seriousness bodily injuries to his sister, this having taken place according to the investigators on 27 August 2001. The police have on many occasions tried to close the criminal file, including because of a time bar on bringing criminal charges. However each time the court has revoked the resolution to terminate the case for various reasons. The investigation into this case has thus dragged on for 8.5 years. The accused with small breaks has already spent 8 years bound by an undertaking not to leave the place. His daughter and grandson live abroad however he has not been able to visit them all this time since he cannot obtain a passport for travelling abroad.

There are considerable problems restricting freedom of movement with the issue of both internal passports and those for travelling abroad.

The practice as regards issue of passports for travel abroad remains unsatisfactory: it takes too long, requires overcoming bureaucratic procedures, is expensive and not accessible for many citizens. It also remains uncoordinated which generates a large number of abuses and corruption in this area. For example, there are numerous cases involving demands for documents not set out in legislation (for example, insurance policies) or payment of services also not envisaged by legislation, such as a fee for a note confirming that a person does not have a criminal record.

One other problem was added to these – the lack of proper funding for the printing of passport forms. Due to arrears before the private concern «SSAPS» [Single State Automated Passport System) which effectively controls the entire process of issuing passports for travelling abroad, in summer problems again arose, with hiccups in the issue of passports. It was only in July that the Ministry of Internal Affairs [MIA] received an additional 20 million UAH for these expenses.² Furthermore, the Minister of the MIA called on people who were asked to pay extra for services

¹ By Volodymyr Yavorsky, UHHRU Executive Director

² The MIA has regulated smooth issue of passports for travel abroad // The Department of Public Relations of the MIA, 09.07.2008, http://mvs.gov.ua/mvs/control/main/uk/publish/printable_article/123473.

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not set out in legislation to turn to the Internal Security Service of the MIA, or to the Prosecutor's Office.³

During all of last year 1.3 million passports for travel abroad were issued. Over 50 thousand people in a hurry had this done within three working days. 150 thousand people received documents within 10 working days, while most had documents prepared within a month. Most such passports were issued last year in Kyiv, and in the Dnipropetrovsk and Lviv regions.⁴

There are also problems with internal passports. The timeframe for issuing them is often breached with this restricting people's rights since without an internal passport they can't receive registration or carry out many other actions related to this. In past the police explain this as due to the lack of passport forms. However the problem often lies elsewhere. There remains a system of passport offices which are often located in housing and communal services [ZHEK] which are presently ordinary business enterprises. Making use of this, the passport offices very often refuse to issue an internal passport, its replacement, provide registration according to where somebody lives, take them off the register or issue various certifying documents due to arrears before the ZHEK for communal services. This practice is clearly illegal however it is abetted by the lack of control over such passport offices by the MIA.

Problems have remained with the issuing of a sailor's identification document which substitutes a passport for this group of citizens. It is effectively the SBU that gives permission to issue such an identification document which does not comply with legislation and restricts the person's rights.⁵

Conflict arises periodically over refusals by Ukraine to admit certain foreign nationals.

*In view of the fact that Russian national Yury Luzhkov did not adhere to the conditions of the warning from the SBU [Security Service of Ukraine] regarding the unacceptability of behaviour bringing harm to Ukraine's national interests and its territorial integrity, today, on 12 May, Y. Luzhkov was prohibited from entering Ukraine. At the present time SBU, as part of this case, has established all the circumstances of the provocative remarks of a political nature made by Y. Luzhkov in connection with the possible involvement of this foreign national in laundering money in Ukraine, including in Sevastopol. SBU as part of preventive measures has also issued a written warning to Russian national K. Zatulin regarding the unacceptability of public statements which could violate Ukraine's national legislation.*⁶

In total during 2008 border guards refused to allow 24,760 people to enter Ukraine.⁷

The migration growth of the population having changed their permanent place of residence, lowered in January – November 2008 as against an analogous period in 2007 from 13.2 thousand to 12.7 thousand people. The amount of migration movement is continuing to fall. For example, the number of people who came to the country to live permanently fell from 40,8 thousand to 33.5 thousand, while the number of those who left dropped from 27.6 thousand to 20.8 thousand. The vast majority of immigrants (80.2%) came from CIS countries. Among those who left Ukraine 65.8% went to CIS countries and 34.4% to other countries.⁸ This in part breaks down the stereotype circulated in the media that the country is becoming ever more attractive for foreigners and that there is a significant rise in the number of migrants. Although these figures do not include illegal migrants, the latest figures on movement across the State border do not significantly alter the findings.

³ The problem around issue of passports for travel abroad has been resolved // Department of Public Relations of the MIA, 16.07.2008, http://mvs.gov.ua/mvs/control/main/uk/publish/printable_article/125719.

⁴ 1.3 million passports for travel abroad were issued last year // Department of Public Relations of the MIA, 29.01.2009, http://mvs.gov.ua/mvs/control/main/uk/publish/printable_article/175824.

⁵ More detail about this can be found in «Human Rights in Ukraine – 2006»

⁶ Information from the Press Centre of the SBU from 12 May 2008 http://www.sbu.gov.ua/sbu/control/uk/publish/article?art_id=78505&cat_id=78711&mustWords=%D0%B7%D0%B0%D0%B1%D0%BE%D1%80%D0%BE%D0%BD%D0%B5%D0%BD%D0%BE&searchPublishing=1

⁷ Results of the operational activities of the State Border Guard Service // Official website of the Service http://www.pvu.gov.ua/control/uk/publish/article?art_id=48708&cat_id=46466.

⁸ On the socio-economic situation in Ukraine during 2008. State Committee of Statistics http://www.ukrstat.gov.ua/operativ/operativ2008/mp/dopovidx/arh_dop2008.html.

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Overall, each year the number of Ukrainian nationals going abroad increases, as well as the number of foreign nationals who come to Ukraine.

Entry of foreign nationals into Ukraine in 2008⁹

	Number of foreign nationals who entered Ukraine in total *	Of these, for the following reasons:						Cultural or sport exchange, religious or other
		work-related, business or diplomatic	tourism	private	to study	to work	Immigration (to live)	
Total	25449078	1048370	1693348	22290975	65224	11987	27842	311332

Number of foreign nationals who visited Ukraine and of Ukrainians who went abroad (2000-2008)¹⁰

Year	Number of Ukrainian nationals who travelled abroad – total	Number of foreign nationals who visited Ukraine – in total
2000	13 422 320	6 430 940
2001	14 849 033	9 174 166
2002	14 729 444	10 516 665
2003	14 794 932	12 513 883
2004	15 487 571	15 629 213
2005	16 453 704	17 630 760
2006	16 875 256	18 935 775
2007	17 334 653	23 122 157
2008	15 498 567	25 449 078

2. FREEDOM TO CHOOSE ONES PLACE OF RESIDENCE

In general there is freedom of choice of place of residence in Ukraine however there are a number of shortcomings in the system of legal regulation which have remained from the days of «propiska» [«registration»]¹¹.

The problems are on two levels:

1) The exercising of many rights and freedoms continues to depend on ones official place of registration. The ability to exercise many rights and freedoms solely in accordance with ones place of residence clearly dates from serfdom and the Soviet system of «propiska». It is solely on the basis of place of registration that the civil rights envisaged by the Laws of Ukraine «On State social standards and State social guarantees», «On pensions», «On education», «On the fundamental principles of health care legislation in Ukraine», «On protection of the population from infectious diseases», «On employment of the population», etc can be exercised. Citizens without a place of residence and registration cannot update documents, find work, or receive medical and social assistance.

This problem is effectively an indirect additional measure of compulsion by the authorities to obtain registration. Another form of such compulsion is the present administrative liability for residing somewhere without registration. Clearly the State can have a system of registration in the inter-

⁹ Based on information from the Administration of the State Border Guard Service // Official website of the Service, http://www.ukrstat.gov.ua/operativ/operativ2009/tyr/tyr_u/vig2008_u.htm.

¹⁰ Based on figures for the State Committee of Statistics http://www.ukrstat.gov.ua/operativ/operativ2007/tyr/tyr_u/potoki2006_u.htm.

¹¹ This was a permission-based system of registration, which the Constitutional Court in 2001 declared was in contravention of the Constitution of Ukraine (translator)

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ests of public order. However such registration should not entail the difficulties and inconveniences which people encounter at present.

2) People who do not have their own homes, and their number is constantly rising, are not in most cases able to register at the place where they actually live due to an unwarrantedly narrow interpretation of the grounds for registration. Thus, the concept of registration is not clearly differentiated from the right to own or use housing with this creating many obstacles in registration.

Such obstacles in fact harm the State since they explain why a considerable number of people live without registration or not where they are registered (registering where this is legally possible, for example, with relatives). The aim of creating a system of mandatory registration of individuals is thus not achieved, and such a system at present is effectively not working. For that reason the State does not have an accurate database of individuals according to their place of residence.

One should also note that Ukrainian legislation regarding registration is exceptionally strict, yet the MIA does not apply it fully which demonstrates the failure of legislation to comply with real social relations. For example, a system has still not been introduced for registration of the place where people are staying.

This demonstrates the need for significant changes to legislation on registration where the latter becomes a formal, not a permission-based, procedure which does not provide any rights regarding ownership or use of housing.

3. THE RIGHTS OF THE HOMELESS

There remain problems with protecting the rights of the homeless. As already mentioned, without registration people are deprived of many rights. This significantly worsens the legal status of homeless people and effectively removes them from the system of State and social security.

The State has endeavoured to regulate this shortcoming by passing a number of legislative acts which should resolve this problem.¹²

These documents create registration centres for the homeless, night shelters and social rehabilitation centres. However the practical implementation of these normative acts remains unsatisfactory.

For example, in Kyiv the homeless are provided with temporary registration for two months in the registration centres for the homeless, and then not allowed to extend the registration which has no logical or legal justification. This means that temporary registration is provided in order to get documents, yet the person then effectively returns to their previous situation due to the lack of registration and therefore exclusion from State social programme.

Mr K. lived and worked in Kyiv, however he did not have housing of his own and therefore had nowhere where he could register. He approached the Social Care Home under the Central Department for Social Protection of the Kyiv City State Administration (KCSA). They registered him, but only on a temporary basis, then they took the registration away. He complained to the Prosecutor, however that either had no effect at all or only fleeting, for example, he was registered for 14 days. It is clear that the Social Care Home did not have legal grounds for its actions. This dragged on for several years. In July 2008 with the help of UHHRU lawyers he lodged an administrative suit with the court. On 3 December 2008 the Solomyansky District Court in Kyiv allowed the applicant's claim in full and ordered that he be registered indefinitely and provided with a place in the Social Care Home. The court thus confirmed that homeless people should be provided with indefinite registration.¹³

¹² See the Law On the fundamental principles of social protection for the homeless and abandoned children» which came into force on 1 January 2006; Order of the Ministry of Employment and Social Policy of Ukraine «On approving standard provisions on institutions of social protection for homeless individuals and people released from places of confinement», from 14 February 2006, № 31»; Resolution № 404 of the Cabinet of Ministers from 30 March 2006 «On approving a standard provision on a registration centre for the Homeless and Order № 98 of the Ministry of Employment and Social Policy from 3 April 2006 № 98 «On approving standard provisions on social hotels».

¹³ See: Homeless Kyiv resident wins case against the City Administration, UHHRU website: <http://www.helsinki.org.ua/en/index.php?id=1232041522>

This story is a typical example where the rights of the homeless were violated.

Furthermore this legislation has only been implemented in some areas. This is mainly in regional centres, and therefore a significant percentage of homeless people do not have access to the new system of assistance for the homeless.

According to government figures, at the beginning of 2008 only 44 social institutions for the homeless were functioning, with 13 of these not State-owned. However just these 44 centres provided their services to 10 thousand people (approximately 227 people a year per centre).¹⁴

In November 2008 the Cabinet of Ministers approved an Action Plan on implementing the Concept Strategy for Protection of Homeless People up to 2012.¹⁵ It is planned, for example, by 2012 to introduce a register of homeless people since at present there are no such records, and there are effectively no official statistics regarding the number of homeless and scope of the assistance provided. Over several weeks a Coordination Council was created on the social protection of homeless people and abandoned children.¹⁶

Improvement is also needed to legislation on social protection for the homeless; the resolution of a number of problems in the prevention of homelessness; reintegration of the homeless; the work of social institutions for homeless families so that these can live together as a family; the formation of a social housing fund; training of social workers specializing in helping the homeless; treatment of such prevalent and especially dangerous illnesses among the homeless as tuberculosis, hepatitis, HIV/AIDS, venereal disease, skin complaints, alcoholism, drug dependence, and others.

4. RECOMMENDATIONS

1) In compliance with the Opinion of the Parliamentary Assembly of the Council of Europe (№ 190) on the entry of Ukraine to the Council of Europe, powers of registration of citizens, foreign nationals and stateless individuals should be passed to the Ministry of Justice of Ukraine

2) Conclude the process of reform of legislation as regards registration, taking into account positive international experience and the Law «On freedom of movement and freedom to choose one's place of residence».

3) Abolish the procedure stipulated in the law on freedom of movement and free choice of place of residence for registration of a temporary place where one is staying (this procedure is set out in the law but not applied in practice).

4) Complete a computerized record system of registration of citizens, using the best models applied in other countries and observing international standards for safeguarding human rights. Such a system should be autonomous and not contain other personal data collected by other State authorities.

5) Consider broadening the grounds for registration (for example, as this was done in the law on the Register of Voters), as well as reviewing legislation in order to eliminate dependence of exercise of rights on place of registration. Provisions of legislation should also be revoked which stipulate that registration provides rights with regard to owning or using residential premises. The procedure for canceling registration in private accommodation needs to be simplified, and the interdependence of the fact of registration on the right to the given premises in State and municipal housing removed. Without this, measures to create a realistic system of registration will be impossible.

¹⁴ Concept strategy for social protection of the homeless, approved by Instruction of the Cabinet of Ministers from 17 April 2008, № 639.

¹⁵ Ludmila Denisova presented five directions in resolving the problem of the homeless, 06.11.2008, Ministry of Employment Press Service, http://www.kmu.gov.ua/control/uk/publish/article?art_id=168929761&cat_id=35884.

¹⁶ Ministry of Employment: Problems of the homeless and abandoned children will be addressed by a specially created Coordination Council. : 27.11.2008, 10:00, http://www.kmu.gov.ua/control/uk/publish/news_article?art_id=173853927&cat_id=35884.

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11. Bring the activities of the MIA into compliance with legislation as regards issuing passports. This includes standardizing such procedure for the entire country and putting a stop to the unlawful demands imposed for additional documents (such as insurance policies, documents confirming the lack of a criminal record, documents giving an identification number, and papers confirming payment for supplementary services).

12. MIA should ensure timely issue of internal passports..

13. MIA must strengthen control over adherence to legislation in passport offices which are located in ZHEK.

14. Improve the procedure for issuing sailors' identification documents, taking into account the provisions of the Constitution of Ukraine on freedom of movement and clearly defined grounds for limiting trips abroad.

15. Abolish the practice of restricting travel abroad for people having access to state secrets

16. A system of registration of homeless people must be introduced as soon as possible in order to heighten targeted assistance and make it more effective.

XII. SOME ASPECTS OF THE RIGHT TO PROTECTION FROM DISCRIMINATION AND ON COMBATING RACISM AND XENOPHOBIA¹

This unit considers some aspects connected with discrimination, racism and xenophobia. Compared with the situation presented in the annual reports *Human Rights in Ukraine*, from 2004 to 2007, there have basically been no changes for the better. The outline of the problems of discrimination and inequality presented in *Human Rights in Ukraine – 2006*² remains relevant today. In 2008 legislation in this sphere did not change, and none of the problems identified were resolved therefore the analysis and recommendations in previous annual reports remain current. Similarly in 2008 the situation regarding the rights of sexual minorities remained unchanged.³

We should note immediately that there is virtually no direct discrimination in Ukraine, but indirect discrimination is widespread. The most common forms continue to be social discrimination on the basis of age and state of health. At the same time one can notice a significant discrepancy between real and imagined discrimination.

1. DISCRIMINATION IN THE MASS CONSCIOUSNESS

Studies of the public's perception regarding discrimination have virtually not been carried out. We are aware of only one sociological study undertaken by the TNS-Ukraine company in January and February 2005.⁴ Only 9.6% of those surveyed said that neither they themselves, nor people they know, had encountered cases of discrimination while the remaining 90.4% named one or several examples. The most widespread forms of discrimination proved to be state of health and age – named by 58.9% and 52.6%, respectively. . Most often mentioned were spheres of work (finding a job; career growth, dismissals) –37.7%, receiving medical care – 30.2%, receiving social services – 26%, getting the appropriate pay – 25.7%, receiving administrative services – 23.1%.

In 2008 the Kharkiv Human Rights Protection Group, together with 18 partner human rights organizations, carried out a socio-psychological study of everyday ideas about human rights⁵ in 18 Ukrainian cities. The study was in three stages: a) a questionnaire among a selection corresponding to the demographic makeup of the population in terms of age, gender and occupation; b) focus groups in each city carried out in order to specify elements which cannot be established by means of the ques-

¹ By Yevgeniy Zakharov, Co-Chair of KHPG.

² *Human Rights in Ukraine – 2006*, available at: <http://www.khpg.org/ru/index.php?r=a2b4c12d3>

³ More details in English about a report by Oleksandr Zinchenkov «Ukrainian State and Society against Gays and Lesbians» can be found here: <http://www.khpg.org/ru/index.php?id=1234292888> .

⁴ 1200 people aged between 16 and 75 from all types of populated areas were surveyed. The selection was representative for Ukraine in terms of gender and age. The error margin was 3%

⁵ By everyday ideas are meant collective and individual mental constructions regarding human rights, typical for Ukrainian citizens, the combination of such constructs corresponds with legal awareness.

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tionnaire; c) a survey of 5-8 civil servants, lawyers, journalists or members of NGOs in each region. 907 questionnaires were chosen (on average 50 for each city), with this selection being representative for Ukraine's urban population.⁶

The study investigated, among other things, Ukrainians' perception of discrimination. When asked «What groups in society suffer from discrimination?», the answers were as follows (people could name a number of categories):

- ◆ women – 24,0%
- ◆ men – 3,3%
- ◆ sexual minorities – 19,8%
- ◆ national minorities – 14,2%
- ◆ religious communities – 8,1%
- ◆ Russian speakers – 10,7%
- ◆ Ukrainian speakers – 9,6%
- ◆ pensioners – 40,0%
- ◆ young people – 21,2%
- ◆ workers – 17,3%
- ◆ villagers – 31,5%
- ◆ people who work with their mind – 12,0%
- ◆ private businesspeople – 9,4%.

People chose their answer from 0 (Kirovohrad) to 30% (Donetsk) of the respondents; approximately half of the answers were: «nobody is discriminated against»; among other categories mentioned as being discriminated against were down-and-outs; the disabled; mothers with small children; people with many children; «foreign coloured students»; Ukrainian-speaking specialists; members of various sub-cultures, military conscripts.

Judging from the results of the survey⁷, discrimination in Ukraine can be divided into objectively existing and perceived, with the latter being in fact a manifestation of exaggerated self-pity or seeking undeserved advantages. If a respondent names a group to which s/he belongs discriminated against, this can be interpreted as the existence of real discrimination, or as the wish for additional advantages for their group, or as a discrepancy between everyday and legal understanding of discrimination, since on an everyday level people mean a low standard of living; poverty; a negative attitude from the authorities, etc.

However if another group is named as discriminated against, one is more likely dealing with cases known to the respondent and sympathy for real victims of social injustice. According to the results of the survey, we have very widespread discrimination on the basis of age (so-called ageism) which State and civic organizations should theoretically be working to overcome. However we have no information about any such work. Discrimination against pensioners and young people was most often mentioned, sometimes children.

From the findings of the focus groups, among discriminatory practices the most widespread were age restrictions when employing staff. The practice of turning down people because they're too young deprives them of the possibility of learning to work. People who are too «old», that is, people over 50, 40 or even 30, are turned down because it's harder to control people with experience using manipulative methods or impose stupid manifestations of corporative loyalty. Quite often the wish to employ or not to employ a certain category of people is due to the manager's personal phobias and without scientific justification.

Gender discrimination is also underestimated, especially against men, with the existence of this virtually hushed up. The reason is clear: complaining about discrimination against yourself over gender contradicts the stereotypes of male behaviour in Ukraine. We still have generally women's occupations or men's, as well as standard situations when a man will almost certainly be treated un-

⁶ Viktor Pushkar. Socio-psychological survey of everyday ideas about human rights / Kharkiv Human Rights Group – Kharkiv, Prava Ludyny, 2009.

⁷ Ibid – pp..64-66.

fairly, but not a woman, or vice versa. However there are virtually no clear taboos on predominantly men's occupations for women, or vice versa, as in masculine societies. As with respect to poverty, a large and negative role here is played by external examples of a gender role not typical for Ukraine but imposed by foreign media outlets and even gender subcultures, created with the participation of those same media, which are closed to the other sex. A sense that they can't match the mass culture standards foisted on them by the media creates specific types of male and female inferiority complexes which would otherwise hardly be widespread.

However on the whole one needs a balanced assessment of the influence of the media on forming public opinion on topical issues. For example, the issue of discrimination on language grounds which is assiduously worked on and seriously politicized received fairly modest recognition.

There was rather little mention in the questionnaires and at the focus groups of socially invisible groups of society such as the disabled, people living with AIDS, down-and-outs and members of youth subcultures. However we need to make a correction here since not all participants in the study have personal contact with representatives of these groups. In the same way some ethnic minorities are socially invisible beyond areas where they are concentrated. However the indicators for how discriminated against these groups are was on the borderline for the statistical error margin in our study, To make these readings more exact one would need to considerably modify the design of the selection, as well as asking the actual representatives of the socially invisible groups and of the State and civic organizations which work with them directly. This should be the subject of a separate study.

2. LEGAL MECHANISMS FOR PROTECTING AGAINST DISCRIMINATION AND INEQUALITY

In the modern world the fight against racism, discrimination, xenophobia and intolerance are considered a top priority of the State.⁸ The duty to provide protection from them is contained both in general documents (the International Covenants on Civil and Political Rights, and on Social, Economic and Cultural Rights, 1966; the European Convention for the Protection of Human Rights and Fundamental Freedoms; the European Social Charter;), and a huge number of special documents (the International Convention for the Elimination of All Forms of Racial Discrimination; some conventions of the International Labour Organization; the European Framework Convention for the Protection of the Rights of National Minorities; the European Charter for Regional or Minority Languages; etc). and international agreements on human rights. The European Union devotes considerable attention to this issue and has since the year 2000 demanded that candidates for membership of the EU introduce into national legislation and practice standards set down in Directive 2000/43/EC of implementing the principle of equal treatment between persons irrespective of racial or ethnic origin».

In accordance with Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms «The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status». Since Ukraine is a party to the Convention, judgments of the European Court of Human Rights on Article 14 of the Convention should be taken into account in Ukrainian legislation and practice. It should be noted that Protocol №. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms which prohibits discrimination on any grounds was ratified by Ukraine in 2006.

All of this suggests the need for substantial amendments to Ukrainian legislation and practice which at present fail to meet the requirements of international agreements. For example, the basic

⁸ Decision of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, passed on 20 August 1998.

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constitutional norm of article 24 of the Constitution on equality before the law and the prohibition of discrimination (we would note that the actual word «discrimination» is not used either in the Constitution or in legislation) does not apply to those who are in Ukraine on legal grounds but are not Ukrainian nationals. The concept «indigenous peoples», mentioned in Article 11 of the Constitution is nowhere developed in legislation and has thus remained undefined.

The principle of equality before the law is reflected in a general way in the laws of different fields, and norms of civil and administrative legislation. However these normative legal acts do not contain anti-discrimination norms preventing discrimination in different areas of public life such as employment, education, health care, provision of accommodation, access to public and social services, contractual relations between individuals, between individuals and legal entities, and so forth. These norms are needed also to introduce effective legal mechanisms and obligations of public bodies to protect against discrimination and to provide compensation for damages sustained.

For example, the Civil Code does not have the concept of discrimination at all. The Civil Procedure Code declares that cases shall be examined on the basis of equality before the law irrespective of race, national identity, religion, education or language (Article 6). Article 248 of the Code of Administrative Offences speaks of consideration of cases being on the basis of equality before the law regardless of race, colour, political or religious convictions or ethnic origin. Article 7 of the Family Codes stipulates that members of a family cannot have privileges or face restrictions on the basis of race, colour, gender, political or religious convictions, ethnic origin, language or others factors. The same general norms are included in the Labour Code (Article 2-1); the Law «On education» (Article 3); the Law «On general secondary education» (Article 6); the Law «On pre-school education» (Article 9) and other laws. These norms, however, are not developed and remain mere declarations. For example, the Law «On remuneration» does not contain any norm regarding equality before the law. No normative act defines and differentiates between direct and indirect discrimination.

The lack of clear and precise classification of certain behaviour as discrimination leads to impunity with discrimination virtually going unpunished in Ukraine, this leading in turn to further discrimination. The overwhelming majority of normative legal acts contain the same fixed phrase «Persons guilty of infringing legislation bear civil, administrative or criminal liability in accordance with Ukrainian legislation». Yet neither civil liability nor administrative liability for discrimination is anywhere defined. With regard to criminal liability, this is applied only to individuals. If administrative liability is introduced, this will also apply exclusively to individuals. This means that members of minorities are virtually not protected from discrimination by legal entities.

Criminal legislation includes discrimination in Article 67 of the Criminal Code in paragraph 3 which makes committing the given crime for motives of racial, ethnic or religious enmity or discord as an aggravating circumstance, and in Article 161 «Infringement of citizens' equality on the basis of their racial or ethnic origin or their attitude to religion.» Article 161 covers «deliberate actions aimed at inciting ethnic, racial or religious enmity and hatred, at denigrating a person's ethnic honour and dignity or causing offence with regard to religious beliefs, as well as direct or indirect restrictions of rights, or the establishment of direct or indirect privileges for citizens on the basis of race, skin colour, political, religious, or other convictions, gender, ethnic or social origin, material position, language or other grounds».

Article 161 needs to be amended. It should firstly be extended to cover all individuals, not only Ukrainian nationals. Secondly, defence of honour and dignity must include additional grounds as well as nationality and religion, for example, race, colour of skin, ethnic origin and language. Thirdly, Article 161 needs to clearly define acts of a racist or xenophobic nature as crimes.

A fourth reason is that it is extremely difficult to prove intent to carry out these actions, especially where texts of a xenophobic nature are involved. Finally, it is impossible to use this article to hold people liable in cases which are unfortunately quite frequent when a text insults the feelings and denigrates the honour and dignity not of a specific person, but of an ethnic group or people in general. UHHRU specific proposals on changes to Article 161 are given later in the text.

It is also necessary to broaden the range of offences which carry criminal liability. Article 4 of the International Convention for the Elimination of All Forms of Racial Discrimination deems «an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;» Article 20 of the International Covenant on Civil and Political Rights states that «Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law». Thus in order to ensure that Ukraine's legislation is in line with international agreements, the relevant elements of the crimes need to be added to the Criminal Code.

Events from 2006-2008 in Ukraine give convincing evidence that legislation needs to be changed in the light of an increase in xenophobia, racially-motivated violence and a worsening in relations between different ethnic groups.

3. RACISM AND XENOPHOBIA

Up till 2005 the level of xenophobia in Ukraine was relatively low and did not exceed that in other post-totalitarian countries. It was lower than in other Central and East European countries – Bulgaria, Romania, Poland, Hungary, the Czech Republic, Slovakia and the Baltic Republics and considerably lower than in Russia. However in 2005 various informal groups of young people aimed at violence based on racism and national enmity, including «skinheads», became more active. These militant and aggressive young people who often use Nazi symbols, attacked people who didn't look Slavonic, for example, people from Asia, Africa, the Middle East, the Caucuses and so forth. Their violence was directed against foreign students, asylum seekers, refugees, immigrants, businesspeople and tourists. Some employees of embassies and UN representative offices, as well as members of their families, were also victims. The US and French embassies put warnings on their sites about such violence.⁹

Ministry of Internal Affairs [MIA] statistics show a clear trend upwards in the number of crimes against foreigners. Over the last five years the number of offences where foreign nationals suffered doubled – from 604 in 2002 to 1178 in 2007¹⁰. The large majority of crimes were committed against citizens of CIS countries (63.5%), with the number against nationals of other countries therefore 36.4%. 25 crimes were committed against Africans, with 21 of these solved.¹¹ It is impossible to say whether the crimes were committed on racial or ethnic grounds since the statistics did separately record such crimes. Clearly these statistics do not present the total picture of hate crimes. Not all crimes committed with respect to foreign nationals are linked to the person's nationality, and the statistics also do not include crimes against Ukrainian citizens from different ethnic groups.

There is a serious problem in the high latency of such crimes with this exacerbated by the dismissive attitude by the law enforcement agencies to these crimes, their unwillingness to recognize their racist and discriminatory nature. A check by the MIA in June 2007 showed that the heads of regional divisions were not monitoring responses to reports of crimes against foreign nationals. As a result of this detective inquiry units had refused to initiate criminal investigations into two thirds of the statements and reports, while in Kyiv criminal investigations were only launched into one in seven such reports.¹² Besides Kyiv, the most critical situation is seen in the Crimea (where only 4 crimes out of 36 reports alleging unlawful actions were actually recorded), the Odessa, Donetsk, Lviv and Kharkiv regions.¹³

⁹ European Commission against Racism and Intolerance: Third Report on Ukraine, Strasbourg: CRI(2008)4, 2008, p.117.

¹⁰ Human Rights in the activities of the Ukrainian Police, Kyiv – Kharkiv, Prava Ludyny, 2009

¹¹ Ibid.

¹² Ibid, p. 119.

¹³ Ibid.

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According to information from the Congress of National Communities of Ukraine [CNCU], frequent attacks began in October 2006 and their number has been rising rapidly. In 2006 CNCU monitoring recorded 16 attacks, two resulting in the death of the victim; in 2007 there were 87 victims, with five of them killed; while in 2008 83 immigrants suffered such attacks with 4 fatalities¹⁴. CNCU experts believe that this is only the tip of the iceberg since only those cases which came to public notice with a pronounced racist nature are recorded. In response to an information request from the Kharkiv Human Rights Protection Group, MIA informed that from January to April 2008, 160 crimes were committed against foreign nationals, this including 7 murders. 91 cases were solved, including 6 of the murders. According to the Deputy Minister of Internal Affairs Mykhailo Verbensky, two murders had been racially motivated. During this period the MIA recorded 33 crimes involving threats against the life or health of people from Asia or Africa of which 28 were solved. The President of the African Centre in Ukraine Charles A. St. Jeboa maintains that more than one thousand people suffered during this period, mainly people from Africa, India, China, Pakistan and Iran.¹⁵ This discrepancy in figures is due to complaints about violent attacks usually being made where there were serious consequences.

The rise in racially-motivated crime forced the authorities to react. On 31 May 2007 MIA adopted an Action Plan on countering racism for the period up till 2009¹⁶. The main priority areas of work according to this Action Plan are measures of a preventive nature; identifying movements of radical youth groups and organizations, carrying out explanatory-prophylactic work among their members; safeguarding law and order in places where a lot of foreign nationals are living or staying; forming a tolerant worldview among young people. The plan contains educational measures, training of employees of the law enforcement agencies on preventing and combating xenophobia and discrimination, the legal foundations for fighting them, studying the positive experience in this area of law enforcement agencies in other countries, etc. The Action Plan also includes an analysis of current legislation and submission of proposals on its improvement; the creation of a specialized unit for investigating crimes committed by foreign nationals or against them, as well as a unit on investigating crimes committing on racial or ethnic grounds.

In November 2007 the Ministry of Foreign Affairs introduced the position of Special Ambassador on Combating Racism, Xenophobia and Discrimination. The Special Ambassador's tasks are to work on preventing inter-ethnic and inter-faith conflict and coordinating measures and action in this area with other ministries and departments. A separate section has been created in the Security Service [SBU] on identifying and preventing action aimed at inciting ethnic or national enmity.

The President did not pass any normative acts on defining State policy on combating discrimination. However on a number of occasions he drew the attention of the law enforcement agencies to this issue, and also submitted to parliament a draft law № 1395 on increasing liability under Article 161 of the Criminal Code. At the President's call, some State bodies began implementing anti-discrimination policy however such actions were not coordinated and systematic.

The Ministry for the Family, Youth and Sport adopted an Action Plan for countering xenophobia, racial and ethnic discrimination in Ukrainian society for 2008-2009.¹⁷ The Plan concerns prevention of certain forms of discrimination, however there no effective steps including for overcoming discrimination. To a large extent the Plan is aimed at studying this issue. There are serious doubts regarding the effectiveness of the creation of an Inter-departmental Working Group on Countering Xenophobia, Inter-ethnic and Racial Intolerance.

¹⁴ Viacheslav Likhachev. *Xenophobia in Ukraine, 2007-2008*, Kyiv, p. 3

¹⁵ <http://www.rbc.ua/rus/newslines/2008/04/02/340999.shtml>; <http://www.ridnews.com/content/view/809/77/>

¹⁶ <http://www.mvs.gov.ua/mvs/control/main/uk/publish/article/83652>. The journalist involved – Editor of the newspaper «Nashe dyelo» Igor Volyn-Danilov. received an 18 month suspended sentence in January 2009 <http://www.khpg.org.ua/en/index.php?id=1232361673&> (translator)

¹⁷ Order № 3716 from 10 September 2008. Measures to implement the Instructions of Deputy Prime Minister I. Vasyunyk, from 06.08.2008 № 11273/11/1-08.

A separate issue is punishment for racist and xenophobic behaviour. Article 161 of the Criminal Code is used extremely rarely. Up till 2007 only one person had been convicted under that article (the organizer of a pogrom in a Kyiv Synagogue after a football match in April 2002). From 2005-2007 only seven criminal investigations were initiated under Article 161. There were 3 cases which were sent to the courts (in the Kirovohrad, Cherkasy and Chernihiv regions); 3 cases in 2006 in Kyiv, of which two were sent to the courts and the third closed under Article 6 § 2 of the Criminal Procedure Code (lack of the elements of a crime); while in 2001 there was one criminal case in Odessa, passed to the court.¹⁸

Since the beginning of 2008 special criminal investigation units on fighting violent crimes of a racist nature have been functioning within MIA departments in Kyiv, Odessa, Lviv and Luhansk. During the first four months of 2008 four sentences were passed under Article 161 in connection with attacks on foreign nationals. Overall in 2008 there were 10 cases underway involving charges under Article 161. 8 crimes were registered, 6 of which were committed by groups of people. This included 5 violent crimes (three murders in Kyiv, and two assaults causing bodily injuries in Kyiv and Ternopil), distribution of anti-Semitic leaflets in Odessa and an attack on a Crimean Tatar cemetery in the Crimea.

The number of criminal investigations initiated under Article 161, let alone the number of sentences handed down, clearly do not correspond to the scale of racist and xenophobic behaviour. Furthermore there is no information about the scale of application of Article 67 § 1.3 of the Criminal Code which envisages as an aggravating circumstance «committing a crime on the motives of racial, ethnic or religious enmity or discord». On 8 February 2009 the Prosecutor General's Office and MIA issued a joint instruction № 11/128 «On a record of crimes committed on the basis of racial, ethnic or religious intolerance, as well as of the results of investigations into these crimes» This should enable statistical reporting on the number and nature of such crimes and on the results of police investigations into them. Now law enforcement bodies will be able to keep a separate list of racially or ethnically motivated crimes. It should be noted that statistical reporting needs to be extended to cover application of Article 67 § 3.

One of the reasons for the inadequate reaction from the law enforcement agencies and the State as a whole to racist and xenophobic behaviour is the lack of complaints from victims of racist attacks who don't hold out any hopes of receiving real protection. Another reason is the formulation of the elements of the crime which is in our view unsuccessful and in many cases makes it seriously difficult to prove guilt.

Nonetheless the efforts of the MIA have borne fruit and the wave of violent attacks which had been steadily rising since the end of 2006, beginning in May 2008 fell. This was recorded by CNCU monitoring, according to which for the first 5 months of 2008 there were 34 violent attacks, while over the last 7 months there 27. This clearly shows a cessation of the most brutal manifestations of racism and xenophobia and does not mean a significant improvement.

If discrimination against the Roma, immigrants from the Caucuses, Asia and Africa increased significantly in 2007-2008 as compared with previous years, public demonstrations of anti-Semitism actually decreased, and this was despite the political crisis and parliamentary elections which have always marked rises in anti-Semitism. It should be noted that there were also attempts by some political technologists during the September 2007 early elections to play the anti-Semitism card, using Jewish roots in attempts to discredit some leaders in the election campaign, for example, Yulia Tymoshenko and Yury Lutsenko. However circulation of several pieces of anti-Semitic material did not influence the electorate's choice. And the single political force which took part in the elections with a xenophobic principle of ethnic proportional representation in its programme, the all-Ukrainian association «Svoboda» received 0.75% of the overall number of votes cast.

The reasons for the decrease in public demonstrations of anti-Semitism in 2007 are, in our view, linked with the cessation from September 2007 of the anti-Semitic activities of the Inter-re-

¹⁸ Human Rights in the activities of the Ukrainian Police, Kyiv – Kharkiv, Prava Ludyny, 2009. – p. 119.

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gional Academy of Personnel Management (MAUP). This gives grounds for describing the character of public manifestations of anti-Semitism in Ukraine as artificial.

Over recent years MAUP was the single prominent centre for the publication of anti-Semitic material. Whereas in 2006 676 anti-Semitic publications were recorded, in 2007 the figure was 542 with the drop become sharper: 183 publications in the first quarter; 137 in the second; 147 in the third (the period of the election campaign) and 75 in the fourth. This trend towards reduction continued and in 2008 the number of anti-Semitic publications was ten times lower than in 2007¹⁹. In the first quarter 17 publications were recorded; in the second – 15; in the third – 11; and in the fourth – 10. One has the impression that criticism of MAUP by Ukrainian society and the government (activation of opposition to anti-Semitism by the government became more noticeable from autumn 2007), attempts by the Ministry of Education to strip MAUP of its license, the closing of several branches forced MAUP to stem their campaign of anti-Semitism.

It should also be noted that the rise in the index of social distance according to the Bogardus scale which has since 1994 been carried out each year by the Academy of Sciences' Institute of Sociology affected Jews to a much lower degree than members of other ethnic minorities and groups living in Ukraine. In relation to Jews this index rose from 3.63 in 1994 to 4.6 in 2007, and fell to 4.1 in 2008. The level of social distance of Ukrainians with regard to Jews is lower than that towards Romanians, Hungarians, Poles and members of other European communities, not to mention the traditional «leaders» – Roma, people from Africa, Asia and the Caucuses. We should also point out that the increase in racially-motivated violence observed against people from Africa, Asia and the Caucuses did not affect Jews.

As before, the most discriminated against ethnic minority remains the Roma. Society's attitude to the Roma remains negative. Sociological surveys show that prejudice towards Roma is greater than for any other ethnic minority. The Bogardus scale index of social distance with respect to the Roma has over all these years been in excess of 5 points and is steadily rising. They are thus not viewed in the public consciousness as being permanent members of Ukrainian society. With the highest social distance rating, the Roma suffer greatly from social discrimination. Unemployment is on average highest among the Roma, living conditions are worse than for other ethnic groups. They experience more difficulties with access to education, medical services and the courts.

According to Roma rights organizations, most complaints are about arbitrary behaviour by law enforcement officers. Most Roma are semi-literate or have never studied anyway at all. They are very intimidated and afraid of complaining. Feeling total impunity, therefore, law enforcement officers force Roma to say that they committed unsolved crimes. In areas with a large number of Roma, the police use their own specific «prophylactic form of fighting crime». Early in the morning, a group of police officers arrives at the Roma camp, shoves all the men into a bus and takes them to the department of the Ministry of Internal Affairs. They hold them there for 3-4 hours, then take fingerprints and with no explanations release them. This behaviour is illegal, yet takes place regularly.

«The programme for the social and spiritual revival of Roma, created in 2002 and completed in 2006, has remained virtually unimplemented, in particular because of inadequate financing (100 thousand UAH). This programme envisaged opening special classes for Roma children in kindergartens and elementary grades so that the children could catch up with other children. However many of the aims have not been achieved. According to Roma organizations, only 68% of Roma people are literate and only 2% have higher education. The main reason for this is poverty and the lack of effective programmes aimed at changing stereotypes about Roma people. Parents of other children don't want their children to study together with Roma children, particularly because tuberculosis is much more widespread among Roma than among other ethnic communities. A lot of Roma do not have access to running water, electricity, roads, means of transport and communication, and one in ten Roma is living in unsanitary conditions. Only half of the Roma are able to eat each day.

¹⁹ More details in English can be found here: Viacheslav Likhachev Trends in anti-Semitism in Ukraine at the beginning of the XXI century: reality and stereotypes : <http://www.khpg.org.ua/en/index.php?id=1229369703>.

Through lack of money access to medical care is considerably worse than for representatives of other communities. Unemployment remains a major problem. According to Roma organizations only 38% of Roma people are working, and only 28% work fulltime. The gravity and link between the problems faced by Roma in areas such as education, employment, housing and healthcare require in-depth research and a concerted effort by all relevant governmental bodies in cooperation with Roma organisations in order to adequately resolve them.²⁰

It is not only public officials and law enforcement officers who become implicated in discrimination against the Roma, but also many media outlets. The headlines and content of articles like «Gypsy brigade into dodgy business» or «Villagers in the Cherkasy region suffer from the carousals of Gypsy newcomers» are not subjected to criticism. Where a person suspected of having committed a crime is from the Roma minority, both the police and the media emphasize the link with «gypsies».

«Hate speech» is a standard feature of the Ukrainian media which impose negative ethnic stereotypes, creating and manipulating images criminalizing certain ethnic groups. In our view such use of hate speech is more connected with lack of professionalism and awareness, than actual demonstrations of xenophobia or racism. This lack of correctness is most often seen in the titles of articles which has a lot to do with the tabloid nature of many media outlets, especially on the Internet, who try to attract readers with catchy headlines.

There was a noticeable increase in discrimination against the Crimean Tatars in 2007-2008. This was in the first instance linked with conflict over squatters occupying land sites which heightened in 2007. Squatting was for all residents of the Crimea virtually the only possible way of getting land to build a home and run their household. It has been used not only by the Crimean Tatars, but by others living in the Crimea. As of November 2007 the Crimean Prosecutor's Office had calculated five thousand cases of unlawful use of land, of which about five hundred cases of land occupation had been carried out by Crimean Tatars.²¹ However the Russian language press of the Crimea, using this subject for its own ends, wrote only about Crimean Tatars squatters, and unfurled a real anti-Tatar and Islamophobic information campaign. Xenophobia against Crimean Tatars is seen in insults, acts of vandalism against sacred places, in particular Muslim cemeteries, and even physical assault. The position in the Crimea is considered separately below.

We would stress that the status of immigrants from the Caucasus, Asia and Africa should be considered within the context of racial discrimination. The research mentioned above by the Institute of Sociology during the 1990s found that the level of intolerance towards these groups exceeded 5 on the Bogardus Scale. This would suggest that they are also not seen as being permanent members of Ukrainian society. The lack of established migration policy, contemptuous attitude by employees of the law enforcement agencies heightens xenophobic attitudes in society. All the more so when high-ranking MIA officials see fit to make dubious and intolerant statements about people from the Caucasus and migrants in general.²²

A review of State measures on fighting discrimination and xenophobia give grounds for concluding that there is no coordinated State programme in this sphere, and that these measures remain on the whole not very effective.

The measures of State bodies do not contain proposals for drawing up and passing anti-discrimination legislation, creating anti-discrimination bodies, and do not envisage any assistance to the victims of discrimination. It is thus unclear what policy on fighting discrimination the State will carry out.

²⁰ European Commission against Racism and Intolerance: Third Report on Ukraine, Strasbourg: CRI(2008)4, 2008, 65-83.

²¹ «Voice of the Crimea», № 47, 16 November 2007

²² See, for example, Halya Coynash: *You round up cattle, not human beings* <http://www.khpg.org.ua/en/index.php?id=1206313396>; *Strange Welcome* <http://unian.net/eng/news/news-267026.html>; *In Defence of Redheads* <http://www.khpg.org.ua/en/index.php?id=1216384990>

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4. ORGANIZED BEHAVIOUR OF A RACIST AND XENOPHOBIC NATURE

Confirmation that State measures against xenophobia are not effective is in the tolerance towards organizations which constantly carry out racist and xenophobic acts and propagandize such ideas. One can understand the reluctance of the authorities to use repressive measures against members of such organizations and not drive them underground, confining their response to preventive measures. However the lack of punishment for most racist and xenophobic acts generates an atmosphere in which anything goes and leads to them becoming more widespread. This in turn creates a mood of despondency and psychological terror among foreign nationals who are the target of such actions.

In Ukraine the most active and aggressive extreme rightwing groups are considered to be the so-called movement «White Power – Skinhead Spektrum», the Ukrainian branch of the worldwide extremist network «Blood & Honour»; the militarized neo-Nazi sect «World Church of the Creator Ruthenia» (WCOTC). They are united by an ideology of racism and nationalism based on establishing their superiority over other races and nationalities. The most numerous groups of skinheads were seen in Kyiv, Dnipropetrovsk, Zaporizhzhya, Lviv, Sevastopol, Chernihiv and the Crimea. Whereas in Russia there are tens of thousands within the skinhead movement, according to preliminary figures from the MIA, in Ukraine there are presently no less than 500 skinheads aged from 14 to 27, in groups of between 20 and 50 people without clear structure or organization.²³

According to information from the Press Service of the Security Service [SBU]²⁴, SBU officers pay close attention to the activities of some neo-Nazi gangs of skinheads in Odessa, Sevastopol, Yalta, Kyiv, Kharkiv, Kherson, Sumy, Donetsk, Dnipropetrovsk, Vinnytsa and Zhytomyr. As we see, the data from MIA and SBU are somewhat different. Monitoring by human rights organizations suggests that the scale and level of organization of neo-Nazi gangs is greater than the law enforcement believe.

For example, in Kharkiv city and region the Kharkiv regional organization «Patriot of Ukraine» [registered 17.01.2006] has become very active. The activities of this organization which has around 150 members is, according to its act of association aimed at the renewal of the Ukrainian nationalist idea, honouring the memory of fighters for Ukraine's independence (in UPA – the Ukrainian Resistance Army and OUN – the Organization of Ukrainian Nationalists), countering illegal immigration of people from Asian and African countries to Ukraine. However, according to the programme of «Patriot of Ukraine», posted on its site www.patriotukr.org.ua (cf. also: <http://community.livejournal.com/patriotukrainy/>), the organization «speaks out for a mono-racial and mono-national society». Its head, A. Biletsky directly states that «*Ukrainian racial social nationalist is the ideology of the organization «Patriot of Ukraine»* (this is the title of his article, printed in the anthology of ideological works and programme documents «Ukrainian Social Nationalism»). While the organization's ideologue O. Odnorozhenko openly writes that «Restriction and control will be imposed on all alien ethno-racial groups, with their subsequent deportation to their historical home. We Ukrainian social-nationalists view so-called «human races» as separate biological species and consider only the White European Human Being» to be intelligent in the biological understanding.»

From the speech of «the Main Commander of the Organization» – Andriy Biletsky at the general meeting of «Patriot of Ukraine» on 13 February, 2009: «*In order to come out victorious from the struggle you must know your enemy – who to fight. How then can we describe our enemy? The general regime in power are oligarchs. Is there anything they have in common? Yes, one thing in common – they are Jews, or their true bosses – Jews – are behind them. Out of one hundred published richest people in Ukraine 92 are Jews, and some others of Tatar origin (Akhmetov and so forth)*»

«Patriot of Ukraine» has groupings organized on military lines and carries out regular «training» for its members. «*In order to affirm the right of the nation any methods from public to underground, from local to global, from parliamentary to armed force are acceptable*» these newly emerged «patriots» write in their booklet.

²³ Oleh Martynenko: Racism and xenophobia in Ukraine: new challenges in human rights protection <http://www.khpg.org/en/index.php?id=1212543971>

²⁴ «Kievskiyе vedomosti», 22 February 2008.

«Patriot of Ukraine» events are often of an openly xenophobic and extremist nature. The organization is even trying to become a specific kind of centre for «the social-nationalist movement in Ukraine». For example, on 12 April 2008 a so-called «All-Ukrainian Congress of «Patriot of Ukraine» was held during which, according to witnesses, *«a number of important organizational issues were resolved, strategy and tactical aspects of the further development of «Patriot of Ukraine» and the social-nationalist movement were discussed, a number of agreements were achieved on further close cooperation with the Russian Orthodox National-Socialist Movement and Cossack communities of the Crimea which in the ideological sense are close to the Organization.»*

It should be noted that officers of the law enforcement agencies have taken the position of outside observers in the conflict between members of «Patriot of Ukraine» and the Kharkiv Regional branch of the All-Ukrainian Society «Prosvita». For over a year members of «Patriot of Ukraine», using the inclination towards rightwing extreme views of the head of the Kharkiv «Prosvita» M. Kondratenko, have effectively seized the premises of the regional branch of «Prosvita» (in the centre of the city), applying physical and psychological pressure on members of the «Prosvita» Board.

The Kharkiv Human Rights Protection Group addressed an open letter over this matter to the Head of the All-Ukrainian Society «Prosvita», Pavlo Movchan²⁵. However the latter has preferred to stay silent.

We would note that «Patriot of Ukraine» consider their comrades in arms to be UNTP [literally, the «Ukrainian National Labour Party», an extreme neo-Nazi party – *translator*). One should not underestimate the seriousness of the actions of this organization. «Patriot of Ukraine» is an organization in the most active sense of that word, with clear hierarchy, action plan, methods of work with youth and the media. It is at present carrying out information work, recruitment, ideological work on its members, physical training, and training in the use of weapons. Having registered almost all its members as members of the Kharkiv «Prosvita» Society, the organization has gained the opportunity to legally carry out work with young people in educational institutions.²⁶

Although in 2008 in Kharkiv just «Patriot of Ukraine» alone held 9 public actions, the regional law enforcement agencies «did not register any cases of participation in mass events in the Kharkiv region by radical youth groups with demonstrations of racism». And «during last year, 2008, no members of the skinhead movement were detained by units of the regional department of the MIA». However they were detained in Kyiv, during the events of 18 October 2008, when members of «Patriot of Ukraine» caused a brawl with police officers. Then police officers detained 143 offenders, 44 of them from the Kharkiv region.

In our view a most principled standard is needed from the law enforcement agencies regarding racially or ethnically-motivated crimes by members of such organizations, and more active work by civic organizations with members of these organizations.

5. MANIFESTATIONS OF RACISM AND XENOPHOBIA IN THE AUTONOMOUS REPUBLIC OF THE CRIMEA²⁷

Inter-ethnic tension, manifestations of xenophobia and ethnic discrimination are often seen in the internal public sphere in the Crimea.

The lack of demands from the central authorities in Ukraine is leading to incidents of xenophobia, chauvinism, racism, incitement to inter-ethnic and inter-denominational enmity, and

²⁵ <http://www.khpg.org.ua/en/index.php?id=1220644493>

²⁶ Denis Kobzin and Andriy Chernousov «Intolerant behaviour and organizations in Ukraine. The Results of a Sociological Study», 2008 (in Ukrainian) <http://www.umdpl.info/index.php?id=1234950701> More about this study in English, as well as about rightwing, supposedly nationalist movements can be found in «Terrible Deceit» <http://www.khpg.org.ua/en/index.php?id=1236005737&w=terrible+deceit>

²⁷ Cf. Mykola Semena.: Racism, chauvinism, xenophobia and ethnic discrimination in the Crimea; in the book «Racism and xenophobia in Ukraine: reality and myths – Kharkiv, Prava Ludyny, 2009, pp. 36-65.

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sometimes acts against the State even from civil servants, which are become ever more common in the Crimea, remaining unpunished.

For example, during the night from 10 to 11 April in the settlement of Chistenke near Simferopol, a Muslim cemetery was desecrated with 39 gravestones smashed. The fence also had the words daubed in red paint «Tatars out of the Crimea», with a hangman's noose and a crossed out tamga (the national emblem of the Crimean Tatars). This was the latest stage in the destruction of Muslim cemeteries. The previous analogous attack was during the night from 9 to 10 February when more than 200 gravestones in the central Muslim cemetery of the Nizhnyohirske settlement. «In the Crimea it's become a bad and virtually daily tradition to carry out actions which heighten mistrust between people. I don't want to separate out ethnically motivated crimes, however the trend is such that in the Crimea the destruction of Muslim cemeteries has already become a constant phenomenon.», the Deputy Head of the Mejlis of the Crimean Tatar People Refat Chubarov told reporters. «For us it is clear that there are forces who want to undermine the situation in the Crimea.»

Criminal investigations into these attacks were initiated, there were several pickets of the Crimean Parliament with demands to punish those responsible; the police took all Muslim cemeteries in the Crimea under their guard; the Crimean Parliament allocated 299 thousand UAH for the restoration of the desecrated cemeteries; the Crimean Council of Ministers approved measures on ensuring protection of cemeteries, places of burial and places of worship in populated areas of the autonomous republic. During a joint operation by the Central Department of the SBU for the Crimea, the Simferopol District Prosecutor, the Criminal Investigation Department of the Crimean Department of the MIA for the Crimea, as well as the CID of the Simferopol Police, three offenders who desecrated graves on the territory of the Mirnoye Village Council of the Simferopol District, were detained, however there has been no information about their punishment.

Evidence of opposition to the restoration of the Muslim religious sphere can be seen in xenophobic actions aimed against mosques. For example, on 12 March in the village of Oktyabrskoye, in the Pershotravneny district, three young people smashed the front doors to the mosque. A local resident witnessed this, immediately called neighbours and informed the police. One of the culprits was caught, the other two managed to escape.

An example of xenophobia from the authorities can be seen in the situation over the refusal to let Crimean Tatars build a Soborna [Assembly] Mosque to replace the Mosque destroyed previously. Despite the fact that in Simferopol the restoration by the Moscow Patriarchate of the Alexander Nevsky Cathedral, destroyed in 1934, is in full swing, the Crimean Tatars despite numerous appeals, pickets, etc, cannot receive permission to build the Soborna Mosque. On 10 January 2008 the Simferopol City Council, which had previously given permission to build the Mosque at the planned site on Yaltynska St, reversed this decision. It allocated another site, however the process of gathering all necessary documentation for the building permits had taken two years and cost over 70 thousand UAH, The Crimean Economic Court ruled in favour of the original site, and ordered the Council to comply. The latter in its response of 28 February declared the land site at 22 Yaltynska St and the surrounding territory a «park forest area», and also suggested putting the question of a mosque at that address to vote in a referendum. The Sevastopol Economic Court of Appeal refused to accept the case for examination, however the Council then appealed to the High Economic Court of Ukraine against the Crimean Economic Court's ruling. The High Economic Court returned the case for new examination to the Crimean Economic Court, then at the end of the 2008 Ukraine's Supreme Court upheld the High Economic Court's ruling.

Support by the authorities for pseudo-Cossack structures in the Crimea and the use of them to counter Crimean Tatar communities force the repatriants to create their own units of fighters, as Mustafa Dzhemilyev, Refat Chubarov and other Crimean Tatar politicians have repeatedly stated. In this way it becomes a mechanism for changing the conflict of «authorities – Crimean Tatars» with the authorities refusing to acknowledge the rights and meet the demands of the repatriants into an essentially inter-ethnic conflict of «Crimean Tatars – Russian Cossacks» which has become the source of xenophobic and racist statements, moods and actions.

Prominent demonstrations of xenophobic moods by pro-Russian organizations in the Crimea are seen in the practice where activists of such organizations counter and disrupt civic events by Ukrainians and Crimean Tatars, this violating their right to peaceful assembly. There have been disruptions of press conferences in Simferopol, and even of direct broadcasts on TV «Crimea» by activists of pro-Russian and communist organizations

The end of 2008 and beginning of 2009 marked a period of active manifestations of xenophobia and cases of aggressively intolerant material in the Crimean media.

A number of media outlets, in particular the newspaper «Krymskaya Pravda» [«KP»] take a very aggressive and negative stand on any attempts at «Ukrainiization», this including, for example, plans to have tuition in Ukrainian higher educational institutions in Ukrainian by 2012. The question of which language students should study in and the respective roles of Ukrainian and Russian is a very fraught area with passions often being deliberately stirred up.

Irrespective of the topic, pro-Russian newspapers give any material an anti-Ukrainian twist, denying this or that right for Ukraine as a nation, or the rights of the Ukrainian people. This can include suggesting that the autonomy's budget should not be providing anything to Kyiv, even though, in fact, the budget is three-quarters financing through subsidies and subventions from the State Budget.

With regard to a performance of the play «Comrade Stalin's Route», «KP» asks: «Which side are you on, masters of hackwork?» (№ 216 25 November 2008) purely because the play is about Holodomor in Ukraine which the newspaper denies.

In numerous articles, «KP» speaks out against the rights of the Crimean Tatars to own land, and effectively calls on the law enforcement agencies to use force against repatriants (for example, №№ 231 from 16 December 2008 and № 13 from 29 January 2009).

The newspaper traditionally comes out with a version of historical issues which repeats long-refuted myths and stereotypes with an anti-Ukrainian or anti-Tatar bent.

In the issue from 7 February 2009 «KP» publishes a propagandist article about the book by G. Kryuchkov and D. Tabachnik «Fascism in Ukraine: threat or reality?» in which it treats the attempts by Ukrainians to have their own language and their own state as fascism. The newspaper, twisting the essence of what was said, treats Yushchenko's works: «A single nation, a single language, a single church» as a manifestation of fascism, like Hitler's demands: «One people, one Reich, one Führer », not noticing the fundamental differences between them. The newspaper, as in communist times, treats the concept of «nationalism» as mere chauvinism, claiming that it is already «the core of ideology and political practice» in Ukraine.

In the article «Voice of the Crimea – voice of the people?», the newspaper «Krymskoye vremya», the articles in which exude xenophobia and intolerance towards Ukrainians and Crimean Tatars, tries to pin those same features on the newspapers «Voice of the Crimea» and «Avdet».

One can therefore conclude that xenophobia in the Crimean press appears in two forms. There is, on the one hand, psychological intolerance towards representatives of other ethnic groups, cultures and languages at a personal, human level, while on the other, there is political and historical, language and cultural intolerance towards whole nations with a complex past history.

Hate speech is common in the Crimea. it is heard in the addresses of deputies speaking in the Crimean Parliament, of activists at political rallies, on television broadcasts, in the press and via graffiti. The first aim of such utterances is to deny in the minds of inhabitants of the Crimea the very existence of the Ukrainian people, the Ukrainian language, the legitimacy of the creation of the Ukrainian State, to elicit a denigrating and contemptuous attitude to Ukrainians and all that is Ukrainian. The examples below are demonstrations of mass xenophobia directed against the entire Ukrainian community of the Crimea, against the Ukrainian nation and its State altogether.

For example, on 24 September 2008 Stanislav Matveyev, Deputy of the Crimean Parliament from the Party of the Regions stated during parliamentary hearings: «There are Russians, there are some Russians who have been labelled as Ukrainians, they found among them national schizophrenics, infected a certain part of the people with these schizophrenic ideas and are trying to make Russians and Ukrainians clash, so as to multiply by zero, and the given territory leave to be settled by Negroes

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from Alabama.» («Krymskoye vremya», № 105, 27 September 2008), furthermore the newspaper did not condemn this xenophobic utterance, but on the contrary, gave it the title «most colourful».

Newspapers like «Krymskoye vremya» and «Krymskaya Pravda» when describing the Ukrainian political milieu unwarrantedly use the term «fascism».

Under an all too frequent section «Ordinary fascism». Natalya Kiselyova deliberately misleads the readers and perfidiously muddles the aim of the Ukrainian State, combining it with the aims of fascism. «They say «renew Ukrainian» and mean «destroy Russian». On 8 July 2008 the newspaper publishes the call: «Burn his effigy again. Vakarchuk is transferring all Crimean schools to the Ukrainian language», although the Minister of Education's Order was talking about something else altogether.

On 19 July 2009 the article «West [the term is referring to West Ukrainian] Nazis again want to deprive the Crimea of its autonomy» was accompanied by a cartoon with fascist symbols.

Various headlines read: «Did they think up Ukraine in order to join NATO?»; «The devil's dozen of patriotism»; «They have chosen Russia as the main enemy in the new Ukrainian history»; «Ukraine isn't even a state?»

Analysts have said a great deal about the articles of Natalya Astakhova in «Krymskaya Pravda» («Brought with the wind» on 22 March 2008 and its sequel [literally] «He who sows a wind reaps a storm» (16 April 2008) as an instrument for inciting inter-ethnic enmity. At the present time we would like to draw attention to the consequences of these articles. As the civic and political situation in the Crimea after them shows, and the discussion on the «KP» site, the sole result of the articles was a worsening in inter-ethnic relations between members of the Crimean ethnic communities. More insults began to be uttered, more contempt and unwarranted demands to deport one group or another; unjustified ideological and historical denials. There was an increase in xenophobic demands in the language, educational, land and legal spheres.

There is only one conclusion that such articles by Astakhova have led not to a decrease in tension, as should be the result of media publications, this being their civic function, but increased in Crimean society a mass of xenophobia and distrust. It is clear that the result (and aim?) of such articles can only be inter-ethnic discord.

Another area of hate speech in the Crimea is with graffiti. In Simferopol there has been a sign saying «Death to the Crimean Tatars, any way!» for several months. Other offensive remarks about Crimean Tatars appeared in Simferopol at the beginning of April 2008.

On 5 April, this time in Bilohirsk the gate to the central Mosque was daubed with offensive graffiti saying «The Crimea is for Russians, Tatars out!». On 10 April similar graffiti appeared elsewhere. According to the Mejilis Press Centre the style, insults and colour of paint used were the same as in Simferopol the previous week.

There are a huge number of examples. If one generalizes their subject matter, one can conclude that the hate speech is most probably of a coordinated nature since all the articles and utterances are concentrated on the same topics trying to instil into the minds of Crimean residents the claim that the Russian language and Russians in the Crimea are supposedly being denigrated and discriminated against by the Ukrainian State and by public officials. There is also denial of Holodomor in Ukraine, constant insults towards the Crimean Tatars, the formation of a dismissive and insulting public attitude towards the Ukrainian language, Ukrainian State and its public officials.

6. RECOMMENDATIONS FROM THE UKRAINIAN HELSINKI HUMAN RIGHTS UNION ON STATE MEASURES AGAINST DISCRIMINATION, RACISM AND XENOPHOBIA

These recommendations are based on a study of the recommendations of international bodies of the UN, the Council of Europe, OSCE, on a generalized study of European Court of Human Rights case law, on the experience of countries of Central and Western Europe, the European Union, the USA and Canada, as well as on an analysis of instances of discrimination and an assessment of the action of the authorities in this sphere.

Key objectives of State anti-discrimination policy are a reduction in the level of discrimination in society and in the number of hate crimes. A vital part of its policy should be cooperation with nongovernmental organizations especially on drawing up legislation, collecting and analyzing information on discrimination, and also preparing and carrying out educational programmes aimed at fighting discrimination.

6.1. PREPARATION AND ADOPTION OF A FRAMEWORK LAW ON PROHIBITING DISCRIMINATION

Such a law should:

- prohibit any form of discrimination⁷
- define basic concepts needed: «discrimination», «direct discrimination», «indirect discrimination», «positive anti-discrimination measures», «victimization», «persecution», etc⁷
- set out the main principles of state policy in this sphere, as well as its duties;
- stipulate basic standards and principles for proving discrimination;
- identify the authorities responsible for implementing the law and monitoring its implementation;
- clearly prohibit direct and indirect discrimination, as well as incitement or calls to discrimination;
- apply to all involved in public and private law;
- provide as broad a list of areas where discrimination is prohibited as possible, though such a list cannot be comprehensive;

It should cover:

- labour relations, including access to employment and help with finding work, working conditions, remuneration and grounds for dismissal
- social security, social protection and social services;
- healthcare;
- education;
- access to goods and services which are generally available;
- housing;
- exercise of justice and the activities of the law enforcement agencies;
- political activity, including the right to vote and hold office.

This law should fulfil the state's duty to undertake positive measures on prevention of discrimination, compensation for damages linked with discrimination, as well as impose proportionate sanctions for infringements of anti-discrimination norms. These sanctions should allow for compensation to victims of discrimination.

The State must ensure access to the courts for all victims of discrimination, including legal assistance, for example, with it being the duty of a special body to provide consultations on these issues, with civic organizations having the right to provide such assistance or represent individuals or groups before state bodies, as well as in the courts. It is important in this law to establish rules whereby the duty to prove discrimination:

- in civil cases is placed upon the claimant with the exception of cases where the claimant is somebody holding authority;
- in administrative cases the respondent must prove the lack of discrimination.

This law should directly stipulate that statistical data received through reliable methods can serve as proof of discrimination.

Such a law is needed since there is no regulation of the above-mentioned provisions at the level of a law. Some gaps are filled by the law on equal rights and opportunities for men and women however that law applies to only one sphere. The current situation prevents individuals from defending themselves against discrimination, while state bodies are also unable to properly fulfil this function.

Without such a law, the prohibition of discrimination remains fine words which are not backed up with normative regulation.

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In 2006 Ukraine ratified Protocol № 12 to the European Convention on Human Rights which places an absolute ban on all forms of discrimination. However its provisions have yet to be incorporated into legislation. In the future this could lead to an increase in the number of discrimination claims lodged with the European Court of Human Rights even without approaches to the domestic court system since legislation does not provide such a possibility.

The law should bring Ukrainian legislation into line with EU Directive 2004/43/EC On implementing the principle of equal treatment of persons irrespective of racial or ethnic origin.

6.2. CREATION OF MECHANISMS FOR MONITORING OBSERVANCE OF ANTI-DISCRIMINATION NORMS

After the introduction of anti-discrimination legislation and refinement of court and administrative practice for its application, careful study should be given to the need to create a separate anti-discrimination body.

The functions of this body should be:

- implementation of state policy on countering discrimination;
- participation in drawing up programmes on fighting various forms of discrimination;
- gathering of information on cases of discrimination, the actions of the authorities, their analysis and summarization;
- preparation of an annual report on discrimination in Ukraine presented to the Verkhovna Rada for its consideration;
- coordination of the work of the authorities in combating discrimination;
- periodic analysis of normative acts to check for different forms of discrimination;
- monitoring of the activities of the central authorities and local bodies of local self-government in this area;

– ensuring that victims of discrimination receive legal assistance;

The control functions of this body should include the following powers:

- examining individual complaints about the behaviour of state authorities, bodies of local self-government and their personnel;
- issue mandatory instructions on eliminating discriminatory behaviour or take measures in the event of inaction by state authorities, bodies of local self-government and their personnel;
- draw up protocols on administrative offences with regard to officials of the authorities or bodies of local self-government, or legal entities for not implementing instructions or other administrative offences relating to discrimination. The courts should have jurisdiction to bring people to administrative liability in this sphere;
- the authorities and bodies of local self-government, if they disagree with the instructions, can lodge an application with an administrative court to have them declared unlawful;

A special anti-discrimination body can be created in three ways:

- through the creation of a separate National Commission against Discrimination as a separate state body;
- through the creation of a special anti-discrimination department within the system of the Human Rights Ombudsperson;
- through the creation of a special Ombudsperson on Countering Discrimination.

6.3. DIVERSIFICATION OF LIABILITY FOR DISCRIMINATION AND ENSURING INEVITABILITY OF PUNISHMENT

The State must ensure a flexible system of liability for discrimination which establishes proportionate punishment and provides the possibility for victims of discrimination to receive proper compensation for the infringement of their rights.

In our view, the State should not so much heighten liability, as ensure by means of a flexible and clear system of liability that there can be no waiving of responsibility even where there is not a significant size of the liability.

Criminal legislation

In our opinion, changes are needed to Article 161 of the Criminal Code which establishes criminal liability for the violation of individuals' equal rights on the basis of their racial or national origin or their attitude to religion.

Court practice in 2008 showed that this article can in fact be applied. Despite this, the following amendments need to be made:

1. The range of possible victims of this crime must be widened since in the present version, this covers only Ukrainian citizens, although in practice it is also applied to those who are not citizens;

2. Since effectively there are several forms of crime contained in this article, as regards both public and private relations, the components of the crime need to be changed:

– liability for «deliberate acts aimed at inciting ethnic, racial or religious enmity and hatred» make into a separate article and transfer it to Chapter XX of the Criminal Code (Article 440-1) since this would be closer to the nature of this crime;

– decriminalize, that is, remove from the Criminal Code, liability for «deliberate acts aimed at denigrating national honour and dignity or offending citizens' feelings with regard to their religious convictions» since the application of criminal punishment for offence and denigration of national honour and dignity are not proportionate and would infringe freedom of expression of views in accordance with European Court of Human Rights case law;

– present paragraph one of this article as follows: «Systematic deliberate acts aimed at direct or indirect limitation of rights, or establishment of direct or indirect privileges on the basis of race, skin colour, political, religious or other convictions, gender, ethnic or social original, position as regards property, place of residence, language or other features».

In our view there is no need to increase sanctions for this crime, but instead to ensure that these sanctions are applied without fail to those guilty of the crime.

Traditionally such articles in undemocratic countries are used for repressive purposes. One can cite such examples from the application of similar articles in Russia. In view of this, the removal of direct intent and failure to add systematic nature of such acts to the components of the crime in Article 161 § 1 of the Criminal Code could lead to negative consequences, the harm from which would far outweigh possible benefit.

In our opinion, there needs to be much more frequent application of Article 67 § 1.3 of the Criminal Code which heightens liability and influences the size and kind of punishment imposed. It would also be possible to broaden the content of this element, for example:

CURRENT VERSION OF THE CRIMINAL CODE:

Article 67: Aggravating circumstances

1) In imposing punishment circumstances regarded as aggravating liability shall be:

(...)

2) committing a crime on the basis of racial, national or religious enmity or discord;

Proposed version of the Criminal Code

Article 67: Aggravating circumstances

1) In imposing punishment circumstances regarded as aggravating liability shall be:

(...)

3) Committing a crime for the purpose of discrimination or on the basis of racial, national, ethnic or religious enmity.

Legislation on administrative offences

Rather than applying norms of the Criminal Code, it would be much more effective to impose clear administrative liability for certain specific discriminatory acts or inaction by officials of the state authorities or bodies of local self-government, individuals and officials of legal entities.

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In our opinion, the problem lies to a large extent not so much in establishing liability in law, as in implementing a tradition of holding people accountable for discrimination. It would thus be wiser to apply relatively minor punishments more often rather than extremely rarely imposing fairly severe sentences. This policy we believe would lead to considerably more efficient countering of discrimination since society and the authorities would begin to more clearly understand which actions are inadmissible since they constitute discrimination.

This would also make it easier to apply liability in the case of those circulating discriminatory material, including media outlets, since there would be the possibility of imposing proportionate punishment in the form of fines to the authors of such information or the officials of the outlets or bodies which had circulated it.

At present in the Code of Administrative Offences there are no offences relating to discrimination.

In our opinion, it would be expedient to establish in the Code of Administrative Offences the following:

liability for:

- discrimination against individuals or groups on political, religious, ethnic grounds, according to age, gender or other factors;
- public calls to discrimination against individuals or groups;
- circulation of information containing calls to discrimination against certain individuals or groups, or information which is discriminatory towards an individual or certain group of individuals;
- preparation and circulation of advertisements whose content is discriminatory, or advertising which contains calls to discrimination;
- the preparation and circulation of printed publications which are discriminatory or which contain calls to discrimination;
- establishment of discriminatory criteria for employing people;
- refusal to provide medical assistance or carry out a medical examination on the basis of discrimination;
- minor damage to property committed as a form of discrimination, or from motives of racial, ethnic, national or religious enmity;
- petty hooliganism, committed as a form of discrimination, or from motives of racial, ethnic, national or religious enmity;
- failure to react to the instructions of a special anti-discrimination body.

This list is not exhaustive and can be supplemented by liability imposed for other specific acts of a discriminatory nature. It is possible that some of the provisions citing may prove controversial, and need more detailed working when drawing up the relevant draft law.

It is also clear that such types of offences can be established after the adoption of a general anti-discrimination law which would define fundamental concepts.

The sanctions should envisage fines from 10 to 100 times the minimum wage before tax, with an increase in the case of a repeated offence during the space of a year, or community work.

Protocols on such administrative offences can be drawn up by police officers, state authorities carrying out controlling functions on observance of anti-discrimination norms, and penalties imposed through the courts.

It would also be important to make amendments to Article 35 of the Code of Administrative Offences which establishes aggravating circumstances for administrative offences.

For example, an additional circumstance needs to be added in the following version:

«committing an offence as a form of discrimination, or from motives of racial, ethnic, national or religious enmity».

Civil legislation

Defining certain acts as offences will make it possible to respond in accordance with civil proceedings, for example:

- by demanding through the courts that printed publications or media outlets be withdrawn;

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– by demanding through the courts the suspension of a media outlet where there has been systematic (three or more occasions throughout the year) circulation of information deemed discriminatory, or containing calls to discrimination;

– by demanding through the courts compensation for moral and material damage.

The use of measures via civil proceedings should comply with the principles of proportionality and what is necessary in a democratic society.

6.4. STUDY AND EDUCATIONAL PROGRAMMES ON TOLERANCE AND COUNTERING DISCRIMINATION

It is clear that without changes to the public's attitude on the issue of discrimination it will be hard to achieve significant results in this area. In our view therefore, it is necessary to:

– analyze curricula and textbooks in schools and other educational institutions to check for discriminatory elements and to remove these;

– introduce into the system of school education programmes on tolerance and human rights together with the relevant training for teachers and the possibility of independent public monitoring of the teaching of these disciplines;

– carrying out training of personnel of law enforcement on tolerance and human rights;

– systematically carry out training of law enforcement personnel regarding investigations of offences based on discrimination;

– systematically carry out training courses for judges and bar lawyers on the issue of discrimination.

7. RECOMMENDATIONS

1. Draw up and pass a basic anti-discrimination law which should contain all necessary definitions, a list of prohibited grounds for discrimination, as well as mechanisms for protecting against such discrimination. It should also increase the State's responsibility for combating discrimination and introduce a special anti-discrimination body.

2. Prepare a Draft law on amendments to the Law «On national minorities in Ukraine», and undertake an expert analysis of the Draft to ensure its compliance with OSCE, Council of Europe and European Union standards.

3. Draw up a Draft law on amendments to the Law on languages and review the Law on ratification of the European Charter on regional languages and language minorities.

4. Prepare Draft laws «On national-cultural autonomy», on amendments to the Civil Code and other laws, as well as special programmes aimed at developing the principle of non-discrimination, and allow special quotas for discriminated ethnic groups (the Roma, Crimean Tatars, Karaims, Krymchaks, etc.).

5. Prepare a special electoral law for the Autonomous Republic of the Crimea.

6. Carry out an inventory of land in the Crimea to help resolve the problem of land allocations to representatives of formerly deported peoples.

7. Provide better definition of the elements of the crime under Article 161 of the Criminal Code; introduce norms stipulating civil and administrative liability for actions directed at discriminating against individuals and groups of society.

8. Broaden the force of anti-discrimination norms to cover foreign nationals legally abiding in Ukraine

9. Draw up and adopt changes to legislation in order to regulate single-sex cohabitation

10. Develop a policy of zero tolerance for manifestations of racism and xenophobia, including drawing up and implementing educational and cultural campaigns aimed at building tolerance towards people of other nationalities.

XIII. PROPERTY RIGHTS¹

1. OVERVIEW

Protection of property rights is a crucial task for the state since this right forms the basis for ensuring other socio-economic rights. In this realm there are no unimportant rights, since each of them reflects an essential aspect of our life which affects each of us.

This year was extremely difficult both from the point of view of ensuring safeguards of property rights, and as regards the behaviour of the authorities in restricting these rights.

Systemic and long-standing problems which had been put off indefinitely have become more acute. The lack of a single, effective system of registration of the right to immovable property has led to a serious weakening of safeguards of property rights and to heightened uncertainty among the public that their rights will be properly protected. That is understandable since without clarity as to who answers for this area of activity it will never be possible to establish such order. This also leads to considerable abuse in cases, for example, where two apparent owners emerge for the same flat or plot of land. This problem is felt particularly acutely in times of economic crisis when people see protection of their right to a home and land as paramount.

At the same time longstanding legislative flaws with regard to buying up land for public needs have led to a situation where at present the State effectively has no legal mechanism for legally ensuring the redemption of land which, for example, is needed for building work of importance to the country, including that required for the holding of EURO 2012. In carrying out measures needed for this major event a whole range of property rights violations are occurring. It should be noted that there are also considerable problems with removing land from owners using it not as intended.

The financial crisis which hit the banking system in 2008 has contributed to unwarranted interference by the State in the individual's right to peacefully enjoy their property. In justifying the need to tackle the crisis, the government has initiated the preparation and adoption of a number of normative legal acts in contravention of current legislation which infringe customers' rights. One can point, for example, to the moratorium on early release of bank deposits imposed by the National Bank of Ukraine (NBU), despite this being in breach of current Ukrainian legislation.

Cases have also become common where money in current accounts and deposits where the term has expired have not been returned by problem banks.

The old problems with enforcement of court rulings remain. Only 8% of court rulings as far as penalties involving property are enforced. With such statistical figures it would be difficult to speak of property rights being safeguarded. The situation is exacerbated by the moratorium on the sale of property of State enterprises, as well as by difficulties in selling the property of people with debts.

Most problems regarding property rights are systemic and continue year in year out. This indicates that they are not a consequence of the world financial crisis with the latter having only highlighted them. The problems require active government attention and a comprehensive approach in resolving them.

¹ Prepared by Maxim Shcherbatyuk, UHHRU

2. SAFEGUARDS OF PROPERTY RIGHTS

2.1. STATE REGISTRATION OF THE RIGHT TO REAL ESTATE

One of the universally recognized safeguards of property rights is provided by a reliable, guaranteed and effective system of State registration of the right to real estate. In 2008 there was still no creation of such a system for protecting property rights based on a «one stop» registration of these rights. This means that one body would be responsible for registering all rights and penalties involving real estate, both plots of land and the buildings, etc, on them.

According to the Ministry of Justice, legislation regulating operations with real estate remains flawed² Gaps in legal regulation of such operations and of the activity of business enterprises on the property market are helping fraud and other violations of legislation to flourish. A substantial circle of people who lack sufficient legal knowledge and experience and need consultation, end up trusting various commercial structures and private individuals to their cost.

The existing model of registration of real estate property rights is flawed and inefficient due to its multi-level structure. For example:

- the right to land plots and some penalties on these are registered in the State Land Register run by the State Committee for Land Resources;

- the right of ownership to buildings, constructions, and flats is registered in the Bureau for Technical Inventory;

- Information about the right of ownership to buildings, constructions, and flats can also, depending on the region be contained in the State Register of Property Rights on Real Estate, under the control of the Ministry of Justice;

- Mortgages of real estate (including land, buildings, constructions, flats) are registered in the State Registry of Mortgages on Real Estate, under the control of the Ministry of Justice;

- Information about other commitments on real estate may be registered and contained in the Single Register of Bans and Arrests on Appropriation of Real Estate, as well as in housing and communal services (ZHEK) office documents.

It should be noted that there are quite frequently concealed charges on real estate which can impede the exercise of property rights.

The main reasons for these problems are, firstly, a chaotic system of registration of charges on property in various registers, this making it extremely difficult to identify them all.

Nor does legislation make it mandatory to register all conceivable charges levied against real estate, for example, court rulings where property is levied, or apartment rent (lease) agreements.

The possibility of such concealed charges on property is the most serious risk connected with the existing system of State registration of real estate property rights. It is impossible to minimize this risk without a single register of real estate property rights based on a «one stop» principle.

After the Law «On State registration of material rights to real estate and limitations of these rights» came into force, the functioning of the present registration system came into conflict with this law however a new registration system has still not been created. As a result of this there is a risk that existing State registration of real estate property rights ceases to be legitimate.

2.2. SAFEGUARDING OWNERSHIP OF CORPORATE RIGHTS

Economic crisis deepens problems with safeguarding ownership of corporate rights, and an increase in the unlawful seizure of enterprises. The main factors at play here are failings in legisla-

² I. Zahalna. Safeguarding property rights in Ukraine: legislation and mechanisms // Key ideas of reports from the International Theoretical and Practical Conference «Issues involved with safeguarding human rights in Ukraine in the light of the Universal Declaration of Human Rights». 10 November 2008.

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tion and with the court system. According to estimates during 2008 there were more than 2,500 businesses were seized in corporate raids.³

A draft law «On joint stock companies» which could remove a considerable number of the gaps in legislation regarding the activities of joint stock companies and related corporate issues. However it was only in September 2008 that the Verkhovna Rada managed to pass this act which was passed into law by the President at the end of October.

The urgent need to pass a special law regulating problems in the formation and activities of Ukrainian joint stock companies is explained by several important factors.

The Law «On economic companies» from 1991 did not ensure basic protection of property rights of either large or small-scale shareholders and failed to address many issues in managing joint stock companies. This led to numerous corporate conflicts which adversely affected the financial state and production capacity of the enterprise.

Flaws and gaps in current legislation have made it difficult for large investors to work normally, making them dependent on disruptions to general meets, judicial red tape and similar obstructions caused by other investors.⁴ All of this has led to major corporate conflicts, including in large joint stock companies which determine the development of whole areas of industry.

One can cite the example of the longstanding conflict taking place in one of Ukraine's biggest mobile operators – the company «Kyivstar GSM». To the present day there is no agreement between the main shareholders, this being seen in various scandals, accusations of spying, etc.⁵ Both parties use all the flaws in corporate legislation in order to achieve their own aims.⁶ Furthermore, in view of the fact that the parties cannot resolve this dispute in Ukraine due to inadequate domestic corporate legislation, they are forced to turn to courts abroad.⁷

It should be noted that the law «On joint stock companies» now adopted regulates in detail the procedure for creating a joint stock company. However the construction regarding the need to dissolve joint stock companies if the size of clear assets does not meet the minimal size of the capital in the acts of association for 10 months remains contradictory. In conditions of world crisis, as well as instability of Ukraine's economy, observance of this norm could lead to a considerable number of bankruptcies.⁸

A positive feature of the new law is the duty of joint stock companies to inform each creditor in writing of a decrease in the size of the founding capital, this, undoubtedly, helping to protect their property rights.

There is an important provision of the law which regulates the specific features of share sales which increases guarantees of shareholders' rights and reduces the opportunities for corporate raiders. Article 26 which imposes liability of officials of the joint stock company where employee shareholders' rights are infringed is also reasonably progressive, however it should be said that the lack of procedure for implementing this provision makes it impossible to apply in practice.

The new law also provides detailed procedure for general meetings (notification of them, the adoption of decisions, quorum, and so forth). Lack of regulation of these aspects had previously led to constant infringements of minority shareholders and corporate raids on enterprises. The new law,

³ S. Pyshchyk. «In 2008 there were more than 2,500 corporate raids» // 16.03.2009 <http://www.intermedia.org.ua/ua/news/48203>.

⁴ M. Libanov, «Who needs the Law «On joint stock companies» and why» // «Dzerkalo tyzhnya», № 29 708), 9-15 August 2008, <http://www.dt.ua/2000/2020/63685/>

⁵ «The owners of Kyivstar are playing spies» // Khreshchatyk № 206 (3422) 14 November 2008 <http://www.kreshchatic.kiev.ua/ua/3422/art/1226610056.html>

⁶ «American court demands Kyivstar shares belonging to «Alpha»/ <http://biz.liga.net/news/E0902887.html>

⁷ Telenor: New York court did not hand Kyivstar over to the Russians // Internet publication «Economychna Pravda» <http://www.epravda.com.ua/news/478e6d49f1020/>

⁸ Commentary to the Law «On joint stock companies» <http://www.consultants.kiev.ua/article/komentar-do-zakonu-pro-akts%D1%96onern%D1%96-tovaristva>

while not preventing machinations during general meetings, provides much more regulation of this procedure, creating the possibility for shareholders to lodge complaints where it is infringed.

There are however also negative elements. For example, at present there are duplications and incompatibility in the law passed as against Articles 1-49 of the Law «On economic companies». These can only be eliminated in two years since in accordance with the Final Provisions they cease to be valid only two years after the law on joint stock companies has come into force.

Furthermore, corruption in the court system makes it possible for «raiders» to receive the ruling they want and gain ownership of any enterprise.⁹

In 2008 there were attempts to introduce criminal liability for direct seizure of buildings, institutions and organizations, however they were not successful. It should be noted that at one stage there was a real detective story over this norm. It was initially contained in the Law «On amendments to some laws on preventing seizure of businesses, institutions and organizations», passed by parliament on 18 September 2008. However in the final version of the document signed by the President, the norm, through a strange coincidence, proved to be missing.

The next attempt to introduce the norm was in the draft law «On amendments to some legislative acts regarding liability for infringements on the securities market» (draft law № 2614), adopted in December 2008 in its first reading. According to this, seizures of buildings and organizations would be punishable by deprivation or restriction of liberty for a period of up to two years. For the same acts, carried out through prior conspiracy or in a manner especially dangerous for those around, the punishment could be imprisonment for up to five years.

However the prospect of this norm being approved has concerned many human rights defenders since there are numerous and varied situation which could be qualified as seizure, for example, basic eviction on legal grounds. Therefore criminal liability creates the possibility for conflicts at corporate level to end up with the police or prosecutor. And success in such cases will therefore be dependent on who manages to gain the support of the enforcement bodies.¹⁰

2.3. NON-ENFORCEMENT OF COURT RULINGS PROTECTING PROPERTY RIGHTS

To understand the situation with enforcement of court rulings, it is useful to begin with some figures. As regards court rulings where property was levied as a penalty, according to the Minister of Justice, Mykola Onishchuk, only 8% of such rulings are implemented (the total level of enforcement of court rulings is around 32.5%).¹¹

One of the reasons for this situation lies in laws from the 1990s on so-called moratoriums. These include a moratorium on the compulsory sale of property of State enterprises, those of the fuel and energy industry, pipeline transportation, enterprises of Ukrudprom [Ukrainian mining and metallurgy industry], shipbuilding. Thus, of 32 billion UAH which were to be redeemed in accordance with court rulings, 18 billion constituted money and property which have immunity, being protected by moratoriums, including immunity from enforcing documents to levy penalties in favour of people owed wages.

By providing immunity from enforcement of court rulings to those involved in business activities in these fields, the legislators have thus placed them in a privileged position over businesses in other fields. It should be pointed out that the laws imposing moratoriums are unconstitutional. After all, the provision of any privileges to particular owners or concessionary regimes of economic

⁹ K. Venhrynyak, «The law is provoking corporate raids» // Yurydychna gazeta», № 18 (153) from 13 May 2008, <http://www.yur-gazeta.com/article/1565/>

¹⁰ O. Hrybanovsky, «Corporate raiders again face prison», <http://news.finance.ua/ua/~2/130/all/2008/12/27/147627>

¹¹ «Mykola Onishchuk: Only 8% of court rulings where property is levied as a penalty are implemented» // The newspaper «Holos Ukrainy» [«Voice of Ukraine»], № 70 (4320), 11 April 2008, <http://www.golos.com.ua/article/1207828613.html>

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activity are a direct contravention of Article 13 of the Constitution. This assessment is shared by the Ministry of Justice.¹²

Certainly at the time these moratoriums were introduced, the situation in the country was difficult and there was a risk that the State could be deprived of the property through corrupt dealings. However a number of years have passed since then, during which the majority of enterprises of the fuel and energy industry and other fields mentioned have been privatized and fairly profitable, with a high level of viability, and yet the moratorium on compulsory enforcement of court rulings remains intact.

The relevant draft laws on cancelling these anomalies have, in fact, been prepared, however at the present time the moratoriums remain in force. Obviously questions will arise regarding the retention of certain restrictions regarding pipeline transportation, train, ammonium and gas pipes. However it is specific property which needs to be protected and not particular enterprises, etc.

The problem of non-enforcement of court rulings is exacerbated by the fact that traditionally, dating from Soviet times, the entire system of enforcement was structured by the State in such a fashion that the debtor remained the privileged party. They needed to be warned, given time for voluntary enforcement, handed a formal order, and they could appeal on the grounds of their own subordinate position against any actions by the State bailiffs. The system of administration in the State Bailiffs' Service is no less bureaucratic. The debtors also have a wide arsenal of means enabling them to avoid enforcing the court ruling.

The procedure for sale of the property of debtors seized during enforcement proceedings remains inadequate and complicated. The State Bailiffs are effectively deprived of any control of this stage of the proceedings. As a result of this, the sale of seized property is often carried out with infringements of the law which drags out the time periods for enforcement; the property's value is reassessed, and its market value often underestimated. There have been cases where the money from the sale of property has not been transferred by specialized organizations.

The European Court of Human Rights can also not stand aloof from these infringements and more and more often passes judgments finding violations by Ukraine of Article 1 of the First Protocol to the European Convention on Human Rights. The case of Pashuk (from Chernihiv) is a good example.

CASE OF PASHUK V. UKRAINE (APPLICATION № 34103/05)¹³

In January 2003 Ms Pashuk who has over 30 years teaching experience, and has worked all her life in Chernihiv Specialized Secondary School № 1 with intensive study of foreign languages (specialist of higher education), lodged a civil suit with the Desnyansky District Court in Chernihiv asking that the Department of Education of the Chernihiv City Council be forced to pay her supplementary payment for number of years served, as well as pay 4,500 as assistance towards health restoration. The court granted 4,865 UAH and 14 kopecks.

However this court ruling was not executed. Moreover, the state bodies which carry out enforcement of court rulings refused to enforce it at all, and on 28 December 2004, closed enforcement proceedings and returned the writ of execution due to the lack of money on the account of the debtor (the State) which could be extracted.

On 13 April 2005 the Chernihiv Regional Department of Justice sent Ms Pashuk a response to her application in which it informed her that due to non-financing in the Budget of payments which were due her, such payments are determined by creditor debt of the State Budget of Ukraine (reference is made to the Law «On restructuring of debt on payments envisaged by Article 57 of the Law of Ukraine «On education» to educational, academic-educational and other categories of employees in educational institutions»). Pashuk was also informed that payment of this creditor

¹² Ibid.

¹³ The case was supported by the UHHRU Strategic Litigations Fund, <http://www.helsinki.org.ua/index.php?id=1154532718>

debt of the State Budget was mandatory, and was paid back over five years in equal parts through inclusion of payments through the relevant laws on the State Budget of Ukraine, starting from 2005. The notification also states that according to information from the Department of the State Treasury for Chernihiv, at the present time planned figures for payments on repaying wages arrears for previous years have not been carried out, calculations under the given types of payments have not been made. That is, enforcement of this ruling was not planned.

Refusing to accept these arguments, Pashuk, with the assistance of UHHRU lawyer Ivan Tkach, approached the European Court of Human Rights. In her application, she complained on the longstanding failure to enforce a court ruling against the State and a violation of her property rights. One of her arguments was that the State could not independently, even by means of legislation, in breach of a court order, determine the restructuring of payments awarded by the court. Furthermore, lack of money in the Budget did not constitute sufficient grounds for violating her property rights.

On 12 June 2008 the European Court of Human Rights agreed with the applicant's arguments and found that there had been a violation of her property rights. The Court thus effectively found that the law on restructuring the debt violated the right to a fair trial and the property rights of the applicant.

In this and many other similar cases which the European Court of Human Rights examined in 2008 infringements were found of the right to peacefully enjoy ones property due to the existence of various restrictions, moratoriums on enforcement of rulings by domestic courts, or due to the inaction of the Bailiffs' Service.

2.4. SAFEGUARDS OF RIGHTS TO MORTGAGED PROPERTY

For safeguarding property rights to housing which is mortgaged, it is important to ensure that there is a court mechanism for repossession of such property. Yet on 25 December 2008 the Verkhovna Rada passed amendments to the Law «On mortgages», where one of the provisions allows for repossession of mortgaged property on the basis of the contract between the parties, without a court order.

These amendments were introduced through the Law «On averting the influencing of the world financial crisis on the development of the building industry and residential construction».

Thus, at the present time banks are entitled to repossess mortgaged flats where the conditions of the mortgage agreement have not been met, for example, where the borrower has fallen behind in repayments.

However the Ukrainian Constitution stipulates that no one may be forcibly deprived of their home except on the basis of the law and in accordance with a court ruling. One can thus expect that where banks resort to extra-judicial mechanisms for repossessing flats, there will be court appeals lodged. Provisions of analogous content are found in norms of the Housing Code of the Ukrainian SSR. For example, paragraphs one and two of Article 109 state that eviction from residential premises is permitted on those grounds established by law. Eviction is carried out voluntarily or in accordance with a court ruling.

The Ministry of Justice also points to the fact that for the practical implementation of the new mechanism of extra-judicial repossession, amendments are needed to a number of other Ukrainian laws, including «On mortgages», «On the notary service» and «On State registration of material rights to real estate and limitations of these rights».

In any case deprivation of flat owners of their property without a court order could significantly weaken the protection of the right to peaceful enjoyment of ones property as set down in the European Convention on Human Rights.

2.5. SAFEGUARDING THE PROPERTY RIGHTS OF INVESTORS IN THE AREA OF CONSTRUCTION

There remain serious problems with ensuring property rights in the construction sphere, and this is leading to widespread infringements on this market. Very little was done to address this

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problem in 2008. The Minister for Regional Development and Construction Vasyl Kuybida acknowledges that there is insufficient liability for violations in the building sphere. In 2008 50% of the construction items checked «proved unlawful».¹⁴

The number of financial building frauds over recent years has reached disturbing proportions. Thousands of Ukrainians have already fallen victim to fraudulent deals involving residential construction. Experts believe that such frauds have become possible due to failings in the procedure for land distribution, the choice of builders, registration of the right to real estate and its restrictions, as well as because of the lack in legislation of norms regarding the ways and mechanisms for ensuring enforcement of contracts in the area of residential construction.

At the same time, a number of measures aimed at fighting these problems effectively remain unimplemented. These include:

- improvement in the norms of current legislation regulating urban construction work, for example, the creation of mechanisms by which a specific investment project for potential construction is put to auction or tender. Only those economic players who have the relevant financial, technical and production capacity for its implementation would be able to bid to be chosen as builder or subcontractor;

- envisaging in legislation mechanisms for ensuring enforcement of the contractual conditions for the construction of a multi-apartment building via mortgage of the land site granted in ownership or use to the builder, or guarantees from solvent members of the market;

- ensuring proper monitoring in the construction area, increasing liability of the local authorities though the obligation to keep a register of investment contracts and agreements on construction of multi-apartment buildings;

- the introduction of registers for builders and building objects where private investors are involved;

- mandatory reporting by construction firms and investment funds on money obtained from individuals during the implementation of the construction or assembly work;

- carrying out a thorough analysis of money obtained in the regions from members of the public for the construction of housing and observance by builders (developers) and investment funds of the conditions of their agreements;

- where circumstances arise to institute bankruptcy proceedings against a builder, only procedure for readjustment of a debtor should be applied, for example, through the participation of individual investors or local authorities;

- prohibition of advertising and announcements about the sale of flats by builders (developers) before building permits have been obtained;

- the creation of proper conditions for carrying out effective public control over developers and investment funds.¹⁵

2.6. PUNISHMENT OF THOSE INFRINGING PROPERTY RIGHTS

Nothing has changed as regards lack of protection of owners in the case of petty theft This was even noted by the Minister of Internal Affairs Yury Lutsenko who spoke of the need to cancel the norms of the law which stipulate that a person who has committed a theft worth less than the minimum wage shall not be held criminally liable. «They steal a cow from an old lady and there's no criminal file, they steal a young girl's bike – no criminal file, a young lad's mobile telephone and no criminal file. People get the impression that the police deliberately don't want to initiate

¹⁴ «Mizhregionbud» supports the imposition of strict liability for violations in the area of construction»// The newspaper «Khreshchatyk», № 226 (3442) from 23.12.2008, <http://www.kreschatic.kiev.ua/ua/3442/news/1235474215.html>

¹⁵ «Yushchenko has sent Tymoshenko reeling with construction machinations» // the Internet publication «Glavred», <http://ua.glavred.info/archive/2008/03/03/131529-6.html>

them», Lutsenko stated. There is a particularly difficult situation in rural areas where petty crimes have become very widespread.¹⁶

It should be noted that up till the present time all legislative initiatives in this sphere have remained on paper.

3. BEHAVIOUR OF THE AUTHORITIES IN RESTRICTING PROPERTY RIGHTS

3.1. PURCHASE OF PRIVATELY OWNED LAND FOR PUBLIC NEEDS

The problem has recently become more pressing of appropriation by the State of privately owned land for State needs. This is due to the expanding boundaries of cities and also the need for new buildings, etc, in connection with Euro-2012.

Furthermore, via court orders the State also takes land away from owners not using it according to its designated purpose. This court practice became entrenched quite recently and raises many questions regarding its compliance with universal principles of the inviolability and protection of private property.

Compulsory appropriation of privately held land is, according to Ukraine's Constitution, an exceptional measure, while pursuant to Article 78 of the Land Code a private owner has the exclusive right to own, use or dispose of land.

Bearing this in mind, the application of compulsory appropriation of land is quite unlawful. According to the Constitution it can be applied, as an exception, for reasons of public need, on the grounds and subject to prior full compensation of its value. Compulsory appropriation of such sites with subsequent full compensation of their value is permitted only in a state of war or emergency. Thus the right to own land is guaranteed and nobody can be unlawfully deprived of this right.

On the other hand, the Land Code is not so categorical on this subject. It states that compulsory termination of the right to a piece of land is carried out through the courts in some cases, among them: the use of the land not as it was intended; redemption (appropriation) of land due to the public need, requirements and confiscation of the land site. o

In order to build any constructions of State or local importance, such as a new ring road, a new stadium for Euro-2012 or other elements of infrastructure, the owners of the land on which the building work is planned, need to be moved.

And this is where the first problems immediately arise. According to information from the Accounting Chamber of Ukraine, there has still been no resolution of organizational, including land, issues with regard to the reconstruction of the main stadium – the National Olimpiysky Sports Complex. For over two years the issue of carrying out design work for this reconstruction has been at decision stage, while the reconstruction of the stadium is being carried out in the absence of approved design documentation. The status of some land sites adjoining «Olimpiysky» also remains unregulated.¹⁷

Yet another example is the fact that the Kyiv Regional Council has recommended that the Regional State Administration draw up an action plan for appropriating pieces of land in order to build a new ring road. The Head of the Kyiv Regional State Administration Vera Ulyanchenko informed a district administration «of the undesirability of land sale and purchase operations in districts marked for the construction of the circle road (plus or minus 250 metres from the road).

It is known that the instructions have been taken literally in district administrations which have stopped issuing documents certifying the lack of prohibitions on the appropriation of problematic sites and other law-establishing documents without which notaries do not register land sale and

¹⁶ «Lutsenko proposes imprisonment for stolen whitewashing» // the Internet site „proUA.com», <http://ua.proua.com/news/2008/09/22/180556.html>

¹⁷ «The economic effect of Euro-2012 is not defined» // The Accounting Chamber of Ukraine http://www.ac-rada.gov.ua/achamber/control/uk/publish/article/main?art_id=1334977&cat_id=411

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purchase agreements. In addition, district departments of architectural and construction as well as controlling bodies are dragging their feet over issuing permits to commence construction work. Effectively owners of sites at issue are confronted with the choice: take the authorities who are hindering them from exercising their right of ownership to court now, or wait for the compensation promised by the Head of the Regional State Administration.¹⁸

Clearly conflict with owners is inevitable. At the same time it should be noted that property rights are not absolute, and are restricted by public and State interests. Regardless of this, however, the owner's interests must be protected, and such appropriation should take place with the minimum expense for him or her.

In reality, unfortunately, we have problems. The Land Code sets down the main principles for compulsory redemption of land sites and their compulsory appropriation for public needs, or for motives of public necessity. The State authorities and bodies of local self-government are given fairly broad powers to appropriate privately owned land. It is interesting that the valuation of the land is carried out using methodology approved by the Cabinet of Ministers and does not reflect the real market value of the land. However the norms of the Land Code are of a general nature and do not regulate the grounds and procedure for such appropriation, but envisage the adoption of a special law which would regulate appropriation procedure.

At present the Verkhovna Rada is considering a draft law «On the redemption of privately owned land for public needs and for reasons of public necessity» (draft law № 0861), which has on several occasions been rejected by the President with the explanation that it does not comply with the Constitution.

The President's proposals state that the Law cannot be signed since it does not safeguard the constitutionally guaranteed inviolability of the right of private ownership, is conceptually flawed, does not establish a clear mechanism for redemption and compulsory appropriation of land for public needs. Furthermore, the draft law, whether deliberately or by accident, does not differentiate between the concepts of «redemption» and «compulsory appropriation of the right of private ownership of a land site», or between «public needs» and «public necessity».

The point is that according to the Constitution and the Land Code redemption is a voluntary procedure and takes place with the consent of the owner for public needs, while compulsory appropriation is without such consent, however only for reasons of public necessity. However the law provides no clear definition of the concepts «public needs» and «public necessity», noting only that public necessity arises in the case of the imposition of a state of war or emergency.

This puts in question whether there is public necessity for the construction of a stadium for the World Football Championship or a petrol station on a motorway and the compulsory appropriation of land for such objects. Will such appropriation be an exceptional measure for the sake of which the right of private ownership is infringed? This question remains without legislative regulation.

Furthermore, the draft law stipulates that where the former owner renounces his right to reinstated ownership of the land or a part of it, the State authorities or bodies of local self-government can at their discretion take the decision to hand the land, or a part of it, in ownership or use to another interested party. There is no procedure for confirming the rejection of the former owner of his right to the return of the land, and this could encourage the relevant bodies to unwarranted and uncontrolled appropriation of the land from one private owner to another, creating conditions for abuse in the buying up of land sites.¹⁹

According to the draft law the redemption price is fixed and the owner notified a year before the purchase, however given the changing prices of land sites, it is certain that by the time of the actual purchase the redemption price could be significantly different.

¹⁸ V. Darpinyants «Picnic on the side of the road» // «Halychan contracts», № 05 from 04.02.2008, <http://www.kontrakty.com.ua/show/ukr/article/34/0520089979.html>

¹⁹ O. Inyutina, «О. ІНЮТИНА, «Forced cessation of property rights to real estate» // Yurydychna gazeta, № 7 (142), 19 February 2008 <http://www.yur-gazeta.com/article/1512/>

Thus, if the Verkhovna Rada overcomes the President's veto and passes the draft law in its present form, this will create the opportunity for abuse when deciding issues of redemption (compulsory appropriation) of privately owned land, and property rights guaranteed by the Constitution will be infringed.

There is also the issue of termination of ownership rights via the court where the land is not being used as intended. Let's assume that on his piece of land for building or servicing a residential building, the owner «accidentally» built an office. Perhaps in the future he plans to change the designated purpose of the land site, however may not have time since according to the Land Code, compulsory appropriation of the right to a land site is carried out via the court where the land is not used in accordance with its designated purpose.

Decisions passed by the courts to deprive property rights due to the fact that a piece of land is not being used in accordance with its designated purpose, although this is envisaged by the Land Code, is also not unequivocal and may contravene the Constitution. It would be more logical in this case to take a decision on removing the infringement, specifically on demolishing the unlawful building or other means.²⁰

One can thus conclude that compulsory termination of ownership rights can take place only in cases clearly set out in law, and only by court order. In order that property rights are observed and the Constitution not breached, a special law should be passed which would regulate the rules of procedure for appropriation. Until such measures are taken, decisions on compulsory appropriation of land sites can be appealed in court as violating the right of private ownership guaranteed by the Constitution.

Thus, at present, legislation is unclear and unforeseeable in issues regarding the grounds and procedure for compulsory appropriation of privately owned land.

3.2. MORATORIUM ON THE SALE OF AGRICULTURAL LAND

It should be noted that in 2008 the State failed to overcome legislative problems in regulating the land market. During the year the moratorium on the sale of land designated for agricultural purposes remained in force. The problems which determined the introduction of this moratorium remain unresolved to this day. No law on a land cadastre was passed and there remains no single State system of notification and documents containing data on land sites, their legal status, qualitative and quantitative characteristics, valuation, as well as on the distribution of land between owners and users, including those renting the land. One of the consequences of these problems was the increased number of corporate raid seizures of farmers' land during this year.

At the same time the Verkhovna Rada at the end of 2008 voted to continue the moratorium on sale of agricultural land until 2010. It should be noted that the President used his veto against this since the moratorium is causing people to effectively be deprived of the right to land and dispose of it by bureaucrats. As the President stated, in the Kyiv region alone the moratorium is meaning that 50-60 thousand agricultural areas are being lost.²¹ Yet at the beginning of 2009 the Deputies once again supported the moratorium which provides yet more confirmation of the State's inability to protect the right of ownership of land.

3.3. NON-RETURN OF DEPOSITS

The financial crisis has hit many people very hard. It has also, however, promoted unwarranted intrusion by the State in people's right to peaceful enjoyment of their possessions. For example, citing the need to fight the crisis, the State initiated the preparation and adoption of a number of

²⁰ «Forced cessation of property rights to real estate» // Land Herald of Ukraine, 16 June 2008, <http://zemlia.ucoz.ua/news/2008-06-16-9>

²¹ «Yushchenko is in favour of revoking the moratorium on selling land» // The Internet publication «Economic Pravda» <http://www.epravda.com.ua/news/499eb75fd4ebc/>

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normative legal acts which contravene current legislation and violate ownership rights of people with money in the bank.

Among such measures one can certainly put the prohibition of early termination of fixed deposit agreements established by the Resolution of the National Bank of Ukraine [NBU] № 319 «On additional measures on banking activities». Although this resolution was revoked on 4 December 2008, in its place came NBU Resolution № 413 «On particular issues of banking activities» and its explanation by the Bank, which effectively continued the moratorium on early removal of deposits.

Clearly the government needed to pass a number of very specific measures to prevent a mass exodus of capital from the banks since if everybody had approached them for their money, few would have received it (since the banks don't in fact have that much money available). However it was difficult to carry out such measures within the framework of legislation since otherwise their legality is placed in doubt and the possibility of applying them.

However, as is often the case, good intentions here bring about serious problems. It turns out, for example, that the above-mentioned NBU Resolutions contravene Article 1060 of the Civil Code which states that «according to an agreement on a bank deposit, regardless of its type, the bank is obliged to hand over the deposit or a part of it at the first request of the depositor, with the exception of deposits made by legal entities on other conditions of return which are stated in the agreement.»

Furthermore, any normative or other restrictions on the rights of depositors with regard to early termination of a contract are unacceptable in accordance with Articles 1058 and 1075 of the Civil Code, Articles 66 and 67 of the Law «On banks and banking activities» which the NBU refers to in its Resolutions do not envisage the right of this body to impose the said restrictions.

However all of this is the dry language of legal documents which in fact means the violation of the rights of each client of the bank who was not given his deposit on demand, with this being explained by the National Bank's Resolutions. They now have the right through the courts to demand reinstatement of their violated rights, as well as compensation for material and moral damages incurred.²²

In addition, at the end of 2008 – beginning of 2009 a wave began of failures by «problem» banks to return deposits the term of which had ended, as well as money on current accounts. For example, a lot of publicity was given to the non-return in full of deposits of the commercial banks «Nadra» and «Kyiv». As a result of this in February 2009 the National Bank imposed a moratorium on meeting the demands of creditors of «Nadra» and «Kyiv» for six months in order to create favourable conditions making it possible to restore the financial condition of the banks.

It should be noted that according to information from the Chair of the Council of the National Bank Petro Poroshenko, in the country 15 banks have suspended payments and repayments of deposits, including even those where a temporary administration was not introduced.²³

3.4. RESTRICTIONS ON THE USE OF PROPERTY RIGHTS OF VEHICLES

In 2008 there was a real problem in large cities due to the unlawful use of tow trucks to remove vehicles, this violating the right to peacefully enjoy ones property. It should be mentioned that the use of these means should take place in strict compliance with the law, but unfortunately this year there were several glaring examples of legislation in this sphere being ignored.

For example, in Kyiv in July 2008 the towing away of cars was restarted since rules of cooperation between the Kyiv Central Department of the Ministry of Internal Affairs and the Central Transport Department of the Kyiv Regional State Administration, which is the executive body of the Kyiv City Council were in force to stop administrative offences involving parking regulations.

²² «Worth knowing: what to do in order to defend yourself against banks' arbitrary behaviour» // <http://www.helsinki.org.ua/index.php?id=1228398145>

²³ «Poroshenko: 15 banks delay payments and returning fixed deposits» // the Internet publication «Glavred», <http://ua.glavred.info/archive/2009/02/10/185540-8.html>

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This procedure does not comply with current legislation, in particular Article 265I of the Code of Administrative Offence which states that the procedure for temporary detention and holding of vehicles in special impoundment areas is determined by the Cabinet of Ministers. Therefore the use of provisions of an unlawful normative act has led to violations of the ownership rights of many vehicle owners.

It was only on 13 February 2009 that an Order from the Central Transport Department of the Kyiv Regional State Administration ceased to be in force. However the private company which does the towing away is continuing to do so regardless of this.

There were similar problems in Lviv. There the local Prosecutor appealed to the court to revoke unlawful decisions by the Lviv City Council and used his powers against the unlawful use of tow trucks in the city. For example, as well as applying to the court, the Prosecutor's Office directed a protest and submission to the Lviv City Council. Admittedly the protest against the decision of the executive committee which stipulated the procedure for carrying out compulsory towing away of vehicles to the penalty compound in Lviv was rejected and the Prosecutor has twice appealed against the decision in court, however thus far without successful.²⁴

4. RECOMMENDATIONS

- 1) Create a transparent and efficient system of State registration for real estate property rights;
- 2) Improve safeguards of the ownership rights of land shares, create mechanisms for combating forced seizure of this land, pass legislative acts to regulate the fundamental aspects of the functioning of the land market;
- 3) Ensure guarantees that people's right of ownership of housing may only be removed by court order;
- 4) Carry out reform of the Bailiffs' Service to ensure unfailing fulfilment of all its functions, including judicial control over the enforcement of court rulings, and also lift the moratorium on compulsory sale of property from State enterprises to retrieve money owed.
- 5) Make amendments to legislation aimed at strengthening protection against petty theft.
- 6) Regulate appropriation of land and accommodation on the grounds of public necessity in clear compliance with the Constitution and Ukraine's international commitments.
- 7) Carry out measures to safeguard the return by banks of clients' deposits, including their early return;
- 8) Improve regulation of issues linked with restricting ownership rights to particular types of possessions, including restrictions on the rights of vehicle owners.

²⁴ «The Lviv Prosecutor is continuing to appeal against the actions of tow-away operators» // The Internet publication Zakhid.net <http://www.zaxid.net/newsua/2008/11/12/173645/>

XIV. SOCIO-ECONOMIC RIGHTS¹

1. GENERAL TRENDS

An economic crisis always affects the exercising of socio-economic rights since these are the most dependent on the financial possibilities of the State. Usually such times test the ability of the State to take responsibility upon itself and do all that is needed so that people feel protected and confident in the future. This depends on a number of factors determining the socio-economic policy of the State, for example, the level of public confidence in the actions of those in authority, the legal clarity of legislation ensuring safeguards for socio-economic rights, as well as implementation by the State of its obligations with regard to social protection.

Unfortunately, recent years have brought no increase in trust of the State. This is hardly surprising given the divide between the words from those in power or seeking to gain power, and what people actually get. High-ranking public officials talk constantly of high wages, pensions, employment however people have virtually stopped believing that the words will ever become a reality. The lack of public confidence is and will remain a main obstacle to carrying out any systematic reform in the area for social protection, whether introducing a single social contribution, or carrying out pension reform. In order that these measures bring benefit and are effective, it is first of all necessary that the public have confidence in these actions by the State.

Another example is the setting by the government of a subsistence minimum, the basic indicator for the entire system of social security. How can the public trust the government when the latter sets the size of the subsistence minimum, on which the minimum wage and pensions depend, at a rate so removed from reality that it would not even provide the minimum requirements for survival? In setting this indicator the government has for several years been infringing legislation, while as a substitute for a real minimum, the government has thought up «surrogate» indicators such as a guaranteed level of subsistence minimum which envisages the payments of various types of social assistance at a level even lower than the subsistence minimum.

There is also a problem with how clear and unequivocal is the legislation ensuring safeguards for socio-economic rights. It is impossible, for example, to speak of any degree of legal clarity where in order to receive certain social payments, a person is forced to turn to the court, go through all the stages of a court examination and even longer still waiting for the court ruling to be enforced, instead of receiving the legally-stipulated assistance through simple and understandable procedure. One seems flagrant examples of the situation with payments where assistance is for looking after families with children, as well as supplements to the pensions envisaged for war children. The court system is inundated with such cases and the public cannot fully understand what they are entitled to, and what they're not.

The government has driven itself into a corner. There is no distinction in legislation between norms which ensure certain socio-economic rights and those that provide certain privileges linked with particular services or position. This is due to the complexity and lack of coordination of gov-

¹ By Maxim Shcherbatyuk, UHHRU.

ernment regulation in cases where the State either provides or revokes certain privileges, and at the same time creates the risk of restriction or reduction of the current range of socio-economic rights, this being prohibited by the Constitution.

As a result we have seen several judgments of the Constitutional Court declaring unconstitutional particular provisions of laws with this adding to lack of clarity in legislation on ensuring socio-economic rights. This has been exacerbated by the fact that the government has effectively ignored the Constitutional Court judgments, this placing in doubt its ability to ensure their enforcement, as well as the enforcement of laws in the area of social security.

2. THE RIGHT TO AN ADEQUATE STANDARD OF LIVING

Although issues of social protection have traditionally been at the centre of attention of each of the branches of power in Ukraine, the actual changes in the quality of life demonstrate the extremely weak positive impact of economic growth on the situation in the social sphere. Despite the population's real income almost doubling over 2003-2008, there were no qualitative moves forward in the position of Ukrainians as evidenced by the following disproportions:

- ◆ Low standard of living (according to the standard of living index for 2008 Ukraine shared 62nd position in the rating with Namibia, having fallen three places compared with 2006); .

- ◆ Insufficient financing of human development, in the first instance, insufficient funds spent on healthcare and education;

- ◆ Increase in the scale and rate of depopulation with deterioration in qualitative characteristics with significant migration losses among the part of the population at reproductive age and with a high professional level;

- ◆ The demographic structure of the population characterized by an increase in the ratio of people aged 60 and above (more than 20% of the population) and a fall in the ratio of those not yet at working age;

- ◆ Fall in the number of births per thousand head of population from 12.6 to 10.2 between 1990 and 2007, and an increase in mortality from 12.1 to 16.4%, with the high death rate not ensuring natural growth of the population;

- ◆ High mortality rate among men of working age (according to estimates, 40% of 16-year-old males are unlikely to live to 60) as a result of which the difference between life expectancy for women and men is 11 years (in some regions up to 13 years).²

In order to ensure the right to an adequate standard of living, it is therefore vital that measures be taken to significantly improve the standard of living of the population with this being especially urgent at a time of increased social tension due to the economic crisis..

2.1. SAFEGUARDING THE RIGHT TO AN ADEQUATE STANDARD OF LIVING

In order to implement international commitments on ensuring the right to an adequate standard of living, it is vital that the government establishes an adequate indicator reflecting the minimum level which the State guarantees its population.

According to the Constitution this indicator is the *subsistence minimum*.

Pensions, other forms of social payments and assistance which are the main source of existence must ensure a standard of living which does not fall below this subsistence minimum.

This indicator thus provides the basis for making a general assessment of the standard of living, determining the criteria of poverty, establishing the size of the minimum wage and minimum retirement pension, the size of social assistance, help for families with children, unemployment benefit,

² Ukraine in 2008: processes, results, prospects. White Book of State Policy / General Editor Y.H. Ruban – National Institute for Strategic Research, 2008 <http://www.niss.gov.ua/book/book2008/index.htm>

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as well as student grants and other social payments. As we can see, the running of all social policy is linked with the use of the subsistence minimum.

It is therefore of interest how this indicator is determined. According to the law, it is the «cost of the range of food items sufficient for ensuring the normal functioning of the human organism and preservation of health, as well as the minimum range of other goods and services needed to satisfy the individual's basic social and cultural requirements»³.

Determination of the subsistence minimum should thus be based on methodology for its calculation and a certain minimum range of food items and other goods, as well as services.

And here it becomes interesting. Not everybody knows that at the present time the subsistence minimum is calculated using methodology and a range of food items, other goods and services approved by the Cabinet of Ministers back in the year 2000. This is despite the fact that according to the Law «On the subsistence minimum», the range of minimum food items, other goods and services for the main social and demographic groups of the population should be reviewed at least once every five years.

Each year the Cabinet of Ministers sets itself the task of approving a new range of food items, other goods and services for the consumer basket, and each year manages to fail with this task. Draft proposals for such a range have circulated from one ministry to another, however all these attempts have achieved nothing. The range of food items, other goods and services forming the present consumer basket can thus be considered illegitimate.

It is no less important that specialists consider the norms established in the subsistence minimum to be significantly lower than physiological requirements, and that the range of non-food items does not cover many of the requirements of people nowadays at all.

It is questionable whether the range and amount of goods in the consumer basket meet medical standards, and serious doubts as to the adequacy of this basket are raised.

The size of the subsistence minimum does not take into consideration a number of crucial expenses: on building, buying or renting housing, spending on education, on health, of sending children to preschool facilities, fee-paying medical services etc. Nor are changes in the makeup of the consumer basket due to changes in the sphere of the housing and municipal services management taken into consideration.

Moreover the indicator for able-bodied person does not include income tax for individuals (15%), which is of course a fairly significant part of any person's wages. It is also worth noting that in calculating the overall indicator for the country, regional differences with regard to prices of food and other items are not taken into account.

Experts believe that if the consumer basket was filled as it should be, the expenditure from the state budget would need to be at least tripled.

This all means one thing: the size of the subsistence minimum at the present time is like a chimera, a screen with which the government is endeavouring to conceal its inability to fulfil its promises in the social sphere. The question arises of how much all fine words about ensuring each citizen with a minimum standard of living are worth if this very minimum standard is the pits and the «ruler» used to set it has long ceased to have any relation with real life.⁴

The next step after it becomes clear that the subsistence minimum is far removed from reality is to determine how it really is used, and whether it is used at all in the social policy of the State. Logically speaking, and on the basis of the Constitution and laws, the subsistence minimum should be used as the criterion for low income, as a basic indicator for determining the minimum wage, minimum pension, various types of assistance for children, etc.

So what is the situation in actual fact?

In fact the subsistence minimum is applied only to establish the size of State social assistance for low-income families and families with children, people who are not entitled to a pension, the

³ Law of Ukraine «On the subsistence minimum» <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=966-14>

⁴ «Worth knowing. The secrets of the subsistence minimum» // UHHRU website, 8 December 2008 <http://www.helsinki.org.ua/index.php?id=1228738638>

disabled. And yet here too a certain «fiddle» is applied, instead of the subsistence minimum. For payment of the assistance envisaged by the Law «On State social assistance to low-income families» a so-called level of safeguarding of the subsistence minimum is applied.

If one endeavours to describe this «element of social policy of the State», then put simply, it is an indicator which reflects the ability of the budget to pay the subsistence minimum to those who are entitled to it. This is approved each year in the Budget and usually its size is 70% lower than the size of the approved subsistence minimum. We thus have an extremely odd situation where the State is only 30% capable of fulfilling what is guaranteed by the Constitution and laws of the country! What then is the point of all this populism which undermines people's trust?

Yet another example of the use of a «surrogate» subsistence minimum is the application of a level of safeguarding of the subsistence minimum when calculating benefit for looking after a child until it reaches the age of three.

It's not just that this assistance is established only at the size of the difference between the subsistence minimum established for able-bodied individuals, and the average monthly total income for a family calculated for one individual for the previous six months. Even the subsistence minimum in this context is not taken in full, but only half that amount. And in this case, the State's «charity» should be seen in the provision that the size of this assistance may not be less than 130 UAH. As we see, again instead of finding the possibility for paying mothers the equivalent of the subsistence minimum as assistance, the government has thought up how not to do so.

One can conclude that government policy is aimed not at seeking the means of ensuring fundamental guarantees, but at seeking ways of making it harder for socially vulnerable layers of society to receive assistance by coming up with various «surrogates» of the subsistence minimum in order to justify inability not only to keep their problems, but also to honour the legally enshrined guarantees of socio-economic rights.⁵

2.2. THE QUALITY AND SAFETY OF FOOD ITEMS

There remains a problem with ensuring that food products are of acceptable quality and safe to eat. The system of State control over quality and safety of food remains ineffective and most definitely does not promote an increase in the quality of what is produced by Ukrainian businesses. Each service within this system functions autonomously at the expense of paid services to producers, setting separate indicators for safety in food products and combining the functions of State supervision over the observance of these indicators.

The organizational and legislative structure of State regulation of quality and safety in food products has basically not changed in any significant way. Despite the adoption of several laws and items of subordinate legislation on the technical regulation of the quality and safety of food products, protection of consumer rights, protection of their health, no integrated and effective system of State regulation has yet been developed.

It should be stressed that the force of the Law «On the safety and quality of food products» and «On standards», the technical rules and procedure for assessing compliance which were adopted recently, do not apply to indicators for safety of products. That is, they won't draw up horizontal technical regulations even though some technical regulations for food products have begun to emerge. This means that the results of control over safety indicators, the maximum level of harmful substances, though internal, not standardize methods for choosing experiments and carrying out analysis will not be recognized as reliable.

Furthermore, the methods for carrying out the majority of analyzes are closed for producers who are responsible for the quality of the items produced and don't have a choice for confirming the accuracy of the analyses carried out.

⁵ Worth knowing. The secrets of the subsistence minimum» // UHHRU website, 8 December 2008 <http://www.helsinki.org.ua/index.php?id=1228738638>

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We see an extremely typical example of the implementation of State standards for different types of sausage. The need to introduce such standards was determined by the fact that the quality of the products is low and on occasion presents a danger to those who consume them. In order to resolve this problem, new government standards were drawn up with these clearly stipulating the content of meat, as well as restrictions on the presence of various food and taste additives and substitute products. From 1 August 2008 they were supposed to be brought into force.

However still in July the State Committee on Consumer Standards cancelled the Order on implementing these standards and their implementation was postponed until January 2009. The argument at official level was that producers were not ready to introduce such standards. And consumers, supposedly, were also unlikely to buy products in which, according to the new requirements, there were no ingredients and supplements which form the original taste of this or that type of sausage.

And there continues to be no surprise at the fact that in December 2008 the implementation of these standards was postponed until 2010. However the reason now given was the task of overcoming the consequences of the economic crisis. With these actions the Government, effectively showing disregard for people's health, placed the interests of business above the human rights to safety and healthy food products.

Food items containing genetically modified products continue to carry any information about this, and people still don't know if they're eating such products. The marking up of genetically modified products was introduced by the Cabinet of Ministers in August 2007, however in November of the same year the Cabinet revoked its own decision. The court reinstated it however nobody has yet set about enforcing this law. Although in November 2008, new rules for marking up food products were introduced these again fail to make marking of genetically modified organisms mandatory. The situation thus remains complicated, and not especially honest producers, in order to economise, are continuing to use various mixtures, for example, with the use of genetically modified organisms, placing many people in danger without their knowledge.

2.3. ENSURING PROPER QUALITY OF WATER⁶

Ensuring proper quality of the water people use remains a problem. Scientists from the National Academy of Science assert that what Ukrainians drink in the guise of drinking water is in fact technical water (sometimes even worse than that) which clearly does not improve the health of the population.

«One cannot on principle receive quality drinking water at waterworks. The water flowing from the tap is not drinking, but technical water. One therefore sees outbreaks of infectious illness, especially during the summer, in the South of Ukraine, because the present system for preparing and purifying water does not provide a full guarantee and absolute sterilization of the water», warns member of the Academy of Sciences, and Director of the Institute of Colloid Chemistry and the Chemistry of Water, Vladislav Honcharuk.

He adds that in the very process of sterilization «we receive a huge range of toxic compounds which it is very difficult to eliminate from the vast volume of water flowing through our pipes.»⁷

2.4. THE RIGHT TO ADEQUATE HOUSING

There are also huge problems in exercising the right to adequate housing. One can obviously not demand that the State provides free housing to all those who want it, that is simply impossible. However the issue involves:

⁶ See also the unit on Environmental rights.

⁷ «A fundamentally new system of water supply presented at session of the National Defence and Security Council» // Internet publication «Korespondent.net» <http://korrespondent.net/tech/759330>

– providing free housing to those entitled to this by law (some social categories, as well as certain civil servants, including where possible the privatization of housing if this is owned by the State and not received only for temporary use;

– creating a state system of assistance to help those on a low income purchase housing through special favourable loans or sale at favourable prices taking into consideration the minimal percentage of profitability or other mechanisms to encourage the purchase of ones own housing;

– providing hostel accommodation;

– creating a system of social housing for the poor owned by the State or municipal authorities but let out at concessionary rates.

According to the Director of the City Institute Oleksandr Serhiyenko at the present time the average predicted waiting time for free housing is 73.9 years.

Official statistics show that 70% of families wait in the housing queue for ten or more years. Moreover, Mr Serhiyenko calculates, if with the birth of a child, a family joins the queue, then a baby girl may live to get the new flat (with the average life expectancy for women being 74 years), but unlikely that a baby boy will (since life expectancy for men stands at 62 years). It is thus ever more futile to wait in a queue for housing,

It is worth noting that according to official statistics, every seventh person in the housing queue is a Kyiv resident. This is despite the City Institute's calculation that young residents of the capital will need to wait for their own flat from the State for 130 years, with this figure for Kyivites who took part in the War being around 83 years. The figure for people in the capital with special status because of the Chernobyl Disaster, the period is 90 years. Residents of old Kyiv buildings can on average expect new housing in 18 years.⁸

It is also important to point out that the programme of social housing is effectively not working. According to the Law «On the fund of socially designated housing», social housing is provided free of charge to Ukrainian citizens in need of social protection on the basis of a lease agreement for a certain period. Pursuant to this law, citizens recognized as in need of social protection or having the right to receive social housing are entitled to receive housing or hostel accommodation. Although the Cabinet of Ministers on 19 March 2008 adopted a Resolution «On establishing temporary minimum norms for ensuring social housing», the matter progressed no further. We must therefore acknowledge that the law on social housing is at the present time not working, and that therefore social housing remains as elusive as ever. And considering the problems we now have in the construction field, the situation is unlikely to improve. .

In 2008 the problem of people being deprived of hostel accommodation became particularly acute. As the result of a collision in legislation, it is possible to transfer an entire hostel, as the object of commercial real estate, into private houses, more often than not as part of the property of a municipal or State enterprise. Yet the people who have lived there for many years cannot privatize their living area, there being no legislative mechanisms. Eviction of socially vulnerable citizens from hostels has taken on a social flavour. One can cite examples with attempts to evict people from hostels belonging to the Lviv car factory⁹, attempts to evict staff of the Ministry of Internal Affairs [MIA] from hostels in Kyiv¹⁰ and the National Complex «Expocentre Ukraine».¹¹

In the light of the emerging social tension, the President issued a Decree «On measures for ensuring the housing rights of hostel residents» which instructed the Ministry of Justice to take

⁸ O. Serhiyenko: «Queue as long as life, or 1/3 of human happiness» // «Dzerkalo tyzhnya» № 43 (722), 15-21 November 2008 <http://www.dt.ua/3000/3050/64676/>

⁹ «50 residents of Lviv hostels picket the Ratusz and want to «transfer» to municipal property» // Lviv Civic Portal, 12 June 2008 <http://www.gromada.lviv.ua/news/2008/06/12/3390.html>

¹⁰ «240 police officers may be evicted from the capital's departmental hostels» // UVS TV Channel, 11 March 2008 http://www.ubcua.tv/index.php?option=com_content&task=view&id=439

¹¹ «The authorities are ignoring the unlawful eviction of hostel residents» // Internet publication «Glavred», 16 December 2008 <http://ua.glavred.info/archive/2008/12/16/121554-19.html>

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measures to stop any forced evictions from hostels until there has been legislative regulation to ensure a mechanism safeguarding the rights of such residents to privatize the accommodation they held in the hostel.

The Verkhovna Rada also adopted a Law «On safeguarding the housing rights of hostel residents» which sets down procedure for exercising their rights. The law stipulates that the right to privatize housing is granted to low-income citizens who have legally resided for no less than five years in a small-family or workers' hostel, who do not have their own housing, and were or are working for the enterprise which provided them with accommodation in the hostel, and are not in a position to themselves finance the building or purchase of housing. The law came into force on 1 January 2009. At the same time, for this law to begin working, the government needs to draw up a number of subordinate normative legal acts envisaged by the law, and the bodies of local self-government have to make an inventory of all hostels.

Unfortunately it has become a common feature of both large and small cities to have people living on the streets, in the entrances to apartment blocks, in attics and basements. It is important to create a system for reintegrating the homeless, including a network of centres registering homeless people, institutions of social protection – night shelters, reintegration centres and social hotels. Here we should note that despite certain progress in this sphere, even the Ministry of Employment and Social Policy acknowledges that the number of such places is unequivocally insufficient¹² to have any impact on protecting this category of people.

2. THE RIGHT TO SOCIAL PROTECTION

3.1. THE SYSTEM OF BENEFITS AND PRIVILEGES

A conceptual problem for ensuring the protection of socio-economic rights remains the failure in legislation to separate those norms which ensure certain socio-economic rights and those which provide certain privileges linked with particular services, position etc. This leads to difficulties with State regulation on providing and revoking certain privileges while at the same time running the risk that the State will limit people's socio-economic rights, this being unacceptable.

The judgments from the Constitutional Court in 2007 and 2008 which found certain provisions of legislative acts unconstitutional since they restricted people's socio-economic rights, confirm the existence of major problems in the area of social security. These lie in the first instance in how public officials understand the essence of socio-economic rights.

We have as a result the ignoring by the State of many provisions of the said judgments from the Constitutional Court, with this leading to wide-scale infringements of socio-economic rights. There is still no understanding of the fact that like other rights and freedoms, socio-economic rights are guaranteed and may not be cancelled and that in adopting new laws or making amendments to those existing, that their content and scope may not be narrowed.

On the other hand, there is virtually no mechanism for revoking various privileges which are not essentially socio-economic rights, and it is therefore difficult to speak of any effective activities in this sphere.

The system of benefits is extremely broad and spread out. It is used by 1.1 million people and envisages as many as 136 types of different social payments, supplements and subsidies.

In any state the system is an important component of general government policy and should make life easier for socially vulnerable layers of society. However it should also be effective: on the one hand many of those needing them may not have the opportunity to actually enjoy the benefits providing (due to certain legislative procedures, the symbolic or unneeded nature of various benefits for certain socially vulnerable groups, etc). On the other hand there are many categories of

¹² Ministry of Employment: the Problems of homelessness are many-faceted and touch on virtually all spheres of public life» // http://www.mlsp.gov.ua/control/uk/publish/article?art_id=91509

citizens who do not in fact need those social benefits and supplements, when compared with other categories.

Unfortunately, we are far from the creation of such a system as is confirmed by a study of the public's assessment of the system of benefits and privileges, knowledge about their rights to specific types of benefit, the possibility of replacing the present system of benefits and privileges with targeted pecuniary assistance carried out by the Centre of Civic Advocacy¹³.

The survey was carried out in December 2008 and January 2009 in Lviv, with 130 people of different age and social status who directly use benefits taking part. The following results were obtained:

- ◆ the majority of those receiving benefits are dissatisfied with the present system of benefits and privileges (70% of those surveyed);
- ◆ there is an excessively complicated and diffuse system of benefits which is socially and economically unjustified;
- ◆ there is a problem with people being insufficiently informed – 62% of the respondents said that they only know a part of their benefits;
- ◆ 46% of the respondents consider that their benefits only slightly improve their standard of living, while 31% say that they don't improve it at all;
- ◆ 32% are positive about a change in the system of benefits to targeted pecuniary assistance; 29% consider that they do not have sufficient information about such a reform to draw any conclusions.

The public does not have any or enough information about the system of benefits, directions for reform, including mechanisms for replacing benefits with payments. It is difficult for them to draw any conclusions at all about the system of benefits and its reform. Their conclusions are based on their own personal experience of exercising the right to benefits, as well as information discussed and circulated by the authorities, politicians and civic society.

Another study of public opinion¹⁴ showed that most citizens (49%) are convinced that benefits are enjoyed mainly by those who assign them. Considerably less (around 25%) chose the option that they are enjoyed mainly by those who earned them through their work, while around 25% answered that they were received by people unable to provide for themselves.

As we see, one of the important directions for reform of the system of benefits and privileges, applied in other countries, and being discussed in Ukraine, is a replaced by targeted pecuniary assistance.

It should be noted that from the point of view of the State certain steps are being taken in this direction. A commission has been created for ordering the system of providing benefits with the aim of drawing up proposals for a gradual move to providing benefits in the form of money. However the steps are too few to make any real inroads.

3.2. ENSURING SOCIAL PROTECTION OF FAMILIES WITH CHILDREN

One of the main priorities of the State in the area of social security is to create conditions for healthy, materially and socially-favourable families. One way of achieving this is through social protection of the most vulnerable categories of society (families with children, low-income families, those disabled from children and children of people with disabilities).

The Cabinet of Ministers and Ministry of Finance in 2007 and 2008 did not ensure enforcement of the Judgment from the Constitutional Court of 9 July 2007 which found unconstitutional the restrictions through Article 71 of the Law «On the State Budget of Ukraine for 2007» on the

¹³ Study of people's attitude to the present system of benefits and privileges, carried out as part of the project «Reform of the system of benefits and privileges in Ukraine – moving towards European standards», by the Centre of Civic Advocacy <http://www.lawngo.net/index.php?itemid=%20759>

¹⁴ Viktor Pushkar: «Social and Psychological Study of Everyday Ideas about Human Rights» / Kharkiv Human Rights Protection Group, Kharkiv, Prava ludyny, 2009, p. 40

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legally established size of assistance for looking after a child up to the age of three, and the provision of this in full (to an amount no lower than the subsistence minimum)¹⁵, and the Judgement from 22 May 2008 with analogous content but regarding the 2008 Budget.

This has prompted numerous approaches to different level courts. In 2008 the courts examined and passed rulings to have the above-mentioned assistance paid as envisaged by the law to over 4 thousand claimants to an overall amount of 11 million UAH. Given the lack of money assigned in the State budget for enforcing the court rulings, the accounts of particular departments of employment and social protection have been frozen, and their managers have faced administrative proceedings for not enforcing the court rulings.¹⁶

The transfer by the Cabinet of Ministers in March 2008 of authority as central curator of subventions from the Ministry of Employment to the Ministry of Finance, due to the lack of procedure for interaction, has created conditions where the Ministry of Employment cannot fully ensure implementation of State policy in the area of social protection of the population. Furthermore, at the district (city) level the curator of subventions event remains bodies of employment and social protection of the population which are not subordinated and do not answer to the financial bodies.

It should be said that non-enforcement by the State of the Judgments from the Constitutional Court of 9 July 2007 and of 22 May 2008 regarding assistance to families with children renders meaningless all efforts by the State to create a system of social protection for the most vulnerable categories of the public, leads to legal lack of clarity when in order to receive assistance set down in legislation, a person has to go through court stages to defend their rights, and even more time spend waiting for when the court ruling will be implemented. All of this leads to social tension, an atmosphere of distrust in the actions of the authorities in the area of social security. This is understandable since there can be no effective system of social protections where the payment on particular types of assistance are carried out only through court orders.

3.3. GUARANTEES OF SOCIAL SECURITY FOR THE ELDERLY

The pension system in 2008 continued to work in conditions of maximum financial tension, while not sufficiently meeting the needs of pensioners who on retirement lose half their earnings.

The demographic situation is very difficult. If in 1966 the percentage of the population at retirement age came to 15.9%, over recent years this figure has increased one and a half times and now stands at 23.8%, and is expected to rise to 35% of the population by 2048.

15.2 million people are paying pension contributions, with the number of pensioners standing at 13.8 million. Thus, already today the average person making contributions is financing 90.8% of the average pension, and in some regions more. This is with the pension component in the GNP of the country already exceeding 15%.¹⁷

Due to demographic trends the solidarity pension system is already incapable, without State support, of ensuring that pensions sufficiently substitute lost earnings, and an optimum differentiation of pensions.

Although two basic laws are already working – on mandatory State pension insurance, and on private pension provisions, the question of implementation of a universal mandatory accumulation system of pensions has yet to be regulated through legislation and no organizational structure has been created. The draft law on introducing an accumulation system of mandatory State pension insurance (№ 0942) has still not been passed, and other measures needed for its work are also not being carried out.

¹⁵ «Proper help through the courts?» // Accounting Chamber of Ukraine, 9 December 2009, http://www.ac-rada.gov.ua/achamber/control/uk/publish/article/main?art_id=1328392&cat_id=411

¹⁶ Ibid

¹⁷ Draft Concept Strategy for further pension reform in Ukraine, from 29 July 2008, Ministry of Employment and Social Policy http://mlsp.kmu.gov.ua/control/uk/publish/article;jsessionid=1C9C12ACC0AEFE6581E2233CB79BDA8A?art_id=80934&cat_id=34950

Even the Minister of Employment and Social Policy, L. Denisa, says that the second level of the pension system can only begin functioning in 2011.¹⁸

It is important to point out that the introduction of a second accumulation level of the pension system is vital for the creation of an effective system of social protection for the elderly. It can become a factor for diversification of the sources of income, ensure a proper level for replacing salary with pension, and mobilization of long-term investment resources needed for the modernization of the Ukrainian economy, and as a result, an increase in the base of insurance contributions.

It should also be noted that a draft is still only being worked on for a law providing pensions for people engaged in especially hazardous work, or particularly difficult working conditions, with this entitling them to receive retirement pension on favourable conditions, or through years of service, through corporate or professional funds. This is despite the fact that the need for introducing pension provisions via corporate and professional funds was stipulated back in 2003 in the Law «On mandatory State pension insurance».

There continues to be disproportion in pension provisions caused by the retention for some categories of the public of special pension programmes (according to profession) which establish different pension provision conditions.

Besides the basic law on pension payments, there are also another 23 laws which envisage different procedure for calculating pensions. According to the main law the pension can on average be calculated at 50% of what the person earned, while according to others – 60-90%. This applies to civil servants, staff of the Prosecutor's office, the courts, science and some other categories. There is no single approach in formulating pensions regardless of where the person worked, in the civil service or in production. We therefore have such a huge difference between the pensions of former deputies, judges and prosecutors, and others.

Things are not all good in the system of non-State pension provisions either. Over the four years of its existence, the number of participants in this system remains relatively small (407.8 thousand people), the net value of shares formed by the pension funds is also not high (404 million UAH)¹⁹.

One must acknowledge that there has not yet been any success in bringing to fruition the possibilities of a system of non-State pension provisions as a way of ensuring pensions for the population.

Among the main causes for the slow development of non-State pension provisions, we would note the following:

- a poor level of explanatory work regarding the content and role of an accumulation pension system in society and the inadequacy of financing for the above-mentioned work;
- insufficient interest by employers in financing non-State pension programmes for employees;
- a low level of pay and wages arrears;
- a limited choice of financial instruments suitable for investing pension funds in them due to the development of the capital market not keeping up with the needs of institutional investors. The possibility of compulsory sale of the shares of enterprises with strategic importance for the economy and its security, of enterprises with monopoly and enterprises with a state share in them, solely on the stock exchange, lack of interest of issuers in running listing procedure on the stock exchange;
- high administrative costs of the system due to the small amount of accumulated assets (in the first quarter of 2008, expenses paid for out of pension assets came to 19 million UAH, or 4.67% of the total amount of the assets).

¹⁸ «A mandatory accumulation system of pensions in Ukraine could become working by 2011, Ludmila Denisova predicts» // National Assembly for the Disabled» 1 March 2009. http://naiu.org.ua/index.php?option=com_content&task=view&id=3009&Itemid=97

¹⁹ Draft Concept Strategy for further pension reform in Ukraine, from 29 July 2008, Ministry of Employment and Social Policy, http://mlsp.kmu.gov.ua/control/uk/publish/article;jsessionid=1C9C12ACC0AEFE6581E223CB79BDA8A?art_id=80934&cat_id=34950

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A considerable problem is also the failure by the State to fulfil its obligations with regard to social provisions for war children. People who according to legislation have the right to receive this status, and the connected benefits with regard to pensions, have begun approaching the courts in large numbers.

For example, more than 73 thousand war children have lodged claims demanding supplements to their pensions just with the Poltava District Administrative Court alone.²⁰ Nor is the situation better in other regions.²¹

All of this is yet another example of the lack of clarity of legislation in the sphere of social protection of the population where people cannot receive the social provisions envisaged by the law and are forced to defend their rights through the court. As well as all else, this has led to a serious overload on the court system, with the courts simply inundated with such cases.

3.4. INTRODUCTION OF A SINGLE SOCIAL CONTRIBUTION

On 15 January 2009 the Verkhovna Rada passed the Law «On a system for gathering and recording a single social contribution for mandatory State social insurance» which proposes to determine the main principles for the functioning of such a system, the conditions and procedure of calculating and paying the single social contribution and the authority of the bodies administering the collection and recording.

At the same time, despite the need and relevance of introducing an effective system of mandatory State social insurance, it should be noted that the law contained a number of very significant failures.

While leaving all existing funds of social security, the law introduces yet another State body – an Administration of Social Security which would be just one more additional structure which would have to be financed from the income from mandatory State social insurance, this in no way raising the efficiency of the system of social protection of the population.

It was also proposed through amendments to Article 21 of the Law «On mandatory State social insurance in the event of unemployment» to remove from people's insurance period the time that they received unemployment benefit, were partially unemployed, the period of leave to care for a child under the age of three, as well as leave to look after a child up to the age of six on the basis of a medical opinion. Bearing in mind that such amendments narrow the rights of people insured, they are in breach of Article 22 of the Constitution which states that the content and scope of existing rights and freedoms may not be reduced when making amendments to current laws.²²

Due to the existence in the law of significant failures, on 8 February 2009 President Yushchenko returned the said law to the Verkhovna Rada.

It should be noted that if the system of social protection on the basis of a single social contribution is really to work, an optimum and transparent model of management of the system for gathering and recording the contributions is needed, with the timeframe for moving over to such a system being agreed. The list of those paying the single social contribution must be clarified, and the basis stipulated for calculating the contribution, while provisions which narrow the content and scope of existing rights and freedoms, the provisions on broadening the supervisory council of the authorized State bank, on the creation of a Methodological Commission on issues of reporting, should be excluded.

²⁰ «More than 73 thousand children of the war are demanding their money through the Poltava Court» // UNIAN information agency, 08.02.2009, <http://unian.net/ukr/news/news-299528.html>

²¹ «War children storm the courts» // the Newspaper «Uzhhorod», 23 December 2008 <http://uzhgorod.net.ua/news/33155>; «War children from the entire Rivne region have occupied the administrative court» // Internet publication «OGO.ua», 27 December 2009 <http://www.ogo.ua/archive/2008-12-27/site/27903>.

²² A. Marmusov: «The «Single corruption contribution» system» // Dzerkalo tyznya», № 3 (731), 31 January – 6 February 2009 <http://www.dt.ua/1000/1550/65280/>

3. RECOMMENDATIONS

- 1) Reform the system for social benefits, divide legal norms into those guaranteeing socio-economic rights and those granting certain privileges in connection with a particular position or special merits;
- 2) Stop the practice of suspending the form or not implementing legal norms guaranteeing socio-economic rights;
- 3) Allow for the full funding of guarantees of socio-economic rights enshrined in law;
- 4) Improve the calculation of the subsistence minimum, approving a new subsistence basket of food items and goods and services; adopt new methods for calculating this indicator;
- 5) Improve regulation of the quality of food items, as well as the quality and safety of drinking water;
- 6) Introduce measures aimed at making housing affordable;
- 7) Ensure proper financing and understandable and effective mechanisms for implementing a programme providing social housing, as well as the development of a network of reintegration centres and social hotels for people who are homeless;
- 8) Gradually reduce the percentage of direct State funding of social needs and increase the amount financed by the population on the basis of increases in all income, first and foremost, wages, pensions and other forms of social transfers;
- 9) Provide all types of social assistance on a targeted basis taking into consideration the total income of the family;
- 10) introduce a single form of targeted social assistance for unforeseen circumstances – the death of a relative, serious illness, natural disaster, social conflict, etc;
- 11) ensure a strict link between social benefits provided and the sources and mechanisms for compensation of their value to those providing them;
- 12) Introduce standardized approaches for determining the size of payments from the State Budget to compensate those providing benefit services;
- 13) Introduce in stages a system for providing benefits in cash form;
- 14) Continue reform of the pension system by introducing an accumulation level of this system and create the conditions for this;
- 15) Avoid discrete increases in the minimum pension and introduce a rule for indexation according to which increases in the pension would be linked to the index for consumer prices calculated for groups in society with different incomes;
- 16) Improve regulation and supervision over private pension funds taking international experience and consultations into consideration;
- 17) Create mechanisms for implementing the judgment of the Constitutional Court regarding the non-compliance with the Constitution of the Law «On the State Budget for 2008»
- 18) Introduce a system of single social insurance and develop mechanisms for introducing it, and for preventing «corrupt schemes» in its functioning.

XV. THE RIGHT TO WORK¹

1. OVERVIEW

The right to work is a crucial socio-economic right and determines people's opportunity to engage in work in order to ensure material well-being and personal development in conditions of freedom and dignity, economic security and equal opportunities.

The safeguarding of this right takes on particular importance in conditions of economic crisis, with rising unemployment and mass infringements of labour rights. The State has a vital role to play here and should take all measures possible to protect and enable the exercising of the right to work and all that is in its power to ensure respect for this right. Clearly the State's economic possibilities do not enable it to provide work to all seeking it.

Poor protection of labour rights in certain spheres of the economy has contributed to a sharp increase in the number of unemployed. There is also a deepening territorial and branch-related disproportion in the number of those without work which further complicates the search for a job. We should also mention that unemployment benefit is very small and in no way sufficient for even minimum requirements.

By no means all measures taken by the State have been adequate and correct. We would mention, for example, the classification of rural dwellers with their own plots of land as employed which can be viewed as discrimination since these members of the population are effectively being denied their right to State assistance in difficult times. There is also a problem with employees supposedly «resigning» as opposed to being dismissed, with this depriving them of the right to unemployment benefit for the first three months.

The situation remains unsatisfactory as regards State-guaranteed remuneration with the minimum wage still less than the subsistence minimum and the number of those receiving such wages being fairly large. There are problems with payment of public sector employees on the basis of a single band scale. When the basic principles for the formulation of such a remuneration system are violated, the dependence of this system on minimum norms for remuneration is undermined.

There is also a problem with huge variations in the level of pay in State bodies. This spread is further escalated by a system of bonuses and supplementary payments which are dependent on the will of the management and are essentially a concealed form of payment to civil servants. Whether one receives such an extra payment and how large it is depends less on work efficiency than on loyalty to the management.

Problems are again arising with wage arrears especially in the production sphere. More and more enterprises and organizations owe their staff considerable amounts of unpaid wages with this leading to an increase in social tension.

A no less important aspect of labour rights is the ensuring of safe conditions of work. Unfortunately the number of industrial injuries remains high, especially as regards work-related illnesses.

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The situation is exacerbated by loopholes in legislation and the fact that many normative documents on labour protection being out of date. There is no document of a programme nature regarding labour protection.

2008 saw a significant increase in the number of infringements of labour legislation. According to estimates both from State bodies, and trade union organizations, almost 90% of employers breach labour legislation. There are a lot of problems particularly with pay, working hours, time off and contracts. There are also a considerable number of violations of the labour rights of women and minors.

In this context trade unions should provide an effective mechanism for protecting labour rights. One must however note that trade unions have not become a force able to fight infringements by employers. There is a lot of conflict within the trade union movement, and there are a fair number of supposed trade unions which are either created or paid by employers themselves, and which are unable to defend workers' rights.

2. SAFEGUARDING EMPLOYMENT

A key aspect to ensuring the right to work is the use of all possible measures to ensure a high level of employment. Obviously every country experiencing economic crisis is encountering this problem and choosing ways of dealing with it.

The percentage of people registered unemployed doubled from 1.8% in July 2008 to 3.2% by the end of January 2009.² In the State Employment Centre they predict that the level of unemployment will reach 9% by the end of 2009 and around 3 million people unemployed will be seeking the assistance of unemployment services.³

The number of people registered unemployed, broken down by gender and into those living in urban or rural areas from 1999-2008 yy.⁴ (at the end of the reporting period; in thousands)

	total	Place of residence			
		women	men	urban	rural
1999	1174,5	729,6	444,9	920,9	253,6
2000	1155,2	730,4	424,8	863,7	291,5
2001	1008,1	645,6	362,5	696,7	311,4
2002	1034,2	665,0	369,2	610,6	423,6
2003	988,9	627,6	361,3	539,7	449,2
2004	981,8	619,9	361,9	514,9	466,9
2005	881,5	535,6	345,9	428,8	452,7
2006	759,5	459,1	300,4	353,9	405,6
2007	642,3	385,8	256,5	296,4	345,9
2008	844,9	465,2	379,7	418,3	426,6

² Figures from the State Department of Statistics <http://www.ukrstat.gov.ua/>

³ «Will unemployment in Ukraine reach 9%?» // The Internet publication «Economicna pravda», 17.02.2009 <http://www.epravda.com.ua/news/499aa50eb03e8/>

⁴ Figures from the State Department of Statistics, <http://www.ukrstat.gov.ua/>

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As we see, the changes are not only in increased numbers, but in who is hit by unemployment. For example, the number of people registered unemployed increased sharply in urban areas (whereas previously there was considerably more unemployment in rural areas). One of the factors for this was the large number of job losses during 2008 in construction and some other areas of the economy where defence of labour rights is weakest and it is easier and quicker to get rid of staff. The fact that such a situation arose is yet more indication that the authorities did not use all measures available to them to deal with violations of labour legislation in these spheres.

There has also been a clear increase in unemployment amount women.

During 2008 there remained discrepancies between vacancies on the one hand, and professional and vocational skills available, as well as where the demand was, on the other. One sees sharp differences between regions, with the highest concentration of unemployed in the Cherkasy region (5.4%), and the lowest in Kyiv (0.7%)

It is important to note that the numbers of those registered unemployed do not fully represent the situation on the labour market. If one could add the people who have not registered at employment centres, or were unable to do so because of bureaucratic or artificial restrictions in legislation, the number of unemployed would be considerably higher. There are also a lot of people working part-time. According to figures from the State Department of Statistics, as of 1 March 2009 there were 570 thousand people on leave permitted and initiated by their employers, while 1.2 million people were working a shorter day, with this tripling the number of those effectively unemployed among the able-bodied part of the population.

3. STATE AID FOR THE UNEMPLOYED

The size of the unemployment benefit is not sufficient to meet minimum conditions for survival. The minimum amount of unemployment benefit for people insured is 500 UAH (per month), while for those without insurance the figure is 360 UAH.⁵ These figures are even lower than the subsistence minimum⁶ and the size of that is clearly insufficient to in any way support a person during difficult times.

It should be noted that at present there are legal norms in place which essentially contradict each other. The Law «On mandatory State unemployment insurance» stipulates that unemployment benefit cannot be lower than the legally established subsistence minimum. At the same time, the Law «On the size of contributions to some types of mandatory State social insurance» states that «on the basis of the capacity of the Mandatory State Unemployment Insurance Fund, unemployment benefit is set at no lower than 23% of the subsistence minimum for an able-bodied person». And of course, State bodies go by this second law, ignoring the first.

At the end of 2008 some categories of the population lost their right to assistance, while for others it became much more difficult to get it or payments were deferred. For example, changes in legislation meant that people who have a land share (from when collective farms were dissolved – translator) were not eligible for assistance, while people leaving a job by mutual consent could only get unemployment benefit after 90 days. Since 13 January 2009 only people made redundant are eligible to unemployment payments immediately. It is also stipulated that a person who turns down two jobs offered by an employment centre loses the benefit altogether. Whereas previously a person had the right, without being penalized, to turn down a job which offered less pay than in his or her previous employment, this is no longer the case. According to the new rules, a person is offered work with a level of pay that cannot be higher than the average pay for the area of work in

⁵ «Will unemployment in Ukraine reach 9%?» // The Internet publication «Economichna pravda», 17.02.2009, <http://www.epravda.com.ua/news/499aa50eb03e8/>

⁶ For more detail about the significant artificial underestimation of the subsistence minimum in, see the section on socio-economic rights.

which the person was employed. Thus if the job applicant previously earned one thousand UAH per month, but the average for the field was 600, then this lower amount is what s/he can expect to receive.

There are also some equivocal new norms regarding pensioners who are still working. According to the Final Provisions of the Law «On amendments to some laws of Ukraine for reducing the impact of the world financial crisis on employment», working pensioners will pay contributions to the Mandatory State Unemployment Insurance Fund, however will not be entitled to unemployment but only to social services in looking for the relevant job, as well as to information and consultation services linked with finding a job. These measures for working pensioners aimed at replenishing the budget of the Fund are to last until 1 January 2011.

Concern over delays in social payments to people who have lost their jobs due to the economic crisis is shown from time to time by the President⁷, and other high-ranking public officials, and at the beginning of 2009 the President sent a submission to the Constitutional Court asking for a judgment as to the constitutionality of some provisions of the Law «On amendments to some laws of Ukraine for reducing the impact of the world financial crisis on employment» from 25 December 2008. However the situation has thus far not changed.

Taking away villagers' right to unemployed status constitutes discrimination of the rural population. The authorities, without radically changing anything, have simply declared them self-employed. They were joined in this «happy state» by teachers, medical workers who were belatedly, as a social sphere of the village, provided with land for growing their own produce. So if for some reason teachers and medical assistants lose their jobs, they will not be able to apply for unemployment benefit.

It should be stressed that these changes have not touched some privileged and limited group, but 4.3 million households with incomes on which they can scarcely survive. Only 178.9 thousand own agricultural technology. This means that for 27 households there is one tractor, harvester or some kind of plough. And that's for 6.5 million hectares.⁸

It is obviously much easier to mechanically move documents from a folder for «unemployed» to a more attractive one for those «in work», than from the million of new jobs declared by the President to be created each year «register» half in rural areas.

This situation has already aroused social tension. For example villagers in the Lviv region came out with a demand to protect their rights.

Thirty villagers whom the Yavorivsky District Employment Centre refused to register as unemployed have prepared an appeal to the Ombudsperson Nina Karpachova. They are demanding that an item of the Law on amendments to legislation aimed at minimizing the effects of the world financial crisis on employment. According to the said item, from 13 January this year all residents of a village who own plots of land are considered members of a personal agricultural enterprise and are considered employed.

Members of the coordination group of villagers, who preferred not to give their names, told the journalist from www.zik.com.ua that they would be forced to other measures if their appeal is ignored.

«This anti-crisis package of laws is steeped in brutal discrimination against the rural population», they say.

The Director of the Yavorivsky District Employment Centre, Mykhailo Vyhrynovych confirmed the information that from 13 January people from rural regions were not being registered at employment offices, and that more than 30 people had been sent away with nothing over the last 14 days. He considers the decision to infringe people's human rights since «a family on a plot of land can grow potatoes to

⁷ «There are already 930 thousand people unemployed in Ukraine» // The Internet publication «Economichna pravda», 09.02.2009, <http://www.epravda.com.ua/news/49903bbf4fe7a/>

⁸ V. Chopenko. «The Employed village» // «Dzerkalo tyzhnya» № 5 (733), 14-20 February 2009, <http://www.dt.ua/2000/2080/65399/>

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survive. Yet where are they to get the money to pay for electricity, gas, or simply to buy a toothbrush, soap or children's shoes?»

Mykhailo Vyhrynovych says that at present the Centre has 2 thousand people registered unemployed, of whom 1, 552 are from rural areas. These are people who managed to register before 13 January. In answer to a question from the journalist, he said that there had thus far been no directive from Kyiv to remove people already registered from the lists.⁹

It should be noted that on 25 February 2009 the Cabinet of Ministers, trying to resolve this problem, passed Resolution No. 144 «On amendments to the Procedure for registration, re-registration and keeping a record of citizens seeking work and the unemployed». This states that citizens who are not working, including members of personal rural economic units, for whom the work in these units is not their main work, are eligible for registration, on condition that they apply to State employment services to help them find work. However these changes were only cosmetic and they have not eliminated discrimination of villagers who have plots of land and don't have other work, who are deprived of their right to register as unemployed.

Among positive changes we should mention that Item 3 of the Final Provisions of the Law «On amendments to some laws of Ukraine for reducing the impact of the world financial crisis on employment», for the period up to 1 January 2010 brings into force Articles 24, 25 and paragraphs 2 – 5 of Article 26 of the Law «On mandatory State unemployment insurance» regarding the provision of a benefit for partial unemployment. This kind of benefit had long been envisaged, but for a long time had not been in force.

4. ENSURING DECENT WORKING CONDITIONS

An important aspect of the right to work is that a level of remuneration is ensured which is not lower than the subsistence minimum. In order to fulfil this duty, the State stipulates a minimum wage mandatory for all enterprises.

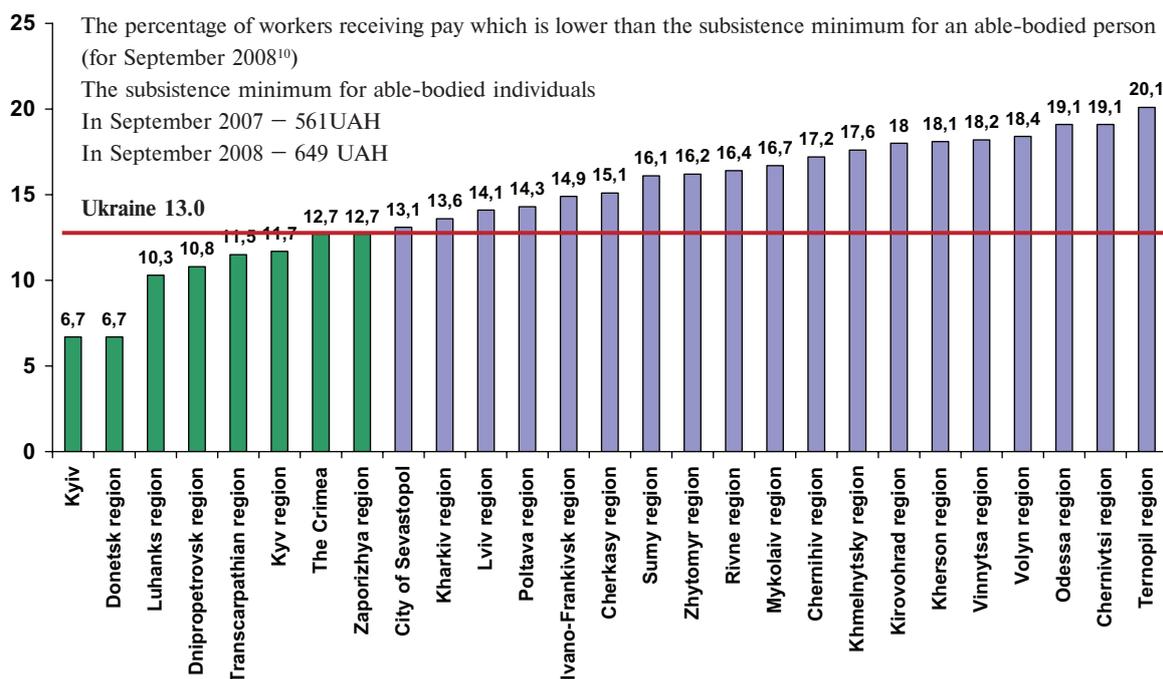
The size of the minimum wage is determined by taking into account the needs of the workers and their families, the cost of the range of food items sufficient to ensure the normal functioning of the organism of an able-bodied person and maintaining their health, a minimum range of other commodities and services necessary for satisfying the main social and cultural needs of the individual, as well as the general average pay, productivity of labour and level of employment.

Unfortunately the legal norms of laws, in particular, the law «On remuneration» remain mere words. The said law states that the minimum wage is established at a level not lower than the size of the subsistence minimum for an able-bodied person. The continued practice of setting the minimum wage at lower than the subsistence minimum places in question the State's compliance with a number of its obligations, and its safeguarding of the right to work.

There remains a fairly high percent of workers who receive wages which are lower than the subsistence minimum. The percentage in the majority of regions is higher than on average for the country. In such regions the number is as higher as 19-20%, and only in Kyiv and Donetsk is the figure less than 10%.

⁹ «Lviv region villagers call on Human Rights Ombudsperson to defend their right to unemployed status // 28 February 2009, <http://www.zik.com.ua/ua/news/2009/02/28/171406> English here: <http://www.khpg.org.ua/en/index.php?id=1235826981>

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And this is with a subsistence minimum - the fundamental State social standard which the size of the minimum wage is based upon – that is underestimated and does not reflect the real level.

There are also problems with ensuring proper conditions for remuneration of public sector employees. According to the Accounting Chamber the introduction of a Single band scale has not led to any significant improvement since the new rates of pay are based on underestimated figures for the subsistence minimum and minimum wage. Given the underestimated subsistence minimum and the high level of inflation, the level of pay in the public sector does not meet the guarantees set out in the laws on education, the fundamental principles of health care legislation and on the fundamental principles of legislation on culture.

Despite the increase in nominal wages, the level of remuneration in education, healthcare, social protection, culture and sport remains consistently low. The average salary for educational workers from January to September 2008 came to a mere 1,393 UAH; in healthcare and the provision of social assistance – 1,123 UAH; culture and sport - 1 483 UAH. This is while in industry the figure was 2,011 UAH and on average in the economy - 1773 UAH. One should bear in mind that the rate of increase of real wages indicating the buying power of the nominal wage is much slower due to the high level of consumer prices index.

Low salaries are adversely affecting the prestige of the professions of doctor, teacher, social and cultural-educational worker with this leading to people who have the appropriate education and training moving into other fields, as well as to an ageing of staff.

Normative legal safeguarding of the conditions of remuneration for employees of the public sector on the basis of the Single band scale is incomplete and does not meet the requirements of the Law «On State social standards and social guarantees», nor Article 5 of the Law «On remuneration» which is leading to significantly under-estimated rates of pay for employees. The pay band system of remuneration was introduced without approved qualifying descriptions for professions (positions) in different public sector fields.¹¹

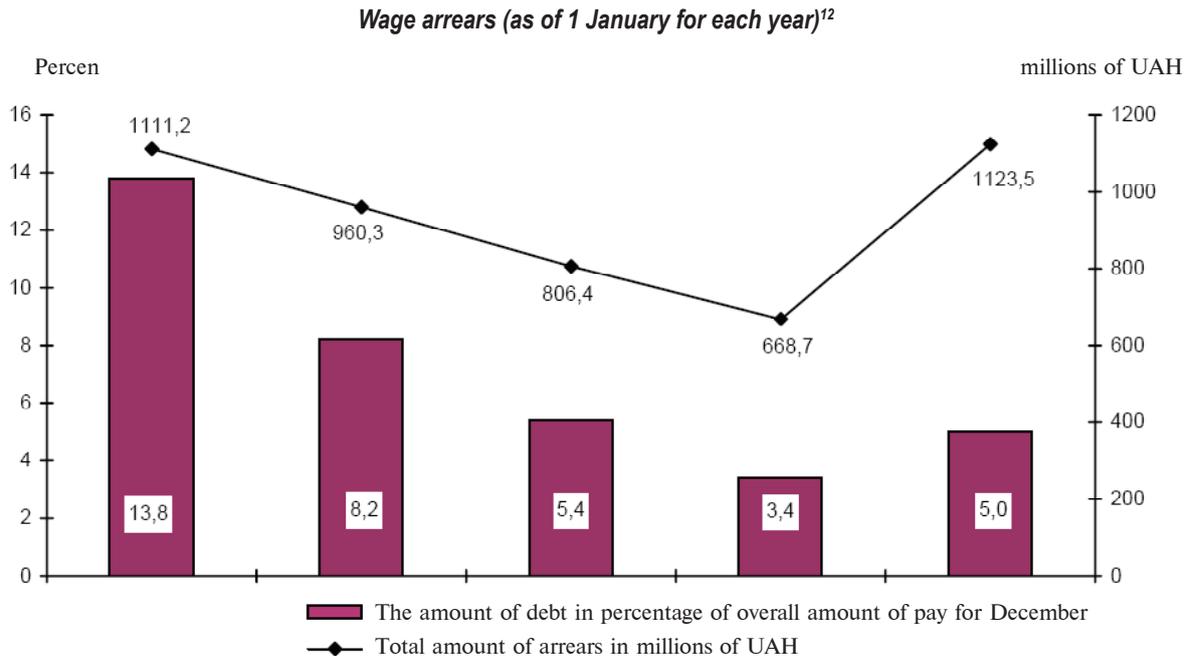
¹⁰ Figures from the State Department of Statistics <http://www.ukrstat.gov.ua/>.

¹¹ «Remuneration for work in the public sector is in need of change». Accounting Chamber of Ukraine, http://www.ac-rada.gov.ua/achamber/control/uk/publish/article/main?art_id=1290592&cat_id=411

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We should also note that at the end of 2008 restrictions were introduced for public sector workers where with an increase in the minimum wage, the rate was only increased for first band employees, i.e. those who receive less than the minimum wage. This effectively froze the pay of public sector workers, as well as undermining the principles of differentiation of pay depending on a worker's qualifications. This could lead to the pay for unqualified public sector workers gradually moving towards the pay level of specialists. These same restrictions are in the Law on the State Budget for 2009.

In addition problems are also re-emerging with wages arrears. These began to increase significantly at the end of 2008 – beginning of 2009.



An increase in wages owed to employees of economically active enterprises was seen in all regions of the country with the exception of the Kherson region. The highest levels were in the Donetsk region (an increase of 92.9 million UAH) and Luhansk region (increase of 57.1 million UAH) and in Kyiv (76.0 million UAH).

The number of employees of economically active enterprises not paid on time on 1 February 2009 stood at 532.5 thousand, or 5% of the total number of people employed in the economy. On average each person had not been paid 1,901 UAH.

In order to ensure proper working conditions, effective measures are needed to achieve safe and healthy conditions of work. Unfortunately the level of industry injury remains fairly high. Over the first half of 2008 the number of fatal accidents increased by 3.9% against 2007, with 501 people fatally injured. There was a 14.2% increase in the number of cases of work-related illness in production (from 5,947 to 6,793). Ukraine has one of the highest number of deaths at work, this being 6 per 100 thousand workers, which is 8.5 times higher than in the UK, 3 times higher than in Japan and more than twice as high as in Germany.

The highest number of accidents was recorded in the Donetsk, Luhansk and Dnipropetrovsk regions. The number of people injured in these regions comes to approximately 53.6% of the total number. These regions also have the highest figures for work-related illnesses, making up around 86% of the total number.¹³

¹² Figures from the State Department of Statistics <http://www.ukrstat.gov.ua/>

¹³ «Prevention of accidents in the workplace and of work-related illnesses requires combined efforts» // Industrial Accident and Occupational Diseases which have caused Disability Fund http://www.mlsp.gov.ua/control/uk/publish/article;jsessionid=B7728DF4E0BCD137ED4DEA358AEC5C0B?art_id=91023&cat_id=35666

The situation is also deteriorating because the number of people working in conditions which do not meet sanitation and hygiene norms has been increasing over recent years. In the main areas of the economy the figure reaches almost 28% of the official number of workers.

There are wide-scale infringements of normative acts on industrial safety. Ukraine's State Committee on Industrial Safety (Derzhnepromnahlyad) has not ensured proper control over removal by employers of identified infringements of work safety. Impunity of officials guilty of work safety violations has resulted in a considerable reduction in control of industrial safety.

According to information from the Accounting Chamber the State Committee on Industrial Safety does not have information about investigation files passed by the law enforcement agencies to the courts and court rulings handed down. This is despite the fact that in 2006 the State Committee on Industrial Safety sent investigators material regarding infringements of work safety legislation by 590 people; in 2007 – by 876; and for the first half of 2008 – by 1,827.¹⁴

There are major legislative gaps regarding regulation of work safety. There is no subordinate normative legal act regulating mechanisms for local State administrations to carry out their powers with regard to work safety as per Article 34 of the Law on Work Safety, and Article 16 of the Law on local State administrations. Given State bodies' inability to fully participate in drawing up normative legal acts on work safety, there are occasions where some norms related to safety and protection in the workplace were adopted back in Soviet times. We are not only talking about the 1980s, but even the 1920s. One glaring example is the Act «On issuing soap at enterprises» approved by the People's Commissar for Labour of the Russian SSR on 6 August 1922, or the «Rules of work safety for employees of cotton production»/ The 38 pages of the Rules contain 92 references to other normative legal acts of the former Soviet Union which have not been revised in Ukraine. New normative legal acts, therefore, need to be drawn up bringing existing norms into line with international agreements and EU legislation.

The problem of an out-of-date normative legal base in work safety is also exacerbated by the fact that the management of enterprises does not have access to existing normative legal acts. There is virtually no attempt to circulate norms after they are added to the register. It is futile to look for them on the Internet or in bookshops. This issue must be resolved since free access or permanent circulation of such documents would make it easier for employers to carry out control over work safety in accordance with modern requirements.¹⁵

Furthermore, there is no integrated document at present of a programmatic nature on issues of work safety. Work on drawing up a new Nationwide Programme for improving safety, work hygiene and the work environment which the State Committee on Industrial Safety is responsible for has been continuing for more than two years. The Cabinet of Ministers and State Committee on Industrial Safety have also not ensured implementation of the requirements of the Law «On the fundamental principles of State supervision (control) in the sphere of economic activity» with regard to defining and approving established time periods for the criteria by which businesses, etc are divided according to the degree of risk inherent in their economic activity and determining the regularity of methods of State control in the area of work safety.

One can also classify as ineffective the Cabinet of Ministers' transfer to the State Committee on Industrial Safety of the role of increasing work safety at coalmining enterprises through the creation of a unified telecommunications system for dispatcher supervision and automated control of mining machines and technological complexes, this being in breach of norms of current legislation, while the 70 million UAH allocated to the State Committee on Industrial Safety for this purpose was used inefficiently – work according to contracts had not been completed in the first six months of 2008.

¹⁴ «State Committee on Industrial Safety – kicking into its own goalpost» // Accounting Chamber of Ukraine http://www.ac-rada.gov.ua/achamber/control/uk/publish/article/main?art_id=1256197&cat_id=411

¹⁵ M. Bondarenko. «Dangerous» right to work // «Legal Weekly» №47(120), 18 November 2008. <http://www.legal-weekly.com.ua/article/?uid=773>

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5. STATE CONTROL OVER OBSERVANCE OF LABOUR RIGHTS

The results of checks carried out during 2008 both by State bodies, and trade unions indicated that almost 90% of the employers checked were infringing labour legislation.

For example, according to a check undertaken by State Work Inspectors from the Minister of Employment and Social Policy, the most common infringements of labour legislation were with regard to pay, working hours, time off, contracts, rules for keeping record of employment books, concluding and implementing collective agreements and work discipline.

The largest percentage of such infringements is found in organizations and institutions with private or municipal forms of ownership, and in terms of business activity – those involved in wholesale or retail trading, industrial and agricultural enterprises.

As already noted, most infringements of legislation on labour rights are linked with pay. These came to 60.2% of the violations identified during checks. They are primarily cases where people are not paid on time for their work, or not paid in full.

At 52 percent of the enterprises with wage arrears checked by the State Labour Inspectorate there were infringements of the norms of legislation regarding payment of compensation for the loss of a part on ones pay in connection with deadlines and payments being missed, While at 56 percent of the enterprises with arrears no indexation of employees' income was carried out in accordance with legislation¹⁶

At 9 percent of the enterprises checked by the State Labour Inspectorate, minimum guarantees of remuneration are not observed. Almost 15% of employers infringe the norms of General Branch Agreements regarding the minimum size of the tariff rate for first-band employees and 11% of employers infringe inter-qualification relations in work remuneration.

During the checks, 5,071 employers, or 42% of those checked, were found to have used hired labour without proper formalities and with remuneration in «envelopes». This figure included 2,203 individuals engaged in business activities, or 74 percent of those checked. Such infringements concerned 20,447 employees, with 2,825 of these having been taken on without formalization of labour relations.

The situation is fairly acute with observance by employers of legislation of employment of minors. During a check by the State Labour Inspectorate young people up to the age of 14 were found to be working at agricultural enterprises. It was found that at some enterprises there was no special record of workers under the age of 18 with their dates of birth indicated, and preliminary medical check-ups had not been carried out when employing minors. The checks found cases when employees under the age of 18 had worked nightshifts, overtime, and weekends, as well as infringements of the Code of Labour Laws regarding payment of employees under the age of 18, when shortening the length of the working day, and unlawful dismissals.¹⁷

Infringements of legislation were also recorded in employing women. These infringements were found at 995 enterprises, institutions and organizations, or 45% of those employers checked for this. There were infringements of the ban on employing women for night shifts, heavy work or work in harmful or unsafe conditions, cases where women had to receive or move items with a mass in excess of the maximum norms. There were infringements with women who have children aged from 3 to 14 being made to work overtime without their consent.

During 2008 proper control was not ensured of observance of the constitutional right of workers to time for rest. As a result, almost 15% of employees for various reasons did not make use of their right to annual paid leave. In come types of work this percentage was considerably higher: in sales – 33,8%, fishing – 30,7%, in hotel and restaurant work – 27,8%, construction – 26,5%, agriculture – 24,8%, the forestry industry – 23,6%.¹⁸

¹⁶ From material from parliamentary hearings: On the situation with observance of the constitutional guarantees of citizens' labour rights», http://www.rada.gov.ua/zakon/new/par_sl/sl1012108.htm

¹⁷ Ibid

¹⁸ Ibid

Over recent years one can observe a negative trend involving concealed dismissal of staff or a change in the organization of the workplace with work being changed under various pretexts or threats of dismissal «with the consent of both parties» or «at ones own wish». This demonstrates that the guarantees of protection against illegal dismissal are not being implemented.

Between January and September 2008 one in five workers changed their job. The vast majority (88.3%) resigned at their own wish. The rates of workers released came to only 2.2% of the total number of those leaving sectors of economic activity. In maintaining this phenomenon in conditions of financial and economic crisis, the level of social protection of workers and adherence to guarantees in legislation in connection with forced resignations could deteriorate.

Ukraine has ratified all necessary conventions of the International Labour Organization with regard to inspection of work however the necessary measures in this area to strengthen the influence of such inspection has not yet been carried out.

Violations of labour rights are leading to considerable social tension, which is demonstrated by the already fairly numerous conflicts at large enterprises.

One can cite the conflict at the Kherson machine building plant. When wage arrears affected workers at this plant, people blocked the work of the enterprise, demanding from the management that they pay the wages owed, and also restart the work of their plant. They demanded that in the document about reinstatement of work that something be written establishing the responsibility of the plant's owners for carrying out their commitments.

The protesters asserted that wages had not been paid since September 2008, and that the arrears already came to 4 million 478 thousand UAH. According to the factory workers, they were told at a meeting with the directorate of the enterprise that the owners were not planning to retain the enterprise.¹⁹

We can also cite the difficult situation at the Lviv Car Factory where employees picketed the City Council and Russian Federation Consulate, demanding payment of wages owed. Of the once over thirty thousand workers, there are only a few thousand left and their prospects are not good. The factory owned by the Churkin brothers who are RF nationals has for eight months not paid wages in full. The arrears have reached 7 million UAH.²⁰ The situation is no better at many other enterprises.

6. PROTECTION OF THE LABOUR RIGHTS OF LABOUR MIGRANTS

Labour migration remains a major issue for Ukraine, and safeguards for their labour rights should be a priority of the State. Ukraine is party to 11 bilateral agreements regarding employment and 7 international accords on social security.

There is no information about the real number of labour migrants. Official statistics record several tens of thousands of people each year, whereas according to sociological studies up to 5% regularly travel abroad for work, and up to 20% of the able-bodied part of the population periodically supplement their income through working trips abroad. A further 30-40% would like to work in other countries. A prerequisite for legally working abroad is receiving a work permit before entering the country. In order to obtain such a permit, as a rule, one needs confirmation from an employment service of the relevant country, social insurance and other necessary documents from the foreign employer.

The issue of permits to work abroad lies exclusively within the competence of embassies and migration services of the relevant countries. At the same time resolution of this issue is possible within the framework of multilateral or bilateral agreements on employment and social security to which Ukraine is a party.

¹⁹ «Ukraine's Confederation of Free Trade Unions supports the strikers in Kherson!» <http://www.kvpu.org.ua/ua/news/144/>

²⁰ V. Khudytsky «Collective overboard» – they are proposing to throw out Lviv's industrial enterprises to save themselves» // Dzerkalo tyzhnya, № 49 (728), 27 December -16 January 2009, <http://www.dt.ua/2000/2600/65071/>

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Yet there remain no international agreements on employment and social protection of nationals with the countries where a considerable number of Ukrainian nationals are presently working, specifically, Argentina, Estonia, Germany, Greece, Georgia, Hungary, Israel, Italy, Portugal, Romania, the Russian Federation, Serbia, Spain and Turkey.

7. THE RIGHTS OF TRADE UNIONS

Where employees' labour rights are violated, it is difficult for them to oppose the «side with power» by themselves with this often resulting in unlawful dismissals or even non-payment of wages and other labour law infringements.

When workers stand alone, they are easier to break, intimidate, dismiss or drag through the courts. The role of trade unions is therefore vital, and the more workers unite in defence of their violated rights, the stronger they are, and the more effective in protecting their rights and making employers meet the lawful demands of the working collective.

It must, however, be noted, that in conditions of crisis, i.e. precisely when workers more than at any time need protection from all those wishing to economize at their expensive, there is no real mechanism for protection. Trade unions in their present state fulfil this role very poorly and people's confidence in them has fallen below the critical point.

The government needs to take measures aimed at providing real safeguards for the freedom of trade union activity and independence of a trade union from the State authorities, and at increasing their role in protecting the interests of the average worker. One of such measures would be the establishment of trouble-free procedure for registration. Unfortunately registration of a trade union remains complicated and involves approaching dozens of different State bodies and submitting an unwarrantedly large number of documents for registration.

Trade unions often encounter difficulties in registering their articles of association with the Ministry of Justice. Most of these problems are caused by failings and lack of clarity with regard to legislation and the possibilities for civic organizations, including trade unions. As an example of this, one can cite the situation which arose over registration of the Masters' Guild as a trade union.

On 14 August 2008 the Masters' Guild sent an application for legalization, together with the other legally stipulated documents to the Ministry of Justice. Yet the Guild has still not been legalized, with the Ministry of Justice refusing to take this step on the grounds that the Masters' Guild can supposedly not fulfil the function of organizing collective management of authors' rights. It does not, however, provide a response to the question of which particular article and which specific law prohibits this. Lack of clarity is thus impeding the registration of this trade union.

Trade unions also encountered fairly serious problems in 2008 in carrying out their tasks. We would point out cases of attacks on representatives of the Federation of Trade Unions of Ukraine on 16 and 17 November 2008 in Kyiv and some other regions. Attempts were made at that time to seize and hold premises of regional branches of the trade union. There is information that people from the outside, applying physical force, burst into trade union premises, breaking the locks on office doors and damaging office equipment. In a number of cases documents were stolen including protocols of meetings of the elected bodies and stamps.²¹

At the same time, it should be said that the biggest trade union structure – the Federation of Trade Unions of Ukraine has recently taken an active role primarily over conflict around trade union property inherited from Soviet times. Privatization of trade union sanatoria and holiday centres has led to innumerable scandals. Furthermore, since 2005 more places owned by trade unions have been sold than during the previous 10 years. Due to this parliament has even placed a year's moratorium on the sale of trade union property, and the Federation itself recently changed its Head.

²¹ «Yesterday throughout Ukraine they stormed the premises of trade unions» // Internet publication «ProUA» <http://ua.proua.com/news/2008/11/17/091459.html>

The practice is very widespread of dodgy trade unions – trade union committees set up or hired by employers themselves for so-called «trade union servicing».

«In Ukraine trade unions which could defend employees are very weak. There are very few trade unions that are independent of the employers», specialist on the trade union movement Yury Vishnevsky told the weekly «Commentaries». «Therefore the only possible protest actions are protests against the government supported by employers. The last strike of workers of the gas industry was against the Government of Yulia Tymoshenko, and she swiftly made concessions because it was effectively a strike of employers. One could have an analogous strike in the mining industry if they're ignored. However I don't see the possibility of strikes aimed against job losses, dismissals, reductions in wages».²²

8. RECOMMENDATIONS

- 1) Increase unemployment benefit to the subsistence minimum envisaged by legislation;
- 2) Reduce high unemployment among the most vulnerable groups of the population, in the first instance, young people, those approaching retirement age and the disabled;
- 3) Pass amendments to legislation to remove the discriminatory norms regarding members of the rural population registering unemployed.
- 4) Increase the ratio held by wages in the GNP and in the cost value of production;
- 5) Bring the minimum wage into line with the demands of the European Social Charter
- 6) Ensure effective differentiation of remuneration in the public sector through the application of a single system of pay bands.
- 7) Take measures to improve pay in State bodies in order to ensure social protection of ordinary employees, removing the system of concealed earnings established through the awarding of various bonuses and supplements which are more dependent on loyalty to the management, than on productivity.
- 8) Reduce wage arrears for employees of the public sector, and also take measures aimed at minimizing wage indebtedness at enterprises and organizations of any type of ownership.
- 9) Improve the system of work safety in order to reduce industrial accidents and work-related illnesses, including through improvements to legislation in this area, as well as carrying out prevention programmes.
- 10) Improve control over adherence to standards and requirements in the sphere of protection of labour and ensure swift and efficient investigations into cases of injury.
- 11) Improve State control over observance of labour rights and create effective mechanisms for reacting to violations.
- 12) Take measures to effectively protect the labour rights of minors and women.
- 13) Conclude international agreements in the area of employment and social protection of labour migrants with countries where a considerable number of Ukrainian nationals are working, where such agreements have not been reached.
- 14) Ensure strict observance of the rights of trade unions, and promote the development of a strong and independent trade union movement.

²² «Trade unions are not ready to protect workers in conditions of economic crisis» // Radio Svoboda 07.11.2008, <http://www.radiosvoboda.org/content/article/1339508.html>

XVI. ENVIRONMENTAL RIGHTS¹

1. THE RIGHT TO A SAFE ENVIRONMENT

After five years of doing nothing to prepare and publish a «National Report on the State of the Environment in Ukraine», the Ministry for Environmental Protection [MEP] finally placed a draft National Report for 2006 on its website². However this document, like the previous report for 2004, in breach of Article 25-1 of the Law «On protection of the natural environment», was not presented for consideration by the Verkhovna Rada and was not published in a separate edition. Its content has therefore not yet become accessible to other authorities and to the public at large.

The fact that National Reports for 2007 and 2008 have not been produced prevents us from drawing comprehensive general conclusions about the state of environmental safety in the country and the observance of environmental rights in 2008. Among the failings of the last draft National Report one should mention first and foremost the lack of proper attention to legal issues, and the issue of observance of environmental rights.

Analysis of the state of the environment suggests continuing escalation in the levels of the man-made burden upon it which are several times higher than those in developed countries.³

Figures for air pollution in Ukrainian cities, pollution of river basins and the radiation situation in zones around Ukrainian nuclear power plants provided in the MEP information and analytical reviews for the 1st to 3rd quarters of 2008⁴ are considerably in excess of maximum permissible levels.

During the first three quarters of 2008 the air was most polluted in city of the East and Central regions, and in some parts of the Southern and Western regions. The most widespread pollutants are formaldehyde and nitrogen dioxide which are toxic compounds of grade 2 danger. In some cities pollution with formaldehyde is five times higher, or more, than allowed, nitrogen dioxide and dust at least 2 times higher.

The list of Eastern cities with the worst atmospheric include: Donetsk, Dzerzhynsk, Horlivka, Kramatorsk, Makiyivka, Mariupol, Lysychansk, Rubizhne, Severodonetsk, Slovyansk and Yenakiyeve. In the Central Region, the worst air quality is found in Dniprodzherzhynsk, Dnipropetrovsk and Kryvy Rih; in the South – Kherson, Odessa and Zaporizhya; in the West – Khmelnytsky and Lviv, while in the North – Kyiv and Sumy.

Five Eastern cities show consistently high levels of nitrogen dioxide in the air: in Donetsk around 2.8 times the maximum permissible concentration; in Slovyansk – 3.5 times; Yenakiyeve – 2.7 times; Makiyivka – 2.5 times and Horlivka – 2.4. The average monthly concentration

¹ By Oleksandr Stepanenko, member of the UHHRU Board, Head of the Environmental and Humanitarian Organization [EHO] Zeleny Svit [Green World] and «Helsinki Initiative – XXI»

² In the section for annual reports <http://www.menr.gov.ua/cgi-bin/go?node=NAC%20dop%20p%20NPS>

³ «National Report on the State of the Environment in Ukraine in 2006», p. 31

⁴ Information and analytical reviews of the state of the environment, the Ministry for Environmental Protection <http://www.menr.gov.ua/cgi-bin/go?node=IAOSD>

of formaldehyde during the reporting period was in excess of the permissible norm in 11 out of the 14 cities of the region and ranged from 0.8 to 5.7 the permissible norm: in Mariupol – 6.3 of the permissible norm; in Rubizhne – 6.3; Severodonetsk and Lysychank – both 6.0. The sources of the pollutant were production of construction material, metallurgy, thermal power engineering, chemical industry and vehicle fumes.

According to the State Department of Statistics the density of emissions from stationary sources of pollution, calculated per square kilometre of the country's territory amounted to 7.5 tonnes of harmful substances, and per head of population – almost 100 kilograms. However in some regions these figures were considerably in excess of the average level. In the Donetsk region density was more than 7.7 times higher, and per head of population – 3.5 times; with the analogous figures for the Dnipropetrovsk region being 4.0 and 2.9; the Luhansk region – 2.8 and 2.5; and the Ivano-Frankivsk region – 2.3 and 1.8. In Kyiv, per square kilometre 32.1 tonnes of pollutants were released, this being 4.3 times the average level. As compared with 2007 an increase in harmful emissions was recorded in 12 regions, with the most significant being in the Kherson region (with an increase of 2.4 thousand tonnes, or 26%); the Kyiv region (13.8 thousand, or 15%); the Lviv, Mykolaiv and Chernihiv regions (15.9 thousand, 3.1 thousand, 5.4 thousand, or 14%); the Cherkasy region (by 4.4 thousand, or 11%), and the Kharkiv region (by 12.9 thousand or by 8%).⁵

This is not the first year that we are observing a paradoxical situation where against a background of stable or reduced levels of production, there is a worrying increase in the level of emissions of pollutants. The reasons for this are physical deterioration, and / or the lack of cleaning systems in production and in the communal economy. During 2007 around 5 billion cubic metres of insufficiently purified drainage water was poured into reservoirs as against 3 billion in 1990. 1.4 billion cubic metres of polluted drainage water was dumped into reservoirs without any purification at all, this being three times as much as in 1990.⁶ In some regions the level of polluted water dumped into rivers exceeds the natural flow. The amount of water used per item of production is 2.5 times higher than in France and 4.3 times higher than in Germany or the United Kingdom.

As a consequence, a huge number of water areas have lost their natural purity and water qualities with their capacity for self-purification being disrupted. Water areas are contaminated with compounds of heavy metals, nitrogen, sulphates, oil products and phenols. There is a noticeably high number of unusually high water pollution, the highest number during the second quarter of 2008. As compared with the previous period there was an increase in pollution of the river basis of the West Bug, the Dniester, Southern Bug, and streams in the Crimea. The greatest number of extreme levels of contamination were recorded in the Dniester Basin (with nitrogen and copper), the Siversky Donets (nitrogen and nitrites and oil products).

For example, the concentration of copper in the rivers Poltva, Rata, Solokiy (the Western Bug Basin, Lviv region) in the first quarter of 2008 varied between 5.5 -15,0 of the maximum permissible concentration which is classified as an extreme level of pollution. An extreme level of contamination with oil products was recorded in the water of the Dniester in the district of Old Sambir (Lviv region) – 67.7 the maximum permissible concentration.

In the first – third quarters of 2008 the amount of radioactive caesium-137 in the reservoirs of the zone of influence of the Rivne, Khmelnytsky, Southern Ukrainian and Zaporizhya nuclear power plants did not exceed the control limit (3.700 becquerel per cubic metre). The maximum content of radionuclides was recorded in the Hlyboke Lake. This was tens of times higher than the control level, and in January 2008 was 120,000 becquerels per cubic metre, in August – 110,000 Bq/ m³, and in September – 100, 000 Bq/m³.

⁵ Express issue of the State Committee of Statistics for 11.03.2009 № 50 «Emissions of harmful substances and greenhouse gases into the atmosphere from stationary sources of pollution in 2008» (according to preliminary data)

⁶ Head of the Accounting Chamber of Ukraine, V. Symonenko: «Programmes of Life are State programmes for preserving the environment in Ukraine» // «Holos Ukrainy» № 146 (4396) 5.08.2008 http://www.ac-rada.gov.ua/achamber/control/uk/publish/article/main?art_id=1158759&cat_id=223

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Overall in the zone of exclusion and the zone which people had to be moved from, there are around 2800 thousand cubic metres of radioactive waste, as well as 1,700 thousand m³ at the Chernobyl Shelter. A considerable part of this amount is kept in conditions which do not comply with established norms for radiation safety. With any manmade activities in the zone there is threat of disruption of the regime of radiation safety, of the spread of areas of radioactive dirt and additional irradiation of personnel.

In 2007 the Ministry for Environmental Protection gave a generally negative assessment of a plan to build a centralized storage facility for spent nuclear fuel in the exclusion zone. This is seen in the conclusion of the State Environmental Impact Assessment posted on the Ministry's website.⁷ One is therefore more than bemused by the activity shown by NNEGC [National Nuclear Energy Generating Company] Energoatom which, despite the conclusion of the environmental assessment, is continuing to lobby for the plan to build a centralized storage facility for spent nuclear waste in the exclusion zone. At the end of 2008 it submitted this plan for the Cabinet of Ministers' approval⁸.

The list of the ten worst polluters of the environment in 2008 still contains the following enterprises: «Zaporizhstal»; the Burshtyn Thermal Electric Power Station «Zakhidenergo» (the city of Burshtyn in the Ivano-Frankivsk region); the Dniprovsky Metallurgic Complex named after Dzherzhynsky; (Dniprodzherzhynsk); «ArsenorMittal Kryvy Rih»; the Thermal Electric Power Station «Dniproenergo» (Zelenodolsk), the Illich Metallurgic Industrial Complex (Mariupol); Azovstal (Mariupol); the Starobeshevska Thermal Electric Power Station; Donbasenergo; the Alchevsky Metallurgic Industrial Complex; Lysychansk Soda.⁹

The law enforcement agencies point out a trend during 2008 towards an increase in the scale of violations of environmental protection legislation, both by enterprises, institutions and organizations, and by bodies of local self-government and State control.¹⁰

It is justified to attribute major violations of the human right to environmental safety and protection of health from unfavourable environmental influences to longstanding neglect of the principles of sustainable development which envisages considering environmental factors when taking any decisions.

2. ASSESSMENT OF ADHERENCE TO INTERNATIONAL ENVIRONMENTAL CONVENTIONS

2.1. UN EUROPEAN ECONOMIC COMMISSION CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS (AARHUS CONVENTION)

In June 2008 it was 10 years since Ukraine signed the Aarhus Convention. 2009 marks 10 years since its ratification, when the Convention became a part of domestic legislation. Unfortunately, the country is marking these anniversaries with a heavy burden of unfulfilled obligations – before the parties to the Convention, as well as to its own citizens. The authorities keep the public in blissful ignorance about the decisions of the Second and Third Meetings of the Parties to the Aarhus

⁷ Opinion № 535 of the State Environmental Impact Assessment regarding TEO «Construction of a centralized storage facility for spent nuclear fuel» of VVER reactors on Ukraine's nuclear power plants». The Ministry for Environmental Protection, http://www.menr.gov.ua/documents/Vysnovok_535.doc

⁸ The draft plan for a storage facility for spent nuclear fuel was approved by Cabinet of Ministers Instruction № 131 from 4.02.2009 «On approving the technical-economic justification for investments in construction of a centralized storage facility for spent nuclear fuel» of VVER reactors on Ukraine's nuclear power plants »

⁹ Sites which are the worst polluters of the environment, <http://www.menr.gov.ua/cgi-bin/go?node= Zabrud%20NPS>

¹⁰ Information from the Prosecutor General of Ukraine «On the level of lawfulness in the country in 2008 (in accordance with Article 2 of the Law «On the prosecutor's office»

Convention with regard to Ukraine. They have still not been published in any official media outlet or on the website of the Cabinet of Ministers and Ministry for Environmental Protection.

The content of these decisions is deeply worrying for Ukraine. The Third Meeting of the Parties to the Aarhus Convention which took place in June 2008 in Riga, Latvia, found Ukraine and Turkmenistan to be countries not adhering to the demands of the Convention.¹¹ The Meeting's decision states that the Government of Ukraine, as previously, is not sufficiently taking part in the process of considering observance of the Convention and is not taking measures to implement the decision of the previous Meeting. Over the past four years the Government had not implemented the recommendations issued by the Second Meeting held in Almaty to draw up a strategy plan for implementing the Convention, bring its legislation into line with its provisions, setting out clear procedure for public participation in decision-making and practical mechanisms for applying the Convention.¹²

Given that the Government had waived any role in drawing up a strategy plan, literally on the eve of the Riga Meeting, the Minister H. Philipchuk issued an Instruction approving a Plan of Strategic Decisions of the Ministry for Environmental Protection [MEP] on implementing the Aarhus Convention.¹³ The document was passed without any prior public discussion. Although at present the Plan is still on the Ministry's website, it is clearly of purely historical interest as a model of MEP strategic planning.

On the day that the Third Meeting of the Parties to the Convention began in Riga, the Ukrainian Helsinki Human Rights Union [UHHRU] sent its participants an Open Appeal on Ukraine's lack of compliance with the provisions of the Aarhus Convention¹⁴ UHHRU called on the participants in the Meeting and the UNECE Compliance Committee to apply the most effective measures of influence at their disposal to force the state authorities to fully honour their commitments. In their view the Parties to the Convention should toughen procedure for ensuring adherence. In this sense the issue of adherence to the Aarhus Convention could be brought up for special review in other international structures, for example, in the European Parliament and in the higher bodies of the UN.

The Riga Meeting of the Parties to the Convention issued Ukraine with a caution and proposed that it:

- ◆ bring its legislation and practice into line with the provisions of the Convention;
- ◆ draw up before the end of 2008 an action plan containing clear internal regulation of time frames and procedure for consultations with the public, making comments and providing information which forms the basis for decision-making;
- ◆ set out in the action plan transparent procedure ensuring that it is carried out in a transparent manner and in full consultation with civic society.

On 27 December 2008 the Cabinet of Ministers approved «Action Plan on Implementation of the decision of the Parties to the Aarhus Convention III/6f».¹⁵ Its adoption was not preceded by any steps by the Government, nor by the passing of any Governmental (ministerial) for establishing transparent procedure of public consultation at the level of adoption and implementation.

¹¹ Draft decision III/6f on Compliance by Ukraine with its obligations under the Convention» <http://www.unece.org/env/pp/mop3/mop3.docI.htm>

¹² Decision 2/5b «Compliance by Ukraine with its obligations under the Aarhus Convention, the Second Meeting of Parties, Almaty, 27.05.05 r. <http://www.unece.org/env/documents/2005/pp/ece/ece.mp.pp.2005.2.add.8.r.pdf>.

¹³ «Plan of strategic decisions of the Ministry for Environmental Protection on implementing the Convention on access to information, public participation in decision-making and access to justice in environmental matters (Aarhus Convention)» from 01.05.2008 p.

¹⁴ Open appeal from the Ukrainian Helsinki Human Rights Union on Ukraine's failure to comply with the Aarhus Convention 11.06.2008 <http://www.helsinki.org.ua/en/index.php?id=1213195555>

¹⁵ Cabinet of Ministers Instruction from 27.12.2008 № 1628- i, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=1628-2008-%F0>

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The Cabinet of Ministers did not react to the proposal of civic organizations to hold public consultations on this issue in accordance with the provisions of its own Resolution from 15 October 2004 № 1378 and the Aarhus Convention.¹⁶

We would name the following as the name failings of the Action Plan:

- ◆ the implementer of all measures of the Plan is exclusively the Ministry for Environmental Protection. Thus the Aarhus Convention continues to be viewed as a departmental convention of this ministry, while the highest institutions of power: the Cabinet of Ministers, the President, the Verkhovna Rada, the Ombudsperson, law enforcement and judicial bodies consciously remove themselves from the process of its introduction;

- ◆ the list of members of the Inter-Departmental Working Group on ensuring Implementation of the Decision of the Parties to the Aarhus Convention (note that there is no talk of implementing the Convention itself, this is merely about the specific criticism and subsequent requirements imposed) does not include representatives of the public, bodies of local self-government, the higher State bodies or law enforcement structures;

- ◆ the Plan does not specify which particular laws need amendments as part of the process of implementing the norms of the Convention;

- ◆ the concept of «environmental information» (which is the wording of the Aarhus Convention) has been perfidiously substituted with the term «information about the state of the environment». In this way activity on formulating normative acts does not include: information of public significance on activity or measures in the environmental sphere, economic analysis of expenditure and results having impact on the environment, people's state of health and safety, conditions of life, the condition of constructions with respect to how the state of the environment has impact on this.

Since MEP is planning in 2009 to concentrate on implementation of the Action Plan on Implementation of the Decision of the Meeting, behinds the above-mentioned MEP Plan of Strategic Decisions from 1 May, it was decided to consign to oblivion yet another document – «Strategy and the Plan for Implementing the provisions of the Convention «On access to information, public participation in decision-making and access to justice in environmental matters (Aarhus Convention)» in Ukraine up to 2020». The creation of this strategy plan was aimed to coincide with the Meeting of Parties. It was drawn up by the Ukrainian division of the international union «Ecology of Man» at MEP commissioning and obviously State funding, in accordance with a tender, the conditions of which have never been made public. At the present time the «Strategy and plan» have disappeared without trace from the Ministry's site, and representatives of the Ministry have simply advised the public to «forget about that».

There are thus more than sufficient grounds for asserting that following the last Meeting of the Parties to the Convention, the Ministry for Environmental Protection is still not demonstrating political will to introduce its provisions in legislation and practice of State bodies. There would seem in fact to be only a pitiful imitation of this process. The higher bodies of power in 2008 did not carry out any real steps aimed at ensuring its obligations under the Convention.

2.2. UN FRAMEWORK CONVENTION ON CLIMATE CHANGE

At one stage the President¹⁷ and Cabinet of Ministers passed programme decisions on implementing the UN Framework Convention on Climate Change and the Kyoto Protocol to this.¹⁸ One can speak now of incomplete fulfilment by the authorities, including the Ministry for Environmental

¹⁶ Letter from EHU «Zeleny Svit» to the Prime Minister Y. Tymoshenko, № 12-11 from 19 November 2008

¹⁷ Presidential Decree № 658/2007 from 20. 07.07 «On bringing into force the Decision of the National Security and Defence Council from 15.06.2007 «On the state and problems of implementation by Ukraine of the UN Framework Convention on Climate Change»

¹⁸ Cabinet of Ministers Instruction from 18.08.2005 № 346-i on approving a «National Action Plan on Implementing the Provisions of the Kyoto Protocol to the UN Framework Convention on Climate Change» UN Framework Convention on Climate Change».

Protection, of its commitments under the National Action Plan for Implementation of the Provisions of the Kyoto Protocol to the Framework Convention on Climate Change.

Ukraine is still not carrying out its commitments under Article 4 of the Convention to formulate, carry out, publish and regularly update nationwide and regional programmes containing measures on ameliorating the consequences of climate change (planned deadline for implementation was October 2008). On the MEP website as usual it was impossible to find the announced National Action Plan.¹⁹ Under such circumstances there can clearly be sense in talking about regional action plans.

The public's attention was attracted in 2008 by the successful outcome of two court suits brought by the environmental organization «Environment-People-Law» [EPL] against the Ministry for Environmental Protection and examined by the Lviv Regional Economic Court. The claim represented by EPL lawyer M. Bulgakova asked the court to declare unlawful the inaction of the Ministry with regard to observance of the provisions of the Framework Convention on Climate Change. It was prompted by the fact that EPL had on many occasions sent formal requests for information to the Ministry but had received no response regarding its activity on protecting against climate change.

The Ministry did not provide any evidence to the court that it was carrying out in a proper manner its obligations with regard to the National Action Plan for Implementation of the Provisions of the Kyoto Protocol to the Framework Convention on Climate Change and the Kyoto Protocol. The court found that as the coordinator of measures on implementing these agreements, the Ministry's inaction was unlawful. It also ordered the Ministry to take measures aimed at implementing climate-protecting policy and reduction of greenhouse gas emissions and carry out a number of points of the Kyoto Protocol, the relevant acts passed by the Cabinet of Ministers, the President and the National Security and Defence Council.²⁰

The mechanism of international trade in emission quotas and the activity of the Government on using the money gained on projects to reduce greenhouse gas omissions is placed in the sphere of environmental protection which envisages the need to fulfil all procedure on public access to environmental information and public participation in decision-making. The requirement arises therefore to unfailingly adhere to the provisions of the Framework Convention on Climate Change and the Aarhus Convention with regard to public participation in adopting all normative legal acts and decisions concerning international sale of quotas, financing projects of joint implementation green investment projects.

Transparency of the procedure for a green investment set up envisages the publishing on the websites of MEP and the National Agency for Environmental Investment of all draft documents, at least a month before the decision is to be adopted in order to receive comments from all interested parties. The comments must also be published so that other interested parties can read them. Each commentary should receive an official response from the authorities regarding their acceptance or rejection according to the Law «On citizens' appeals. The authorities should also ensure absolute open access to reports on implementation of projects using money from the sale of quotas.

Unfortunately in 2008 one could observe only the first precedents of such policy among a considerable number of examples reflecting attempts to take decisions behind the scene on the use of climate protection funds. In March 2008, after an active campaign of public lobbying, MEP finally began publishing in accordance with the requirements of the Framework Convention information about projects of joint implementation. Since then on the official website of the Ministry one can read projects which are under consideration, or have already received letters of support.²¹ However

¹⁹ The UN Framework Convention on Climate Change», Ministry for Environmental Protection of Ukraine <http://www.menr.gov.ua/cgi-bin/go?node=Un%20Konv>

²⁰ The case with climate change – infringements by the Ministry for Environmental Protection of legislation on information and on public participation. «Environment – People – Law», http://epl.org.ua/a_spr_climate_change.html

²¹ JOINT IMPLEMENTATION PROJECTS. THE MINISTRY FOR ENVIRONMENTAL PROTECTION <HTTP://WWW.MENR.GOV.UA/CGI-BIN/GO?PAGE=77&TYPE=LEFT>

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the National Reports on Cadastres of Emissions and Absorption of Glasshouse Gases are only available for the period up to 2006.²²

The National Agency for Environmental Investments, in breach of the Framework Convention and the Kyoto Protocol, did not in 2008 place registers of glasshouse gas emissions on its website. As of the end of February 2009, the registers of emissions had not been made public. Under such conditions Ukraine will simply not be able to carry out a transparent sale of its quotas and use the funds received in a justified and responsible fashion. As a result, the arrangements which the Government vocally advertised about the beginning of practical green investment activity (for example, on the sale of a part of the quota to Japan²³) may arouse criticism from other parties to the Framework Convention, a decision by the Japanese partners to reject cooperation, and even new debt obligations for the country's budget.

The position of civic organizations with regard to Ukraine's position at the UN negotiations on climate change. There was no response from the Government to the proposals from environmental organizations regarding Ukraine's position at the scheduled UN international negotiations on climate change in Poznań in December 2008. The main aim of the negotiations was to seek agreement on a reduction in countries' emissions by 2020. Ukraine's Government declared an intention to reduce glasshouse gas emissions by 20% from 1990. Yet civic environmental organizations in the course of several wide-scale public actions have endeavoured to convince the authorities that such commitments only deceive the international community since Ukraine's emissions are already considerably less and come to only 44% of the 1990 level. Thus, with such a «commitment» Ukraine can do nothing at all on reducing emissions. Environmental organizations consider that in 2020 the level of Ukraine's emissions should at least be no higher than at the present time²⁴.

2.3. THE UN ECONOMIC COMMISSION FOR EUROPE CONVENTION ON ENVIRONMENTAL IMPACT ASSESSMENT IN A TRANSBOUNDARY CONTEXT (THE ESPOO CONVENTION)

The objective of the Espoo Convention is to assess adverse transboundary impact of human activities and to report on this to other parties to the Convention, provide warning, minimize such impact, inform and monitor it.

At the end of December 2007 Romania submitted a statement to the Espoo Convention Compliance Committee expressing concern over the environmental consequences of the construction of a deep water Danube – Black Sea Canal in the Ukrainian part of the Danube Delta. Romania thus created a precedent in the history of the Convention (since 1997) of considering the complaint of one country against another over non-compliance with the requirements of this international agreement.²⁵ However the Cabinet of Ministers and Ministry for Environmental Protection clearly decided not to add to the Ukrainian public's worries by informing them about the approach of a neighbouring country to the Convention's Compliance Committee. There was simply no report of it at all in the official national press.

The Fourth Meeting of the Parties to the Espoo Convention took place from 19-21 May 2008. At the Meeting Ukraine effectively admitted its violation of Article 3 of the Convention in not providing the Parties to the Convention and the public of its own country with information about the adverse transboundary impact of the project. The Ukrainian Delegation committed itself to review

²² National Report on the Cadastre of Emissions and Absorption of Greenhouse Gases in Ukraine for 1990-2006 <http://www.menr.gov.ua/cgi-bin/go?node=Nac%20kadastr%20parn%20gaz>

²³ Ukraine signs up for the world's first «Green Investment» // the Internet publication «Ukrainska pravda», 19.03.2009 <http://www.pravda.com.ua/news/2009/3/19/91602.htm>

²⁴ International negotiations in Poznań, 1 – 12 December 2008. Working Group on Climate Change http://climategroup.org.ua/?page_id=191

²⁵ Meeting of the Parties to the Convention on Environmental Impact Assessment in a transboundary context, Report of the Committee on Implementation on the work of its fourteenth meeting. The UN Economic and Social Council, 20 February 2008 <http://www.unece.org/env/documents/2008/eia/ece.mp.eia.2008.3.r.pdf>

its final decision on building the canal, hold consultations with the Secretariat and members of the Committee on Implementation of the Espoo Convention, the European Commission and with their support fully carry out its international obligations.²⁶ It was only on 11 August that the Ministry for Environmental Protection notified that it was withdrawing the second phase of the plan for the deep-water canal. At the end of the year it placed in the second of its website on Interaction with the Public an «Assessment of the impact on the environment in the transboundary aspect of the plan for reinstating the deep-water Danube – Black Sea Canal in the form of a many-volume study by the Ukrainian Institute of Environmental Issues.²⁷ Of course, in this case too the respectable Ministry gave preference for communicating with the Ukrainian people to the English language alone.

The authorities have not explained where exactly the non-fulfilment of the provisions of the Convention lie in the process of planning and building the deep-water canal and what changes need to be made to Ukraine's decision regarding this project, in order to fulfil the country's international commitments. Instead during the year publications continued to appear in many media outlets, including some that are State-owned, , the tenor of which boiled down to waxing lyrical about the positive economic benefits of the project – «an economic miracle on the Danube», «a window to Europe», etc – and a lack of negative environmental impact on the implementation of the project.

At the same time in no media outlet was any information to be found about the content of Romania's report on this issue, provided to the Committee on the Implementation of the Espoo Convention in October 2008. There was no official notification of the content of the comments and recommendations to Ukraine in the Committee's decision which found that Ukraine had infringed a number of articles of the Convention in the course of decision-making with regard to the construction of the canal and incomplete fulfilment of its commitments given at the May meeting of the Parties to the Convention.²⁸

Thus the «Danube Project» during 2008 continued to tar Ukraine's international image, complicating its relations with neighbouring countries, demonstrating the authorities' silence over its negative environmental impact, its double standards with regard to the public, scientists and international organizations.

On the other hand the Ministry for Environmental Protection avoided answering a formal request for information regarding whether Ukraine planned to make use of the Espoo Convention's mechanisms should other countries not fulfil their commitments in implementing projects which could have a transboundary impact on the environment and threaten the environmental safety of Ukrainians, for example, a plan to build a factory for destroying chemical weapons in the town of Pochep, the Bryansk region of the Russian Federation..²⁹ An assessment of the transboundary impact of this project has not been made public by the Russian Government.³⁰

3. THE CATASTROPHIC FLOOD OF 23-27 JULY 2008 IN WESTERN UKRAINE

A strong cyclone from 22-28 in the Carpathian region led to heavy rain. In those days alone 50-344 mm. of rain fell in the Lviv region; 38-399 mm. in the Ivano-Frankivsk region; 98 – 276 mm. in the Chernivtsi region; 92 – 107 mm. in the Ternopil region; and 115-260 mm. in the

²⁶ Fourth Meeting of the Parties to the Convention on Environmental Impact Assessment in a transboundary context News of the Ministry for Environmental Protection, 23.05.2008, <http://www.menr.gov.ua/cgi-bin/go?node=2405>

²⁷ Interaction with the public. Website of the Ministry for Environmental Protection <http://www.menr.gov.ua/cgi-bin/go?node=gromada>

²⁸ Address by the Implementation Committee on the work of its fifteenth session which took place from 228-30 October 2008 in Geneva. UN Social and Economic Council, 4 December 2008 <http://www.unece.org/env/documents/2008/eia/ic/ece.mp.eia.ic.2008.2.r.pdf>

²⁹ Response from MEP to a formal information request from the Head of the EHU «Zeleny Svit», O. Stepanenko, № 9845/12/10-08 from 28.07.2008

³⁰ Russian Federation signed the Espo Convention in 1991, but has still not ratified it

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Khmelnitsky region, this being 95-293% of the monthly norm. The basins of the Dniester and tributaries of the Danube (Pruta, Sireta) reached a record level close to the historic floods of 1941 and 1969. Due to the vast scale of the consequences for an area encompassing a considerable part of the Ivano-Frankivsk, Chernivtsi, Lviv, Ternopil, Transcarpathian and Vinnytsa regions, the flood can be considered the biggest natural catastrophe in all the years of Ukraine's independence.

As a result, in the disaster area approximately 42 thousand houses were flooded, more than 35 thousand hectares of agricultural land suffered damage, 360 vehicle and 560 pedestrian bridges were destroyed, and 681 kilometres of car roads (not counting forest industry roads) were swept away.³¹ According to information from the Ministry for Emergencies, 32 people died in the disaster zone between 23-28 July.³² The largest number of victims were in the Ivano-Frankivsk region – 25 people, 7 of them children. Just in the village of Prutivka, in the Snyatynsk district, the flood claimed 8 lives.

Unnecessary human loss can in the majority of cases be explained by inadequate monitoring and forecasting of extreme meteorological phenomena, a poor system of information about emergencies, and low capacity of sections of the Ministry for Emergencies and Civil Defence to react to a major natural disaster. The authorities were forced to acknowledge that the State had from a technological and organizational point of view been incapable of withstanding such a test.³³ There is virtually no single system of civil defence in the country. A State service for providing emergency assistance has not been created. Special units are not ready for the tasks they have been vested with and their equipment does not meet modern requirements. More than 80% of the technological items which the Ministry for Emergencies Public Defence Service have been equipped with have been used for more than 20-30 years. Modern types of technology and means of swift reaction form only 3%, while means for rescuing people, individual equipment and defence – 20% of what is needed.³⁴

The catastrophic consequences of the July floods were also caused by miscalculations in planning and building of populated areas, the construction of hydraulic and energy structures, in the court of their exploitation. The State to a large degree has lost control over the situation in the water, forest and agricultural fields, and the development of precious stone.

Unnatural transformation of large territories led to additional risks as far as environment safety, stability is concerned, and heightened ruinous force of the flood.

The consequences of the disaster in the initial period heightened attention to the issue of forestry in the Carpathian area. After all it is known that the level of forestation in the Carpathian Mountains is considerably lower than the environmental optimum (36.7% as against the optimum 50-55%)³⁵. Unfortunately over the last decades forest ecosystems have been seriously interfered with this considerably altering the nature of the flow and water regime of rivers. Excessive felling and irrational practice with forest renewal have seriously damaged the forests of the Western region. The amount of forest in the Dniester Basin has halved over the last century, with the existing forest plantations insufficient and spread irrationally³⁶. In just 10-15 post-War years around 20% of land in the Carpathians was stripped of forest. The scale of felling over recent decades is in excess of the capacity of the forest ecosystems for renewal. The percentage of mature forest is unacceptably low

³¹ Operative information from the State Committee of Statistics on the water economy, 29.07.08 . http://www.scwm.gov.ua/index.php?option=com_content&task=view&id=33&Itemid=18

³² As a result of the natural disaster in Western Ukraine 31 people died – Minister for Emergencies V. Shandra, statement from the Minister for Emergencies http://www.mns.gov.ua/news_show.php?news_id=8995

³³ <http://www.president.gov.ua/news/11956.html>

³⁴ Cabinet of Ministers Instruction from 20 August 2008 N 1156-i adopting a «Nationwide targeted programme for the development of civil defence from 2009-2013»

³⁵ «Ukraine's forest industry: problems and prospects», edited by Member of the Ukrainian Academy of Sciences I.R. Yukhnivsky – Interdepartmental Analytical and Consultative Council on the Development of Constructive Forces and Production Relations, Kyiv 2003.

³⁶ Concept framework for a State programme of ecological renewal of the Dniester, drawn up by the Ukrainian Scientific Research Institute of Environmental Issues of the Ministry for Environmental Protection (2004).

(in real terms from 5-10% while the optimum is 18-20%), whereas it is known that it is specifically century-old forests with diversity of types which best fulfil their ecological functions.

The local powers that be are deliberately hampering implementation of the laws, programmes and decrees of the President on creating new natural-reserve territories. One example is the opposition over many years to the establishment of national parks «Hutsulshchyna» in the Ivano-Frankivsk region and the «Dniester Canyon» in the Ternopil region.

Since independence, a totally corrupt network of shadow business has developed in the Carpathian forest. The area around the Carpathian Mountains is presently fulfilling the function of a raw material supplement for the tree-felling industry of neighbouring countries. According to the Head of the Forestry Committee, State forestry enterprises alone in previous years have exported more than 20% of unprocessed wood (around 2.5 million cubic metres of forest each year) abroad.³⁷ However a larger percentage of forest export is carried out by private firms. There are not just isolated instances where forest has been smuggled out of the country. During the year criminal investigations into such cases were initiated by the Prosecutor of the Transcarpathian, Ivano-Frankivsk, Lviv, and Chernivtsi regions.³⁸

Law enforcement and controlling agencies, other authorities as well as the local population are being dragged into the shadow business. Over the last decade the forestry industry in the Carpathians has become virtually out of control. Principles of sustainable forest use are ignored, the age at which trees are felled is unwarrantedly lowered, and the practice which has frequently been criticized of total felling is continuing. This is carried out on hilly steep slopes and in river valleys, in the warm time of the year, with barbaric methods of transporting the felled trees and littering of the woodcutting areas. This destroys the undergrowth and causes erosion, mud torrents and landslides posing a real threat to populated areas and communications. It is specifically the Carpathian region which is most plagued year in year out by such mud torrents and landslides.³⁹ During the July floods just in the Ivano-Frankivsk region alone 214.4 kilometres of forest roads and 127 bridges on them were devastated.⁴⁰

During the first weeks after the floods, the President issued an Instruction ordering the creation of a special commission headed by the Deputy Prosecutor General T.V. Korniyakova to investigate the running of the forest industry in the disaster zone.⁴¹ The Commission was instructed to study the level of observance of forestry legislation, analyze the measures carried out on protecting and defending forests, examine whether legislation was adhered to in taking decisions on withdrawing land from the forest fund and to submit proposals on ordering the use of forests, etc. Unfortunately, no official report on the work of this Commission has yet been made public. The Prosecutor General has only informed of isolated offences in response to formal requests for information on this subject addressed to the President and Prosecutor General.⁴²

In the course of checks carried out by the Prosecutors of the regions which suffered from the floods, 98 criminal investigations were initiated into the unlawful felling of trees, half of which were submitted to the courts. For example, in the Dubivske forest area on a steep slope over an area of 3 hectares the State enterprise «Tyachivderzhspetslishosp» had felled without permission over 1.6 thousand trees

³⁷ Mykola Tymoshenko: «You won't succeed in cornering me with red flags like on a hunt!» // *Dzerkalo tyzhnya*, № 35 (714) 20 – 26 September 2008, <http://www.dt.ua/3000/3320/64112/>

³⁸ Information from the Prosecutor General of Ukraine «On the level of lawfulness in the country in 2008 (in accordance with Article 2 of the Law «On the prosecutor's office»

³⁹ According to information from the Ministry for Emergencies and the Protection of the Population from the Consequences of the Accident at the Chernobyl Nuclear Power Plant, and from the Ukrainian Statistical Annual Report, Kyiv – 2006, pp. 538–551

⁴⁰ «The national disaster of 23-27 July in the Carpathian region» – Analytical report of the Ivano-Frankivsk Regional Administration from 05.08.2008 <http://www.if.gov.ua/modules.php?name=Content&pa=showpage&pid=746>

⁴¹ Presidential Instruction № 251/2008-I from 06.08.2008. «On studying the running of the forest industry in the Vinnytsa, Ivano-Frankivsk, Transcarpathian, Lviv, Ternopil and Chernivtsi regions»

⁴² Response from the Prosecutor General's Office from 05.12.2008 № 7/4-19272-08 to an information request from the Head of EHO «Zeleny Svit» O. Stepanenko

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over 1 thousand cubic metres, causing damage of almost 2 million UAH. The Prosecutor's Office of the Ivano-Frankivsk region submitted a criminal file to the court regarding officials of the State enterprise «Kutske Forest Enterprise» who had concealed cases of illegal felling of trees with a total value of 380 thousand UAH.⁴³ According to information from the State Economic Inspectorate, in the Ternopil region just in the current year the State enterprise «Berezhnauahrolic» had cut down trees in the forests without permission, to the tune of more than 800 thousand UAH. The investigations into these cases are being run by the Security Service [SBU]

The State as represented by law enforcement, controlling and water industry bodies, allowed wide-scale barbaric extraction of river stone, gravel and sand simply in the channels of Carpathian streams and on the land of the water fund.⁴⁴ This unlawful and entirely unregulated practice is exacerbating the devastating effect of floods, causing the migration of currents and creating danger sites and the threat of large areas of the banks, including in populated areas, being washed away.

The State Economic Inspectorate, in the Ternopil region has on a number of occasions informed of sand and gravel being unlawfully taken away from the Dniester and on the territory of the Dnistrovsky Canyon in the Buchatsk, Zalishchytsk and Monastyrsk districts. As the results of checks carried out in the riverbeds near two villages in these districts protocols on administrative offences were submitted to the court against 16 individuals, with losses estimated at 4,226 UAH. The most devastating impact on the river was in the boundary of the Dobrivlyanska Village Council in the Zalishchytsk district where a private businessman V.D. Andrusyk extracted and sold more than 800 cubic metres of a sand and gravel, this being worth 160,300 UAH. In order to stop him, the State Economic Inspectorate issued a temporary ban on the technology which Andrusyk had been using to get the gravel out of the Dniester. The material of the check has been passed to the Ternopil Inter-district environmental protection prosecutor. Criminal proceedings have been initiated under Article 240 of the Criminal Code.⁴⁵

As one of the elements of a system for protection against flooding, in the 1980s the Dnistrovsky Hydro-Electric Unit consisting of two Hydro-Electric and Hydro-accumulating Electricity Plants was begun. This is presently reaching completion. The level of the protection during the July floods proved clearly inadequate. There remain, furthermore, a number of unanswered questions regarding the adequacy of the response of the administration of the Hydro-Electric Plan to changes in the flood regime on the Dniester. One can presume that from 23 – 27 July when the flow of water to the reservoir reached 5,680 cubic metres per second⁴⁶, the discharge of water into the plant was insufficient, while from 27-28 July it was excessive. On 27 July a forced discharge of water with speed of 3,500 m³/c was undertaken, as a result of which in 25 populated areas of the Vinnytsa region in the districts located below the hydro-electric power plant, 670 homes were flooded, with 3,675 people having to be evacuated⁴⁷. An area of the Dniester valley on Moldovan territory was also flooded. Unfortunately the figures from monitoring of the hydrological situation on the Dniester from sources of the Ministry for Environmental Protection, the Ministry for Emergencies and the State Committee on Water Management are at variance. From the site of the State Committee on Water Management one could not receive up-to-date information about the passage of the flood on 22-27 July. For some reason the first available report on the site is dated 29 July.⁴⁸

There are many questions regarding the efficiency and quality of the rescue and restoration work in the disaster zone, as well as whether state money was used lawfully. Prosecutor's checks

⁴³ Ibid.

⁴⁴ Summing up by the National Security and Defence Council from 19.08.2008 p.

⁴⁵ <http://www.menr.gov.ua/cgi-bin/go?node=3341>

⁴⁶ On the hydrological regime of water objects of Ukraine, drawn up in February and expected in March 2009. Ukraine's Hydro-meteorological Service http://meteo.com.ua/hydro/h_review_

⁴⁷ Operational Information from the State Committee of Ukraine on Water Management, 29.07.2008 p., http://www.scwm.gov.ua/index.php?option=com_content&task=view&id=33&Itemid=18

⁴⁸ Ibid.

have uncovered numerous cases of abuse, and 84 criminal investigations have been launched, with the losses from these reaching 16.5 million UAH. 127 protests have been lodged, 439 submissions and orders. More than 300 public officials have faced disciplinary or administrative proceedings. 133 cases have been submitted to the court by Prosecutors to the sum of 1.6 million UAH. Furthermore, almost 30 million UAH in illegal payments from the State budget have been prevented.⁴⁹

At the same time it should undoubtedly be recognized that the State demonstrated the wish to ensure observance of the constitutional right to compensation for environmental damage. During 2008 an unprecedented level of financial and other material assistance was provided to victims of natural disasters, and a huge number of social objects and new housing were built. Presidential decrees declared 44 administrative districts and 12 cities in six regions environmental emergency zones⁵⁰, and urgent measures were set out for overcoming the consequences of the natural disaster.⁵¹ The Verkhovna Rada as an extraordinary measure made changes to the State Budget.⁵² On targeted subventions alone parliament directed more than 2 million UAH to the regional budgets of the regions which suffered for dealing with the results of the disaster. Pecuniary compensation was paid from the budget to victims whose homes had been destroyed or damaged (50 thousand and 15 thousand UAH, respectively), or where members of the family died (100 thousand UAH). Large-scale humanitarian aid in the form of food, medical supplies, clothes, appliances etc was provided.

However there have been cases where the right to compensation for environmental damage has not been observed since the procedure in each specific case is not regulated by normative legal acts. These include the failure to provide compensation for loss of property during the disaster (entirely washed away plots of land in the village of Kutu, Ivano-Frankivsk region, and the death of a person in the village of Bila, the Ternopil region. With regard to this, the public advice centre of the Ukrainian Helsinki Human Rights Union (UHHRU) in Ternopil appealed on a number of occasions to the Prime Minister and the Human Rights Ombudsperson. Their letters spoke of the need to add the family of the person who died to the register of victims of the natural disaster in order to provide targeted pecuniary assistance, as well as to pass additional acts for regulating procedure for providing victims of the floods with compensation for the entire loss of plots of land.⁵³ Unfortunately neither the Government, nor the Ombudsperson's Secretariat, has reacted in a proper manner to these appeals.

The authorities paid no heed to the proposals put by civic organizations regarding draft State strategy plans on anti-flood protection.⁵⁴ In the view of specialists from NGOs the main priority for strategy to minimize the risk of hydro-meteorological phenomena should be measures aimed at the gradual restoration of territories of river basins of their natural state. This means specifically the renewal of the regulating qualities of forest and swamp ecosystems, an end to infringements of

⁴⁹ In the regions which suffered from the flood, proceedings have been brought against public officials guilty of using financial and other material resources not as intended / Press Service of the Prosecutor General's Office 09.09.2008., http://www.gp.gov.ua/ua/news.html?_m=publications&_t=rec&id=18206&fp=21

⁵⁰ Presidential decree from 28 July 2008 № 682/2008 «On declaring some areas of the Vinnytsya, Ivano-Frankivsk, Transcarpathian, Lviv, Ternopil and Chernivtsi regions environmental emergency zones»

⁵¹ Presidential decree from 27 July 2008 № 678/2008 «On urgent measures to deal with the consequences of the natural disaster of 23-27 July 2008»

⁵² The Law «On amendments to the Law of Ukraine «On the State Budget for 2008, and on amendments to some legislative acts» (Bulletin of the Verkhovna Rada, 2008 № 36-37, p..278)

⁵³ Legal assistance to victims of natural disasters not in the Human Rights Ombudsperson's scope? <http://www.helsinki.org.ua/en/index.php?id=1222858122>.

⁵⁴ «Concept for a State targeted comprehensive programme for protection against flooding in the Carpathian region from 2009-2015» and «Plans for comprehensive protection against flooding programme for protection against flooding in the Carpathian region in the basins of the streams of the Dniester, Pruta and Sireta» http://www.schw.gov.ua/index.php?option=com_content&task=view&id=129&Itemid=24

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environmental protection legislation, gradual removal of housing and objects of economic activity beyond the range of possible flooding, and so forth⁵⁵.

At the end of the year the Cabinet of Ministers adopted the «State targeted programme of comprehensive protection against flooding in the basins of the streams of the Dniester, Pruta and Sireta» which is clearly aimed in the first instance at the creation of huge hydraulic technical systems with dams, reservoirs, dry capacities, polders etc.⁵⁶ The predicted expenditure under the Programme come to over 31 billion UAH, including 28 billion from the State budget. The main administrator of the funding would be the State Committee for Water Management. At present nothing is known about public discussion, an economic assessment and State environmental impact assessment of this document at either the concept stage, or during the preparation of the final version of the programme. Given the large scale of the global economic crisis and the heightening political chaos in the country, the ability of the authorities to carry out and support such major projects would seem highly doubtful.

In October the Government approved new, stricter, rules for wood felling in the forests of the Carpathian Mountains, formulated on the basis of an ecosystem approach and principles of getting the forest back to its natural state. On the whole this document warrants a positive assessment, although some provisions do not comply with legislative norms, for example, the Law «On a moratorium on carrying out total tree felling on mountain slopes in the fir and beech forests of the Carpathian region».⁵⁷

However it is worth noting that at the end of 2008, the immediacy of the problems linked with the reasons and consequences of the flood was reduced which can be explained by the deepening economic crisis, gas conflict with Russia and an exacerbation in the political confrontation within the country.

The catastrophic flood of 23-27 July undoubtedly exposed deep-rooted problems in existing environmental policy and the capability of the relevant State structures to cope with extreme tests. The lack of resolution of many problems with avoidance, adaptation, urgent response to extreme natural phenomena lead to catastrophic consequences and a colossal burden on the State budget. The present real threats demand that officials of bodies of power and the law enforcement agencies finally extract themselves from a vicious cycle of political competition and give real recognition to the priority of environmental safety, observance of environmental protection legislation and the broadening of criminal liability for its violation.

4. THE RIGHT OF FREE ACCESS TO ENVIRONMENTAL INFORMATION

We have already mentioned the Ministry for Environmental Protection's delays over many years in drawing up and publishing National Reports on the State of the Environment. This is obviously not due solely to the malicious intent of the Ministry to keep environmental information secret, although its unwillingness to carry out policy in accordance with modern principles of openness and freedom of information is quite evident. The problems go much deeper, with it being reasonable to mention the failings of State information policy in general, and the inefficiency of present methods of monitoring, collection, processing of environmental information within the State structure. Under such circumstances the Ministry for Environmental Protection simply lacks

⁵⁵ Disregard for the principles of sustainable development led to catastrophic consequences of the July 2008 flood. The position of the working group of nongovernmental organizations <http://climategroup.org.ua/upl/zvern-pavodok08.pdf>

⁵⁶ <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=1151-2008-%EF>

⁵⁷ Cabinet of Ministers Resolution from 22.10.2008 № 929 «On approving Rules for felling trees of main use in the Carpathian Mountain forests».

sufficient possibilities for giving an objective view of the state of the environment. The information needed is not monitored, and is often diffuse and not systematized.

Nonetheless we should point to isolated positive changes in the activity of the Ministry for Environmental Protection with regard to providing environmental information. Although the Ministry's website remains a telling demonstration of disrespect for users, and a model of imperfection, there are certain cheering moments from the functional point of view. One can give as an example the fact that in 2008 the Ministry began publishing on its site monthly information and analytical overviews of the state of the environment. As of March 2009 there were overviews from January to November 2008.⁵⁸ They present the results of monitoring of the state of the air, surface water, the geological milieu and radiation situation in different regions of the country.

At the end of 2008, besides the published draft «National Report on the State of the Environment for 2006», one could read on the Ministry's website annual regional reports for 2007/⁵⁹. These reports are prepared by State Departments for Environmental Protection in all regions and cities of State subordination.

One can also welcome the fact that the Ministry has fulfilled one of the requirements of the «Verkhovna Rada Resolution «On informing the public on issues which concern the environment» from 4 November 2004.⁶⁰ On the Ministry's website during 2007-2008 there was information about the 100 worst polluters of the environment.⁶¹

On the other hand, we should point out that the above-mentioned Resolution imposes the duty to provide wide access to environmental information on the Cabinet of Ministers, the Council of Ministers of the Autonomous Republic of the Crimea, regional State administrations, bodies of local self-government and local executive bodies, the Kyiv and Sevastopol city State administrations. And this is understandable since after all the weaker in institutional and resource terms Ministry for Environmental Protection is capable of receiving and processing only a small part of environmental information which is held by State bodies. It is the Government and regional administrations who should demand the information from structures of MEP, the State Committee for Forestry, the State Committee for Water Management, the State Land Committee, the Hydro-Meteorological Service, the Ministry for Fuel and Energy, the Ministry for Agriculture, other ministries, departments, etc. Yet in official publications of the State authorities, no systematic provision of environmental information has yet been set up. With all the will in the world you won't be able to find sections on environmental information on either the Government's website or those of regional State administrations.

The requirement set out in the Resolution to create a network for nationwide computerised, information and analysis system for ensuring access to environmental information has yet to be implemented. This information network was supposed to be functioning back on 1 January 2005.

The Ministry for Environmental Protection is continuing to procrastinate with drawing up and publishing special reports on the state of the environment. Just as last year, the most current documents on the Ministry's website remain the «Second National notification regarding issues of climate change» and the «Third National Report on Implementation of the Convention on Biodiversity» – in English.⁶² Both documents are for 2005, all others for 2001-2004.

As of the beginning of 2009, among special reports, the Ministry's website contained the Report to the Second Meeting to the Party to the Convention in 2005. As for the Combined National

⁵⁸ **Information and analytical overviews of the state of the environment**, Ministry for Environmental Protection <http://www.menr.gov.ua/cgi-bin/go?node=IAOSD>

⁵⁹ Regional reports on the state of the environment in 2007. **Ministry for Environmental Protection**, http://www.menr.gov.ua/cgi-bin/go?node=reg_dop_07

⁶⁰ Verkhovna Rada Resolution «On informing the public on issues which concern the environment» № 2169-IV from 4 November 2004, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=2169-15>

⁶¹ The worst polluters of the environment <http://www.menr.gov.ua/cgi-bin/go?node=Zabrud%20NPS>

⁶² Website of the Ministry for Environmental Protection, <http://www.menr.gov.ua/cgi-bin/go?node=SP%20dop%20p%20NPS>

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Report for 2007 on Implementation of the Aarhus Convention in Ukraine to the Third Meeting of the Parties in Riga which aroused active criticism from the public, for some reason this disappeared without trace at the end of 2008 from the Ministry's website.

The interested public will search in vain on the MEP website for traces of information about the sources of income and division of expenditure of the State Fund for the Protection of the Environment over recent years, as well as of regional and local funds.⁶³ Several normative acts and general explanations of the conception of funds of environmental protection on the website are designed to create the illusion of information noise and camouflage the lack of specific information. The list of income for the State Budget in 2008 gives only the total amount extracted for polluting the environment which will clearly not add to the competence of the average citizen.

The Government and Ministry for Environmental Protection have for the last five years been breaking the Law «On Ukraine's Red Book» by delaying the printing of a third edition. This in turn makes it possible for the State Committees on Forestry and on the Fishing Industry to issue permits for hunting or catching some creatures that should be in the Red Book.

Over recent years the Ministry for Environmental Protection has demonstrated consistence worthy of better application in producing orders which restrict access to a whole range of categories of environmental information by classifying it as confidential.⁶⁴ In its unlawful drive to make information secret the Ministry cites the relevant Government Resolution⁶⁵, despite the fact that restrictions on access to information may only be imposed by law.

Civic organizations consider that classifying environmental information as confidential is in breach of Ukraine's Constitution and laws⁶⁶, its international agreements and the practice limits the right of free access to environmental information. This applies in the first instance to restriction of access to «some opinions from the State environmental impact assessments».

The concept of environmental information contained in the Aarhus Convention and in the law «On the protection of the environment» includes «activity or measures, including those of an administrative nature, agreements in the field of the environment, policy that has impact or could impact upon elements of the environment». Environmental assessments in accordance with the Law «On environmental assessments» are a form of theoretical and practical activity assessing objects which may have an adverse impact on the environment. Information about such environmental assessments thus fully complies with the concept of environmental information. Among the main principles of environmental assessments as per the above mentioned law (Article 6) is openness. Article 11 of the law obliges environmental assessment bodies or formations, after finishing their assessment, to inform of their conclusions through the media. There is no mention in the law of any possible restrictions on the right of free access to the material of environmental assessments. Article 30 of the Law «On Information» prohibits the classification as confidential of information

⁶³ State Fund for the Protection of the Environment of the Ministry for Environmental Protection <http://www.menr.gov.ua/cgi-bin/go?node=Derz%20ohor%20NPS>

⁶⁴ Ministry for Environmental Protection Order № 361 from 19.09.2002 «On bringing into force a list of items of confidential information» № 158 from 03.04.2006 «On amendments to the Ministry for Environmental Protection Order from 25.11.200 № 470», № 540 from 12.12.2005, № 159 from 28.03.2008. «On approving a List of items of confidential information which is given the stamp «For Official Use only» № 231 On the ordering and systematization of data about confidential information» via which Order № 159 was revoked, and Order № 289 from 09.06.2008 On approving a List of items of confidential information which is given the stamp «For Official Use only» (current)

⁶⁵ Cabinet of Ministers Resolution № 1893 from 27.11.1998 «On approving Instructions regarding the procedure for recording, retaining and using documents, cases, editions and other material carriers of information containing confidential information held by the State»

⁶⁶ The Ukrainian Constitution (Article 50); the Convention on access to information, public participation in decision-making and access to justice in environmental matters (Aarhus Convention) (Article 4); the law «On protection of the environment» (Articles 25 and 25-1). All these guarantee each person the right to free access to environment information. This information according to the Constitution may not be made secret.

on statistics, the environment, banking operations, taxes and information whose concealment could place the life and health of people in jeopardy.

It is frustrating that following in the tracks of the Ministry, State Departments for the Protection of the Environment in many regions have passed analogous orders. This significantly complicates the procedure of access by the interested public to environmental information, for example, to the opinions of State environmental assessments.

For example the department in the Ternopil region passed its own List of pieces of confidential information,⁶⁷ which, among other things, restricts access to «some opinions of the State environmental assessment unit. In response to a proposal by the Head of EHO «Zeleny Svit» O. Stepanenko⁶⁸ to reconsider the content of the List, and bring it into line with legislation, the Department for the Protection of the Environment issued a stupid refusal, citing Article 7 of the Law «On State environmental assessment», according to which «military, defence and other objects, the information about which constitutes a State secret, are liable to environmental assessments. It is clear that the List, approved by the State Departments, due to the differences in legal regime between secret and confidentiality.

During 2008 the civic campaign to have the said Orders of the Ministry for Environment Protection revoked. Those who took place included the National Ecology Centre of Ukraine [NECU], EHO «Zeleny Svit», «The bureau of environmental investigations», «Ecology – People – Law», VEGO «Mama-86», the EBU «Zeleny Svit» and other organizations.

For example, NECU Deputy Head O. Vasylyuk sent the Ministry for Environmental Protection a detailed legal analysis of the reasons why most of the items of the Ministry's notorious Orders are in breach of the Constitution, Ukraine's domestic laws and the Aarhus Convention.⁶⁹ The Deputy Leader of this authoritative environmental organization called for most of the items of the Ministry's list to be brought into line with the Aarhus Convention and that the Ministry instruct its departments and offices in the regions to make their lists of items of information classified «For Official Use only» compliant with current legislation.

Despite numerous protests from civic organizations the Ministry for Environmental Protection has still not cancelled the illegal provisions in its Orders. At the present time Order № 289 from 09 June 2008 On approving a List of items of confidential information which is given the stamp «For Official Use only» remains in force.

The Human Rights Ombudsperson, in breach of the law, has not published annual reports for 2006-2008. In the Fourth Report (2005) «On observance and protection of human rights and freedoms in Ukraine»,⁷⁰ as usual, there was no section on observance of environmental rights.

The new management of the State Committee for the Forestry Industry has not succeeded in overcoming the traditional and highly indicative lack of openness in the department's activities. Over many years this State Committee has failed to comply with the requirements in Articles 28 and 35 of Ukraine's Forest Code, and in the Government Resolution⁷¹, which orders it to systematically monitor and keep an official record of forests and a State Forest Cadastre. The State Committee is obliged to renew every five years the documentation of the State Forest Cadastre on the basis of the latest register of forests and publish material on the state of the forest fund. The last time such a record was taken was in 2001, and only of State forestry areas.⁷² At present the State Committee's

⁶⁷ Order of the State Department for the protection of the environment in the Ternopil region «On approving a list of pieces of information which is given the stamp «For Official Use only» » from 09.04.08 № 21

⁶⁸ Letter from O. Stepanenko do the Head of the State Department for the protection of the environmental in the Ternopil region

⁶⁹ NECU letter «On the work of the Working Group reviewing the Ministry for Environmental Protection's Order from 09.06.2008 № 289»

⁷⁰ «On observance and protection of human rights and freedoms in Ukraine – Report of the Human Rights Ombudsperson for 2004/2005 in Ukrainian http://www.ombudsman.kiev.ua/dopovid%204/Dop4_%20Zmist.htm

⁷¹ Cabinet of Ministers Resolution from 27 September 1995 № 767 «On approving procedure for keeping a State record of forests and a State Forest Cadastre.»

⁷² Head of the Accounting Chamber of Ukraine, V. Symonenko: «Programmes of Life are State programmes for preserving the environment in Ukraine» // «Holos Ukrainy» № 146 (4396) 5.08.2008 http://www.ac-rada.gov.ua/achamber/control/uk/publish/article/main?art_id=1158759&cat_id=223

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official website cannot provide the information sought by the interested public with regards to results of monitoring of forests and the forest cadastre.⁷³

There is virtually no information about the impact of different environmental factors on people's health in official reports and analytical material of the Ministry of Health. The latter's website is probably the poorest of all ministries and departments in terms of its information content. The information is not updated in proper fashion and draft normative acts are not regularly posted. The Ministry of Health Order on ensuring openness in its work⁷⁴ is of a formal nature and clearly fails to comply with modern principles for publishing information of public interest.

At the same time the State Committee on Nuclear Regulation, in our assessment, most consistently fulfils the requirements of the Aarhus Convention and the law «On the use of nuclear energy and radiation safety». It prepares annual reports, albeit somewhat belatedly, on the situation with nuclear and radiation safety. In 2008 the State Committee published a «Report on the situation with nuclear and radiation safety in Ukraine in 2007» in Ukrainian, Russian and English, sending this to the State authorities and bodies of local self-government. The said report appeared on the Committee's official website on 30 January 2009.⁷⁵

In implementation of the President's Decree from 4 February 2003 № 76 the Ministry for Emergencies and the Protection of the Population from the Consequences of the Accident at the Chernobyl Nuclear Power Plant, together with the Ministry for Environmental Protection and the Ukrainian Academy of Sciences, systematically prepares National Reports on the State of Man-made and Natural Safety in Ukraine. The Report for 2007 appeared on the Ministry for Emergencies website in 2008.⁷⁶

The Ministry on Housing and the Municipal Economy, in fulfilment of Article 9 of the Law «On drinking water and drinking water supply», almost annually, although very belatedly, produces a «National Report on the quality of drinking water and the situation with the supply of drinking water». The last such report, for 2006, was placed on the Ministry's website at the beginning of 2008.⁷⁷

Thus some ministries demonstrate endeavours to maintain a certain level of access to environmental information. Obviously the organization of high quality work in the area of information requires sufficient resources and proper level of professionalism by employments of these authorities. However resources and staff are clearly not everything. Failure to observe the principle of free access to environmental information in the practice of some bodies of power can at the same time be a reflection of legal nihilism and dilution of the sense of public responsibility of their management, as well as pronounced corrupt interests of officials.

5. THE RIGHT OF ACCESS TO INFORMATION ON ENVIRONMENTAL MATTERS

As promising innovations in legislation in the sphere of public participation we should mention the «Procedure for encouraging public assessment of the work of the authorities» passed by

⁷³ State Committee for the Forestry Industry website, second on «Monitoring forests in Ukraine» http://dklg.kmu.gov.ua/forest/control/uk/publish/article?art_id=62971&cat_id=32880

⁷⁴ «On ensuring openness in the work of the Ministry and informing Ukrainian citizens about its activities – Order № 320 from 29.06.2005, <http://www.moz.gov.ua/ua/main/docs/?docID=3900>

⁷⁵ State Committee on Nuclear Regulation, <http://www.snrc.gov.ua/nuclear/uk/doccatalog/list?currDir=37795>

⁷⁶ National Report on the State of Manmade and Natural Safety in Ukraine in 2007, Ministry for Emergencies http://www.mns.gov.ua/annual_report/2008/content_1.ua.php?m=B5

⁷⁷ National Report on the quality of drinking water and the situation with water supplies in Ukraine in 2006, Ministry on Housing and the Municipal Economy http://www.minjkg.gov.ua/editattach/bigdoc/nd_voda_2006.doc

Government Resolution⁷⁸ and the draft «Regulations on an Electronic Register of data on public assessments and their results», submitted by the Cabinet of Ministers for discussion.

One must however acknowledge that over recent years there has been a noticeable trend towards reducing «environmental democracy». On the one hand, there is an ever more noticeable shift in public consciousness away from environmental awareness – in comparison with the first years after the Chernobyl Disaster. On the other – the authorities, bodies of local self-government and business structures more and more often and ever more flagrantly demonstrate disregard for public opinion and breaches of environmental legislation. This process has encompassed virtually all spheres from strategic decision-making by the top echelons of power on issues of development and preparation of draft laws, to clashes with public land in cities, villages, parks, reserves and resort areas, on land of the forest and water funds, being handed over for construction work. Activity of the environmental protection bodies is being deliberately hampered by the oligarch-corrupted authorities and businesses interested solely in getting rich quick, including at the expense of uncontrolled exploitation of natural resources.

5.1. PUBLIC DEBATE OVER THE CONSTRUCTION WORK TO COMPLETE THE TASHLYK HYDRO ACCUMULATING POWER STATION

On 23 June 2008 public hearings were held in Mykolaiv over the environmental situation around the completion work in building the Tashlyk Hydro Accumulating Power Station [HAPS] and the raising of the level of the Aleksandrovsky Reservoir. Experts were present who had taken part in a public environmental assessment, specialists, representatives of the Mykolaiv Regional State Administration and Regional Council, of the management of the State Department for Environmental Protection, the Southern Ukrainian Nuclear Power Plant, and of civic environmental organizations of the Mykolaiv region.⁷⁹ Members of the public and scientists cited a disturbing list of violations of environmental legislation in the process of planning and building the Tashlyk HAPS, which have caused irreparable damage to the places of historical and natural legacy within the landscape park «Granite-Steppe Pobuzhya» The participants in the hearings demanded that the conclusions of the State environmental assessment be taken into consideration in carrying out plans for developing the Southern Ukrainian Energy Union, that the protected status of the natural terrain of the Southern Bug Valley be strengthened, and that the creation of a national park «Granite-Steppe Pobuzhya» be accelerated. Unfortunately the Mykolaiv Regional State Department for the Protection of the Environment, as the organizer of the hearings, has still not been able to agree a resolution on its results.⁸⁰

5.2. PUBLIC HEARINGS ON THE PLANNED CONSTRUCTION OF THE KANIV HYDRO ACCUMULATING POWER STATION

The Public hearings on the planned construction of the Kaniv Hydro Accumulating Power Station which took place on 27 November in the villages of Pshenychnyky and Hryshchentsi in the Kaniv district, instead of public discussion, proved to be a show address by the Head of the company «Ukrhydroenergo». Members of civic organizations were not given the chance to present facts refuting the claims of the energy industry representatives of economic benefit and environmental safety of the construction. «Energy industry representatives yet again promised the local population manna from Heaven, however the experience of Ukrhydroenergo's work on the Dnis-

⁷⁸ Cabinet of Ministers Resolution from 5 November 2008 № 976 «On approving Procedure for encouraging public assessment of the work of the authorities», <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=976-2008-%EF>

⁷⁹ The public discussed the issue of completing construction of the Tashlyk HAPS: News of the Ministry for Environmental Protection, 25.06.2008 p., <http://www.menr.gov.ua/cgi-bin/go?node=2521>

⁸⁰ Public hearings have taken place over the environmental situation which has eventuated as the result of the construction of the Tashlyk HAPS, News of the Mykolaiv Regional State Department for the Protection of the Environment i, 24.06.2008 p., <http://www.duecomk.gov.ua/new/news.php?id=66>

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trovsky and Tashlyk hydro-accumulating power stations demonstrates the emptiness of such promises, – Viktor Melnychuk, NECU Director, recounts, – when we tried to present documented facts from other construction sites, we were rudely shut up with the words «Nobody's interested in what you think».

«Hearings where only the point of view of those who commissioned the construction work is expressed are a fiction, Serhiy Fedorychuk, Head of the Information Centre of EVA «Zeleny Svit» is convinced. That unfortunately is already the established practice for «Ukrhydroenergo». You can only hide the fact that the project is economically unviable and environmentally unsafe if you don't allow the facts confirming this to come out».⁸¹

5.3. «PUBLIC PARTICIPATION» IN DRAWING UP DRAFT LAWS

A languid and inconsistent process for modernizing legislation in the information sphere has been dragging on for several years. In 2007, the Ministry of Justice initiated discussion of a draft law «On amendments to the Law on Information». Numerous proposals from civic organizations were not taken into account in this process. EHO «Zeleny Svit» also sent a number of proposals from a group of organizations with regard to the section on environmental information which must clearly comply with the standards of the Aarhus Convention. We received no response from the Ministry.

In February 2008 the Ministry of Justice informed that it was winding down the process of making amendments to the existing law on drawing up a Concept Strategy for a new law «On information», as well as a new draft law «On access to public information». The Ministry did not respond to agreement to provide a candidate for a working group on preparing the draft law on access to public information. However for a certain amount of time, the Ministry's website had another document «Concept for a draft Law of Ukraine «On access to public information». No information was provided on the procedure for its discussion and decision-making.

In the second half of the year the Ministry of Justice entirely wound up work on drawing up draft laws in the information sphere, or at least there was no longer any mention of this on the Ministry's website, or that of the Cabinet of Ministers.

5.4. PUBLIC INITIATIVE TO ENVIRONMENTALIZE THE FOOTBALL CHAMPIONSHIP «EURO-2012»

In an open letter sent in May 2008 from 35 organizations to the Government and National Agency for the Preparation and Holding of the football championship «Euro-2012», it was suggested that environmental priorities in planning and holding the championship be formulated. In the programme on «Euro-2012» approved by the Government, there isn't a word about the environmental principles and environmental protection components to be observed when preparing for and holding the championship. However civic organizations consider that an environmentally responsible approach to the organization of the championship will make it possible to reduce expenditure on the use of energy, and eliminate the adverse impact linked with transport, lighting, utilization of waste and development of green recreation zones for up to, during and after the championship.

Those who signed the open letter assured the Government of their willingness to cooperate in the process of preparation for the championship and that they could provide more detailed recommendations regarding implementation of the said proposals. . The «Letter of 35» was posted on the website of the Working Group of Nongovernmental environmental organizations on climate change

⁸¹ Energy industry officials are frightened of the truth. The National Ecological Centre of Ukraine. 1 December 2008., <http://www.necu.org.ua/energetiki-boyatsya-pravdi/>

and was open for signatures.⁸² Unfortunately during the year there were no proposals from the Government on forms of cooperation with civic organizations.

6. THE RIGHT OF ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS

We can cite several varied examples of successful court suits with the participation of representatives of environmental organizations.

◆ *On 6 May 2008 the Central District Court in Mykolaiv found unlawful the decision of the Mykolaiv Regional Council from 6 March 2007 on approving a scheme for the functional zoning of the territory of the regional landscape part «Kinburnzka kosa» and establishment of the boundaries of the villages of Pokrovka, Pokrovske, and Vasylivka. In October last year A. Halkina and O. Derkach lodged a suit calling for this decision to be revoked. The claimants were represented by lawyer from «Environment – People – Law» O. Melen. The claimants demonstrated during the court hearings that the Regional Council's decision had no scientific justification, while at the same time it effectively broadens the boundaries of populated areas with this having a significant adverse impact on an area of the nature reserve fund. Over four hearings there was a comprehensive examination of the case after which the court ruled that in taking decision № 9 from 16 March 2007 the Mykolaiv Regional Council had acted in breach of current legislation, in a manner not envisaged by any current legislation and had exceeded its authority.*

◆ *There were several successful court cases through the year brought by the Kyiv Environmental and Cultural Centre [the Centre], together with the organization «Ecopravo-Kyiv». In November 2008 the Svytoshynsky District Court in Kyiv brought to an end the proceedings of the management of the State Committee of the Forest Industry against the leader of the Centre V. Boreiko. The latter had consistently exposed a State system for organizing hunting for foreign currency of bison in the «Red Book» which was flourishing within the State Committee for the Forest Industry and the Ministry for Environmental Protection. One of the main organizers of the illegal bison hunts was the head of the department on hunting of the State Committee for the Forest Industry M. Shabura. The court concluded that the facts published by V. Boreiko in the media were true and refused to order him to pay moral compensation of 10 thousand USD.⁸³*

◆ *Over the year several precedents were created for applying administrative court proceedings for observing environmental rights, protecting the interests of the media and organizations of civic society in Severodonetsk by the city organization of «Zeleny Svit». For example, an administrative suit was filed with the Severodonetsk City Court against the Severodonetsk City Council and its Mayor. «Zeleny Svit» asked the court to declare unlawful the refusal to allow representatives of the organization to see the General Plan of the City, and to order the respondents to remove the stamp «For Official Use only» of the Plan. A cassation appeal was also lodged against the rulings of the Kreminsk District Court and the Donetsk Administrative Court of Appeal over a claim lodged by «Zeleny svit» against the Kreminsk District Council and the Luhansk Regional State Department on Forestry and Hunting. That claim had asked the court to declare illegal the inactivity of the Council and State Department with regard to creating a National Nature Part «Seversk—Donetsky».⁸⁴*

◆ *On 30 September 2008 a panel of judges of the Lviv Administrative Court of Appeal allowed the claim lodged by the Head of EHO «Zeleny Svit» O. Stepanenko in which the latter asked the court to declare unlawful the inactivity of the Ternopil Mayor R. Zastavny in not answering his formal request for information about the state of the environment in Ternopil. The Chortkiv District*

⁸² Letter from environmental organizations, http://climategroup.org.ua/upl/euro2012_ua_final.pdf

⁸³ «Justice triumphs! Court case between killers and defenders of bison – the bison's defenders have won!» <http://www.ecoethics.ru/projects/zubr/news-2008-1.html>

⁸⁴ Severodonetsk City Environmental Association «Zeleny Svit» <http://zsvit.narod.ru>

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Court had previously handed down a ruling rejecting Mr. Stepanenko's claim. He had asked the Court of Appeal to revoke the original ruling, to find the Mayor's inaction unlawful and to order him to provide an answer to the substance of his information request. The court agreed that the Mayor of Ternopil had behaved unlawfully by not responding and ordered him to provide the information requested.⁸⁵

We consider that given the deterioration in State environmental policy and pervasive corruption, the court system should be one of the few spheres where the public can openly resist violation of citizens' environmental rights.

7. CASES OF PERSECUTION FOR ACTIVITIES AIMED AT PROTECTING THE ENVIRONMENT

THE ALL-UKRAINIAN CIVIC CAMPAIGN IN SUPPORT OF THE VILLAGE HEADS

V. MARUNYAK, L. LADA AND V. DRYHAL

Each of these people faced repression due to his uncompromising position against unlawful squandering of land in nature protection and recreation zones, for example, in the Dnipro Delta and on the Black Sea Coast which was carried out with the protection of corrupt officials of executive bodies and the Kherson Regional Prosecutor.

◆ *V. Marunyak, Village Head of Stara Zburyivka in the Holoprystansk district, despite repeated threats, over several years tried to counter land machinations on territory set aside for the creation of the National Nature Park «Nyzhnyodniprovsky» as wetlands of international significance «Dnipro Delta» (in accordance with Ukraine's international commitments under the Ramsar Convention). On 14 March 2008 he was arrested on a trumped-up charge of taking bribes. Following an unprecedented public campaign in protest⁸⁶ he was released on 3 April, however the fabricated charges were not withdrawn. The court case is continuing at the present time. On 3 February a session of the Stara Zburyivka Village Council reinstated Mr Marunyak as Head. In July 2008 his fellow villagers created a «People's Self-Defence Committee of Stara Zburyivka in order to protect the village community's land in protest at the dismissal of V. Marunyak.⁸⁷*

◆ *The Village Head of Khorly in the Kalanchaksk district, Leonid Lada, who for a long time was opposed the privatization of 340 hectares of reserve land on the shore of the Black Sea, was sentenced to 5 years imprisonment on a trumped-up charge of taking a bribe. An application over the case has been lodged with the European Court of Human Rights.⁸⁸*

◆ *On 25 March 2008 the Head of the Volodymyrivska Village Council in the Skadovsk district Viktor Dryhal was detained by officers of the Department for Fighting Organized Crime. He was also charged under Article 268 § 2 of the Criminal Code – receiving a bribe. However the large number of circumstances in the arrest itself, the detective inquiry and the activities of Mr Dryhal as Head of the Village Council suggest something else – that the real reason for his detention and arrest was his opposition to unlawful privatization (and effective embezzlement) of land set aside for recreational purposes on the sea coast.⁸⁹*

⁸⁵ <http://www.greenworld.org.ua/index.php?id=1253876064>

⁸⁶ Open appeal regarding the role of the Kherson Department for fighting organized crime in the theft of land near the Dnipro <http://maidanua.org/static/news/2007/1222035663.html>; «No» to the theft of the future Nyzhnyodniprovsk national nature part / support and defence of its defender – Viktor Marunyak <http://maidanua.org/static/news/2007/1207697820.html>

⁸⁷ The V. Marunyak case is supported by the UHHRU Fund of Strategic Litigations

⁸⁸ Electronic Mailing «Baibak» of the environmental group «Pechenyg» (№ 384 from 15.03.09)

⁸⁹ Electronic Mailing «Baibak» of the environmental group «Pechenyg» (№ 358 від 12.11.08)

8. CONCLUSIONS AND RECOMMENDATIONS

The main reasons for the deepening environmental crisis in Ukraine are undeveloped legal consciousness, total corruption and the low priority given to environmental policy as a component of State policy. One can see over recent times a progressive «de-environmentalizing» of State policy and public consciousness in general.

The higher echelons of power in Ukraine more and more often show signs of distancing themselves from environmental problems and issues of safety of vital functions. The lack of an effective system of State environmental policy is leading to pollution and the exhaustion of natural resources, the destruction of people's environment and a wide-scale violation of the constitutional right to environmental safety.

10 years have passed since Ukraine adopted a strategic document intended to define the main directions of State policy in the field of environmental safety.⁹⁰ The time is ripe for a new Strategy of national environmental policy as one of the first priorities of the authorities. Such a strategy should take into consideration the state of crisis in economic policy and new aims based on the decisions of the World Summit on Sustainable Development in Johannesburg (2002), Ukraine's plans for integration with the EU, its commitments under international agreements and through its membership of the Council of Europe.

The issues of protection of the environment and sustainable (environmentally balanced) development should be viewed as one of the priorities for Ukraine's European integration. The requirements for joining the European Union envisage implementation of a strategy of sustainable development, not merely at the level of documents, but in practice.

Most importantly, such strategy should be based on the need to stop the deepening environmental crisis, reduce the threat to people's life and health, create mechanisms for public participation in the passing of decisions on environmental issues of public importance.

RECOMMENDATIONS

1) The President should issue a Decree «On urgent measures for increasing the priority of environmental policy» which establishes that environmental policy is one of the main priorities of Ukraine's State policy, and give the relevant instructions to the Government on drawing up a draft long-term Strategy of national environmental policy;

2) The Cabinet of Ministers should:

– draw up a draft Strategy for integrating the provisions of the Aarhus Convention into national legislation, together with preparation of the relevant timeframes, practical mechanisms and procedure for bringing into force implementing legislation;

– include members of the public, bodies of local self-government, higher echelons of power and the law enforcement structures in a working group on implementing the decisions of the Parties to the Aarhus Convention;

– ensure implementation of Article 10 of the Law «On protection of the natural environment» with regard to creating a nationwide computerized system for ensuring access to environmental information.

3) The Cabinet of Ministers, the Ministry of Justice and the Ministry for Environmental Protection should speed up preparation of draft laws complying with modern principles of freedom of information, including new versions of the Laws «On information», «On protection of the natural environment», «On environmental assessments». «On ratification of an amendment to the text of the Aarhus Convention regarding public access to information regarding the release of genetically modified organisms», etc

⁹⁰ Verkhovna Rada Resolution «On the main directions for Ukraine's State policy» in the field of environmental protection, the use of natural resources and ensuring of economic safety. From 5 March 1998 № 188/98-BP (Bulletin of the Verkhovna Rada), 1998, № 38-39, p.248)

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- 4) The Ministry for Environmental Protection should:
 - prepare, present for review by the Verkhovna Rada and publish «National Reports on the state of the environment in Ukraine» for 2007-2009;
 - cancel unlawful normative acts regarding restriction of access to environmental information via the stamp «For Official Use Only», and make acts which had been classified public, for example, the opinions of State environmental assessments, provided by the Ministry of its regional departments;
 - submit for the consideration of the Cabinet of Ministers draft Resolutions on access to environmental information and public participation in decision-making on environmental matters;
 - prepare and present for review by the Verkhovna Rada drafts of amendments to legislative acts on broadening the sphere of application of criminal liability and strengthening administrative liability – for infringements of environmental legislation and people’s environmental rights;
- 5) The National Agency for Environmental Investment should enforce the provisions of the UN Framework Convention on Climate Change and the Kyoto Protocol to this with regard to publishing registers of glasshouse gas emissions
- 6) The Human Rights Ombudsperson should have a section on environmental rights in the next Report.

XVII. VIOLENCE IN THE FAMILY AS A VIOLATION OF HUMAN RIGHTS¹

Despite the existence in this field of a large number of laws and subordinate normative legal acts, including the Law «On preventing violence in the family»², «On the protection of childhood»³, the relevant articles of the Criminal Code, the State Anti-trafficking Programme for 2006-2010⁴, «On approving Rules of Procedure for people engaged in social work with families in difficult circumstances»⁵ etc, violence in the family remains a serious problem.

Assessments of the situation can be compared with the data presented in the annual reports «Human Rights in Ukraine» for 2006 and 2007. A good many of the criticisms can be repeated. At the same time certain positive moves were seen in 2008, reflected in considerably more attention being given to attempts to resolve this problem by State authorities, in the first instance the Ministry on the Family, Youth and Sport and the Ministry of Internal Affairs (MIA). Other positive elements were the formulation of comprehensive approaches and strategies for preventing violence in the family, as well as of a new field of activity linked with the adoption by the Verkhovna Rada of amendments to the Law «On preventing violence in the family» and the Code of Administrative Offences.

1. STATISTICS

According to data from the MIA Department of Public Safety as of 1 January 2009 the police had **85,085** people on their preventive register as having committed acts of violence in the family – 8760 women, 75,750 men and 575 minors.

	Total on the register for violence in the family'	Placed on the register from 01.01.2008	for physical violence	for sexual violence	for psychological violence	for economic violence
total	85085	66119	38741	2	24917	2459

66,119 people were placed on the register during 2008. In 2008 **10,257 children** were identified as having been the victims of crimes.

The statistics do not give the gender of the victims of domestic violence which makes it difficult to analyse instances of this offence.

¹ By representatives of the International Women's Human Rights Centre «La Strada – Ukraine» K. Cherepakha , O. Kalashnyk, K. Levchenko, and M.V. Yevsyukova

² <http://www.kmu.gov.ua/sport/doccatalog/document?id=92768>

³ <http://www.kmu.gov.ua/sport/doccatalog/document?id=92751>

⁴ <http://www.lastrada.org.ua/readlaws.cgi?lng=ua&Id=35>

⁵ <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=z0824-06>

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Methods used

Official paper over violence in the family	Official warning over victim behaviour	Protection order	Taken off the register	Including for a crime committed	Protocol drawn up – 173.2 in all	Court ruling passed	warning	fine	Community work	Administrative arrest	Released from administrative liability
81971	2674	6394	67796	257	98891	90556	5104	74169	350	10342	591

It is also worth reiterating that these statistics do not reflect the full scale of domestic violence which remains a largely latent phenomenon.

We should also note that unfortunately not all cases of domestic violence are properly looked into by law enforcement officers which victims give testimony to.

«La Strada – Ukraine» received a letter from Ms R. about unlawful acts on a systematic basis against her by Mr. T., the father of her son who was born in 2005. She stated that Mr. T. had begun systematically beating and tormenting her after the birth of the child and that this was continuing. All appeals by Ms R. to the law enforcement agencies and social services had not had any proper result, decisions had been taken to not initiate a criminal investigation, and they had mainly had preventive talks with her attacker. Such measures in respect to Mr T. made him behave even more aggressively and forced him to fear for her state of health and be on the verge of committing suicide. The situation is exacerbated by the fact that a small child is witness to all of this which cannot but have an adverse effect on the emotional and psychological state of both the child and his mother.

One of the functions of social service centres for the family, children and youth⁶ is to carry out social-rehabilitation measures aimed at providing people in difficult circumstances (including who have suffered from domestic violence) with assistance in restoring damaged health, compensation for restrictions on their capacity, and support for an optimum physical, psychological and social level to achieve social adaptation. This is by means of early identification and being placed on the register, social accompaniment and provision of social services aimed at defending the person's rights and dealing with the circumstances which led to family problems.

During 2008 social service centres for the family, children and youth recorded 3,341 complaints to them about violence of which:

- 2495 were about families where acts of violence had been committed, or there was a real danger of such (there were a total of 3,190 children in these families);
- 839 about ill-treatment of children (120 children who suffered from ill-treatment);
- 4 appeals regarding human trafficking (4 people);

From the overall number of complaints regarding violence against children (or ill-treatment of them), information was sent by the social service centres to services on children's issues about 757 cases. In addition, 38 people and 47 families (89 children) were sent to centres for social and psychological assistance.

The largest number of complaints (829) of violence or a real danger of such were noted in Kyiv (24.8% of the total number, and the lowest (1 – 0.03%) in Sevastopol.

776 families (in which there were 1,529 children) were under social accompaniment of social service centres for the family, children and youth, because of violence in the family or a real threat of this (3.1% of the total number of families that are under social accompaniment, of which:

⁶ According to 11.4 of the General Provisions on a Social Service Centre for the Family, Children and Youth, approved by Cabinet of Ministers Resolution № 1128 from 27 August 2004

– 432 families (955 children) – were under the accompaniment of district social service centres (of which 40 families, with 100 children, were under the accompaniment of specialists working in branches of district centres);

– 197 families (300 children) – were under the accompaniment of city social service centres;

– 40 families (63 children) – were under the accompaniment of city district social service centres;

– 23 families (23 children) – were under the accompaniment of settlement centres and 70 families (170 children) – village centres.⁷

The largest number (844 people) turned for help over violence or a real threat of such in the Donetsk region (17% of the total number and in Kyiv (786 or 16% of the total number). The smallest number was 14 people, or 0.3% in Sevastopol.

2. LEGISLATIVE REGULATION

On 25 September 2008 the Verkhovna Rada adopted the Law «On amendments to some legislative acts to refine legislation on countering violence in the family»⁸, which came into force on 1 January 2009.

This law envisages changes to the Code of Administrative Offences, specifically Articles 173-2, 262, 263 and 277, and the Law «On preventing violence in the family». Among the main changes are the possibility of applying administrative arrest for up to five days with respect to a person who has committed an act of violence in the family; extension of the list of people considered members of the family; introduction of corrective programmes for people guilty of violence in the family, and removal of the provision on liability for victim behaviour, and others.

Unfortunately, the provision on excluding fines as a form of administrative penalty for violence in the family, was not taken into consideration, and instead the size of the fine was increased to ten times the minimum monthly wage. The majority of problems are thus again placed on the shoulders of the victims, and on the family as a whole.

The removal from the Law «On preventing violence in the family» of the provision on issuing an official warning about the unacceptability of victim behaviour is a positive move. Since, in essence, a warning is a type of penalty, the person who was issued such a warning was placed on the police register.

In the previous version of the Law, the opinion regarding the presence of victim behaviour was made by a police officer (district inspector of the police or officer of the criminal police on juvenile matters). Yet a qualified assessment of the presence in the case of a victim of violence of what actively provokes victim behaviour can only be made by a specialist psychologist. Therefore police officers definitely needed to receive an assessment from a psychologist of a specialist institution as to the presence of signs of conscious and deliberate behaviour of this kind in order to issue a well-founded official warning about the unacceptability of victim behaviour. No such procedure was set out in the previous version of the Law. Moreover such a mechanism is not very realistic in a situation involving domestic violence.

Secondly, via the envisaged warning about the unacceptability of victim behaviour, liability for violence in the family is automatically transferred from the offender to the victim, this being unacceptable in the context of upholding human rights.

During the consideration of the draft law there was active discussion regarding the proposal to force people who have committed acts of violence in the family under the influence of alcohol or drugs to undergo treatment for alcoholism or drug dependency. However this provision was not supported, either by National Deputies or by the human rights community due to its violation of the right to respect for ones private life.

⁷ Information provided by the Department for Family and Gender Policy of the Minister on the Family, Youth and Sport

⁸ «La Strada – Ukraine» followed the draft law for around two years and was one of its creators.

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To efficiently implement the new provisions, the Law envisages bringing the normative legal acts of the Cabinet of Ministers, ministries and other central bodies of power, into line with the new Law. For this purpose, the Ministry on the Family, Youth and Sport created a working group of experts to draw up new subordinate normative legal acts on prevention of violence in the family. The working group includes representatives of the State structures involved in dealing with issues of violence in the family, as well as representatives of civic organizations.

3. THE NATIONAL CAMPAIGN «STOP VIOLENCE»

As part of the World Campaign to eliminate violence against women initiated in February 2008 by UN Secretary-General Ban Ki-moon, a number of civic organizations⁹ approached the Ministry on the Family, Youth and Sport with the proposal to hold a national campaign «Stop violence!», aimed at fighting violence against women, children and violence in the family.

The Ministry on the Family, Youth and Sport as the specially authorized body on prevention of violence in the family supported the idea of running the Campaign which began on 15 May 2008 and will last until 25 November 2009 (International Day for the Elimination of Violence against Women).

The objectives of the campaign «Stop violence!» are: to improve the legislative base on issues around combating violence; to encourage national civic leaders and figures with influence on public opinion to publicly recognize the seriousness of such violence; to facilitate awareness among the public that violence is a violation of human rights; develop zero tolerance for violence, work with victims of violence and people who have committed acts of violence in the family.

As part of the campaign «Stop violence!», on 16-17 October 2008 in Kyiv the Ministry on the Family, Youth and Sport, together with nongovernmental and international organizations held a **national forum «Ukraine without violence»**.

As part of this campaign the Ministry on the Family, Youth and Sport, in cooperation with civic organizations, prepared and printed posters and calendars containing information regarding the problem of domestic violence, violence against women, etc, as well as advice and the number of the National Helpline on the prevention of violence and protection of children's rights.

The campaign greatly increased the work of civic and international organizations on combating violence and mainly, activated their cooperation and joint activities. A coalition has effectively been created against violence which has its own electronic mailing which increases the level to which people are informed about the issue, as well as the participation of various organizations in measures and discussion of issues. This can be seen as a move towards transparency and openness, including among State bodies since representatives of the Department of Family and Gender Policy of the Ministry on the Family, Youth and Sport are also included in it.

The next step should be to create a website «Stop violence!»

One new feature in 2008 was the involvement of business structures in activities around combating violence. For example, the company «Elivon» began a charitable programme «Against violence in the family» aimed at promoting observance of human rights, provision of social, legal and psychological assistance to women who have suffered domestic violence; overcome violence in the family against women; ensuring that the public are better informed about the issue of violence in the family in order to prevent violence and ill-treatment.

⁹ UNDP Equal Opportunities Programme, International Women's Human Rights Centre «La Strada – Ukraine», the International civic organization «School of Equal Opportunities», the international humanitarian centre «Ro-zrada» and the Information and Consultation Women's Centre.

4. PROVISION OF ASSISTANCE FOR VICTIMS OF DOMESTIC VIOLENCE

Work on providing assistance to victims of domestic violence is carried out both by State bodies, first and foremost all social service centres for the family, children and youth, as well as non-governmental organizations.

The main forms of work on prevention of violence in the family and ill-treatment of children of these centres include: socio-legal and psychological consultation; representing the interests of a children or one of the members of a family; referral to State institutions or nongovernmental organizations; the provision of socio-education and psychological assistance.

During 2008 regular assistance (according to cards of receivers of services) was provided to 4,971 people (of whom 1805 were children) who had suffered from violence or who faced a real threat of such violence (including 9 people who approached them in connection with human trafficking), with these received 23331 social services.

As a result of work carried out in 2008, 240 people had documents processed or reinstated; 2095 – social links were organized or reinstated; 102 had studies organized; 48 were set up with a job; 1289 – were involved in rehabilitation programmes; 821 – learned social and everyday skills; 521 – received assistance with medical treatment (examination); 825 received access to better education opportunities or social activity; 100 received registration; 167 – were given training in safe style of life with regard to HIV infection..¹⁰

At the same time victims of domestic violence encounter considerable difficulties in receiving assistance due to the failings of legislation and the small number of centres where one can get help.

2008 saw no resolution of the problem with the Kyiv City Centre for Work with Women and the shelter for victims of domestic violence which did not have its lease extended. The attractiveness of Centre at 20 Melnykova St which is effectively in the city centre in a picturesque square have blinded State bureaucrats who prefer to use any measures to gain the property despite the serious social significance of the Centre. The latter has been disconnected from electricity and communications networks, and restricted in financing.

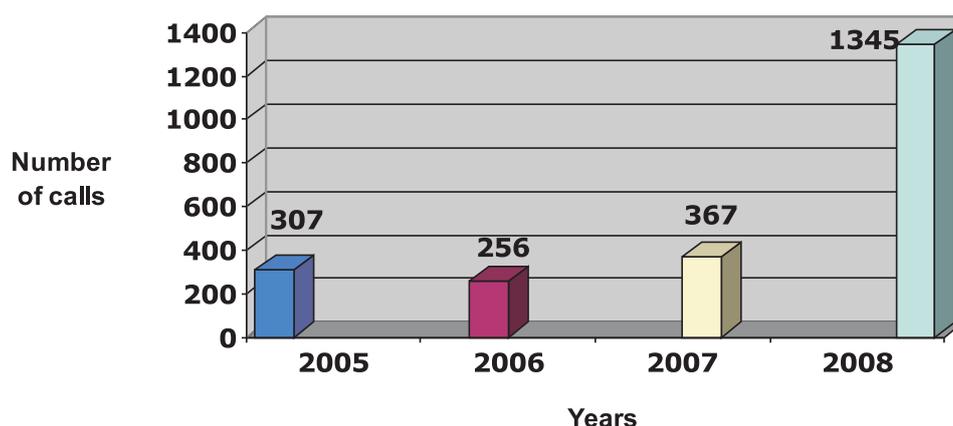
Civic organizations appealed to the country's leaders over this however the decision of the Shevchenkivsk District Council in Kyiv to hand the premises to a business structure remained in force. This situation could become an example to be imitated in other cities where through subventions to the State budget centres for the mother and child, centres for social and psychological rehabilitation and other institutions providing assistance to victims of domestic violence were created.

5. NATIONAL HELPLINE ON THE PREVENTION OF VIOLENCE

In 2008 the National Help Line on Violence and Protection of Children's Rights based at the «La Strada – Ukraine» Centre continued its work. During the year there were 1,345 calls. A considerable percentage of the calls are directly linked with violence in the family (physical, psychological, economic, moral) as well as related problems of a legal nature, divorce, division of property, resolution of housing problems, determining where children are to live, organizing care for children, appeals to the law enforcement agencies. There was a significant increase in the number of calls against the previous year, suggesting that problems like violence in the family are becoming more relevant.

¹⁰ Information provided by the Department for Family and Gender Policy of the Minister on the Family, Youth and Sport

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It should be pointed out that resolving the situation does not only involve legal consultations. Psychological assistance is also provided and in some cases the caller also needs social aid (being put up in a shelter, etc). Some consultations can last from 40 minutes to an hour.

Of particular concern are calls in connection with the inaction or insufficient fulfilment of their duties by officials of State and law enforcement bodies with competence to resolve particular issues.

The following are typical appeals to the Helpline

«I just don't know how to go on. My husband torments the whole family. Previously he beat me, but now the children as well. The police do nothing – they don't even come when I call them. What can I do?»

«My husband and I are divorced but he lives at my place. He torments me physically and psychologically. I can't get him out.»

«My husband beats me. He is now beginning to beat my small child. I want to divorce him but he threatens me. My husband's a police officer and therefore the police ignore my appeals. They answer that there are no elements of a crime. What can I do?»

«I have a privatized flat (in my name and my son's). My husband and I are divorced, but we live together. He drinks and beats me. I want to get him out. How can I do it?»

«My husband beats me and my child, he threatens and blackmails. I'm frightened to turn to the police because he knows people everywhere...»

«The child lives with his grandmother. His mother has not been stripped of her parental rights, but receives alimony. She beats the children. The authorities (the ward council, service on children's matters don't do anything. What can be done?»

«My husband is a former MIA employee. At the moment we have very tense relations. He beats me, torments me and exerts moral violence. The district police station says nothing and refuses to initiate a criminal investigation. What can I do, who can I turn to?»

As can be seen from these examples, almost half of those calling complain that reporting domestic violence to the police is ineffectual. Analogous complaints were heard in 2008 about the Prosecutor's office, the courts, the SBU [Security Service], departments of social security (in the Mykolaiv region), guardianship councils (Vinnytsa), the Pension Fund, regional departments of education (Zhytomyr and the Chernihiv region) and services of the family and youth (Kharkiv) and others.

In November – December 2008 the «La Strada – Ukraine» Centre, together with the MIA Public Safety Department, carried out an action for «16 days against gender violence». As part of this Department staff carried out consultations on the help line. One of the aims of the action was to exchange experience, including the reaction of the MIA to complaints over cases of inaction. However we cannot as yet call work in this direct effective.

Besides lawyer consultations on the Helpline, «La Strada – Ukraine» also receives written appeals. An analysis of these letters suggests an increase in the number of situations linked with viola-

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tions of children's rights, including cases of sexual violence against children. A considerable number complain of the inaction of the law enforcement agencies (prosecutor's office, police), and cases being dragged out in courts.

6. RECOMMENDATIONS

- 1) Improvements are needed to legislation, specifically:
 - A change in the name and reformulation of the objectives of the Law «On preventing violence in the family» (The sense of this recommendation is difficult to convey, since the word «prevent» is already a broader term in English. The suggestion is that «combating» would better encapsulate all tasks, those of prevention and or actually stopping what is already happening – *translator*)
 - In implementation of the Law «On amendments to some legislative acts to refine legislation on countering violence in the family which came into force on 1 January 2009, new subordinate normative legal acts need to be drawn up setting out the mechanisms for implementation of new provisions of the law, such as corrective programmes with people who commit acts of violence in the family, improving referral mechanisms etc.,.
- 2) Educational work is needed on the problem of violence in the family and new additions to legislation, ways of resolving the problem, and on the possibility of appealing for assistance
 - among the public
 - among specialists
- 3) Special training is needed with specialists, and specifically:
 - Employees of Ministry of Internal Affairs bodies
 - Social workers
 - Judges
- 4) The MIA should pay attention to the large number of unwarranted refusals to react to domestic violence by police officers and draw up a comprehensive range of educational and control measures to overcome this problem.

XVIII. HUMAN TRAFFICKING AS A MODERN FORM OF SLAVERY¹

1. OVERVIEW

The problem of human trafficking and organizing anti-trafficking measures, as well as providing assistance to its victims, remain as current as ever. Most of the conclusions regarding ensuring the rights of victims from the annual reports «*Human Rights in Ukraine*» for 2006 and 2007 remain valid at the beginning of 2009. We are therefore prompted to highlight some new aspects, in particular developing transparency in the work of the authorities in countering human trafficking, analysis, circulating information on the problem on the websites of State institutions, and so forth.

The main problem areas with implementing State anti-trafficking policy remain effective examination and judicial punishment of the perpetrators, as well as organizing the help which victims need in accordance with the demands and standards of international documents, such as the Council of Europe Convention on Action against Trafficking in Human Beings which formulates the basic principles of governments' role in this sphere², OSCE Action Plan to Combat Trafficking in Human Beings³ and others.

Each year since 2001 the US State Department's Office to Monitor and Combat Trafficking in Persons has published a report on the situation throughout the world. In gathering and analyzing information, it divides countries into three groups, first, second and third in terms of the level of implementation of anti-trafficking policy. Ukraine's positioning has been as follows:⁴

2001	2002	2003	2004	2005	2006	2007	2008
	2	2	2	2 Watch list	2	2 Watch list	2

The main criticism of Ukraine's policy has concentrated around problems with coordinating the efforts of different bodies, not enough court prosecutions and the effective lack of opportunity for providing assistance to victims.

¹ By members of the International Women's Human Rights Centre «La Strada – Ukraine» K. Cherepakha, T. Doroshok, O. Kalashnyk, K. Levchenko and M. Yevsyukova .

² Council of Europe Convention on Action against Trafficking in Human Beings was not ratified by Ukraine's parliament in 2008. <http://www.lastrada.org.ua/content/doc/Convention%20on%20Action%20against%20Trafficking%20in%20Human%20Beings1.doc>

³ Decision № 557 OSCE Action Plan to combat trafficking in human beings, http://www.osce.org/press_rel/2003/pdf_documents/07-3447-pc1.pdf

⁴ Trafficking in Persons Report, <http://www.state.gov/g/tip/rls/tiprpt/index.htm> The report for a particular year is issued around the beginning of June of the following year.

A major international event stimulating activity on combating the commercial sexual exploitation of children at national and international levels was the Third World Congress against the Sexual Exploitation of Children and Adolescents. (25-28 November 2008). The Congress was organized by the Brazilian Government, by the organization 'End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes' (ECPAT) and by the United Nations Children's Fund (UNICEF)⁵. Unfortunately Ukraine did not have an official Government Delegation at the Congress and it was represented by civic and international organizations. The All-Ukrainian Network on Combating the Commercial and Sexual Exploitation of Children prepared a monitoring report on how State on combating trafficking of children is being implemented.⁶ No governmental report was presented.

2. THE ACTIVITIES OF STATE BODIES AND COORDINATING THEIR WORK

A roundtable was held on 27 February 2008 by the Verkhovna Rada Committee on Legislative Backup for Law Enforcement Activities on implementation of the State Anti-trafficking Programme. It formulated relevant tasks for improving the work of State bodies on combating human trafficking, as well as recommendations for State structures, international and civic organizations.⁷

On 19 November 2008 the Cabinet of Ministers adopted Resolution № 1013 «On criteria for assessing the risk factor in carrying out economic activity involving acting as middleman for job recruitment abroad, and determining the regularity of State supervisory (control) measures». This normative legal acts establishes clear criteria for determining how much risk a person could face from the fraudulent activities of dishonest licensees, the unlawful activities of foreign employers and the risk of falling victim to human traffickers.

In 2008 the work of the Inter-Departmental Coordination Council on Issues of Demography, Family Policy, Gender Equality and Combating Human Trafficking was restarted, after virtually not working in 2007. Three meetings were held during 2008. However with such a wide range of areas of social policy, the Council cannot function effectively as was demonstrated in 2008.

In response to criticism from civic and international organizations, including the International Women's Human Rights Centre «La Strada – Ukraine», the Ministry on the Family, Youth and Sport, which remains the coordinating body among the central authorities in the area of combating human trafficking, initiated the preparation of a Cabinet of Ministers Resolution to create a separate Inter-Departmental Coordination Council on Combating Human Trafficking, separating this from the above-mentioned Coordination Council with broader scope created in 2007.

Such a step could have led to improved coordination of the work of different structures at national level, while also being reflected in the work of regional structures which follow the pattern and model of work of the national coordinating body.

However the draft resolution was rejected by the Ministry of Justice.

⁵ The first such World Congress took place in 1996 in Stockholm. It passed the Stockholm Declaration and Agenda for Action which bound governments to begin active work on combating the commercial sexual exploitation of children, to define and criminalize this offence, and also called for the creation of an international legal document which would formulate the general definitions, principles and obligations in this sphere. The Second World Congress took place in 2001 in Yokohama (Japan). Its practical result was the adoption by the UN in 2002 of the Optional Protocol to the Convention on the Rights of the Child against child prostitution, pornography and trafficking of children. Ukraine ratified this in 2003.

⁶ <http://www.lastrada.org.ua/content/doc/Report%20Brazil%202008.pdf>

⁷ Record and recommendations of the roundtable // <http://www.lastrada.org.ua/readnews.cgi?lng=ua&Id=1424>

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During 2008 the Ministry on the Family, Youth and Sport, together with civic and international organizations, worked on updating the State Anti-Trafficking Programme up to 2010 in accordance with adopted rules and requirements for such programmes. They endeavoured to turn an effectively little connected action plan into a document setting out strategic objectives, measures to achieve these, anticipated results, indicators for assessing activity, strategy for carrying out monitoring of implementation of this programme.

However the work was not supported by the Cabinet of Ministers and not included in the updated document.

At the end of 2008 there was a danger that the existing anti-trafficking programme would be cancelled altogether, however fortunately this did not happen.

Analyzing the activities of State structures on combating human trafficking, one can conclude that despite serious failings, the Ministry on the Family, Youth and Sport in 2008 significantly increased its activities. Separate funding was allocated from the Ministry's budget for implementing measures.

Of particular importance is the fact that activities were directed towards the development of a system of referrals for trafficking victims which is a basic mechanism for providing such victims with assistance. The work was carried out in close cooperation with the Office of the OSCE Project Coordinator and La Strada – Ukraine, the International Organization for Migration, civic organizations and charities.

The position of the Ministry of Health is still not sufficiently active.

In order to ensure efficient contact between those involved in carrying out coordination of State anti-trafficking policy and the subordinate body which implements directives on concentrating its own efforts in a given direction of State policy of the given profile, the following suggestions, supported also by international experts (OSCE, IOM, ILO) warrant attention:

- In order to improve the impact of those carrying out coordination to consider the possibility of creating a separate office of National Coordinator on combating human trafficking (this could be a public official at the level of Deputy Prime-Minister, or office which would carry out coordination via decisions approved by a Deputy Prime-Minister;

- To carry out objective assessment of State policy in this area to consider the creation of a separate office of National Coordinator on combating human trafficking which would be independent of the executive branch of power;

- Attention is given to improving the advisory system of the Inter-Departmental Coordination Council – an Expert Working Group possibly through the creation of a merged advisory body including the Minister of his/her Deputy with the right of delegating decision-making powers to designated individuals like representation in court with the maximum range of rights).

Among problems which also need to be resolved, although not necessarily at legislative level, is that of general, unified, objective State statistics in this area. At present all those carrying out the State programme provide purely departmental statistics with this at variance in its methodology from the statistics of international and civic organizations, and from the system for collecting statistics in other countries.

2.1. TRANSPARENCY IN COVERAGE OF STATE POLICY ON COMBATING HUMAN TRAFFICKING

Topics around prevention of human trafficking are covered on the website of the Ministry on the Family, Youth and Sport. The section «Countering human trafficking» contains the State Anti-trafficking Programme for 2006-2010. Information about current measures, seminars, conferences, etc is posted in the news section.

Nine ministries and a lot of departments are involved in implementing the State Anti-trafficking Programme for 2006-2010.

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Analysis of the websites of ministries and departments involved in implementing the State Anti-trafficking Programme

Ministry or department	Has a separate section «Combating human trafficking»	There are some State documents on anti-trafficking issues	Contains the State Anti-trafficking Programme for 2006-2010	There is news on the subject, with coverage of current activities	There are analytical material, publications, reports	There is the opportunity to ask questions, receive consultations
Ministry of Education	–	–	–	+	–	+
Ministry of Justice	–	+	–	+	+	+
Ministry of Employment and Social Policy	–	+	–	+	–	+
State Employment Service www.dcz.gov.ua	–	+	–	+	+	+
Ministry of Internal Affairs ⁸	–	+	–	+	+	+
Department for fighting crimes linked with human trafficking www.ctu.mvs.gov.ua	+	+	–	+	+	+
Department for monitoring human rights observance in police stations	+	+	+	+	+	+
Ministry of Foreign Affairs	–	+	–	+	+	+
Ministry of Health	–	–	–	–	–	+
SBU [Security Service]	–	–	–	+	–	+
Ministry of Transport and Communications	–	–	–	–	–	+
State Border Guard Service	–	+	–	+	+	+
State Committee for Television and Radio Broadcasting	–	–	–	–	–	+
State Committee for Nationalities and Religion	–	–	–	+	+	+
Ministry on the Family, Youth and Sport	+	+	+	+	+	+
Ministry of Culture and Tourism	–	–	–	–	–	+
National Bureau of Interpol	–	–	–	–	–	+
State Committee on Regulatory Policy and Enterprise	–	–	–	–	–	+

Through information resources (www.dcz.gov.ua, 27 websites of regional employment centres and www.trud.gov.ua), regularly inform the public of the possibility of receiving social services in the employment service, consultations regarding current legislation, looking for a job, news from the regions regarding work with the public by employment centres, provision of services to employers, cooperation of the service with social partners.

⁸ The MIA website is linked with the site of the Department for Monitoring Human rights Observance in the activities of Internal Affairs bodies, created at the end of 2008 (www.umdpl.info), on which there is a separate section «Combating human trafficking».

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In 2008 new free social services were introduced – a mobile service «Looking for work» (number 730). Around 3,4 thousand people approach the portals of the Employment Service each day. With the help of the «Looking for work» service, people can look at current vacancies, and in the section «Work», each can leave their CV. The State Employment Centre's nationwide database is updated on a daily basis and on 29.12.2008 contained around 100 thousand vacancies and 330 thousand CVs of people seeking work.

At the base employment centres there is an automatic system which provides callers from land-lines with information about vacancies as the result of an automated selection of types of work.

There is an operator centre which, by ringing 8-800-50-50-600 jobseekers can contact with questions concerning employment.⁹

3. LEGISLATION ON COMBATING HUMAN TRAFFICKING

3.1. WORK ON A COMPREHENSIVE LAW «ON COMBATING HUMAN TRAFFICKING»

With the aim of resolving the above-mentioned problems and in compliance with Cabinet of Ministers Instruction from 27 February 2008 № 383, the Ministry on the Family, Youth and Sport drew up a draft Cabinet of Ministers Instruction «On approving a Concept Framework for a Law «On combating human trafficking and assistance for trafficking victims», and in a letter from 24 December 2008 № 4.3/2332 sent it for review to the Cabinet of Ministers.

After this the Working Group drew up the actual Concept Framework for a Law «On combating human trafficking and assistance for trafficking victims» which passed through coordination procedure in central executive bodies and was sent to the Cabinet of Ministers. Later the Working Group set about preparing the draft law.

This is not the first attempt: a draft law was drawn up back in 2002-2003 by a group of authors. However the previous drafts by specialists were not considered by the newly created team.

Legislative consolidation of State anti-trafficking policy will free it from the vagaries of political circumstances and from the level of expertise and understanding of heads of the particular ministries and departments. The process of drawing up the law is reasonably public, demonstrating real and productive cooperation between State structures, civic and international organizations.

The European Convention on Action against Trafficking in Human Beings (2005), which pays attention to observance and protection of the rights of trafficking victims, still awaits ratification. However there is no clarity on this at present.

A positive event which took place on 5 March 2009 was the adoption by the Verkhovna Rada of a Law «On a nationwide programme «National Action Plan for implementation of the UN Convention on the Rights of the Child», which had been on parliamentary consideration since 2006. The National Action Plan is aimed at merging into one system State efforts on protecting the rights of the child. It is directed at ensuring optimum functioning of an integrated system of protection of children's rights in Ukraine in accordance with the demands of the UN Convention on the Rights of the Children, and taking into consideration the development aims announced in the UN Millennium Declaration and the strategy of the Special Session of the UN General Assembly on Children «Building a World Fit for Children».

The National Action Plan was adopted without a list of measures. According to a Verkhovna Rada Resolution, these need to be prepared by 5 June 2009.

The National Action Plan contains a separate section on protecting the rights of children in connection with various issues, including trafficking in children, sexual exploitation and other forms of ill-treatment.

A main task in this sphere should be raising the effectiveness of preventive and explanatory work among parents in order to prevent brutal treatment of children, improve procedure for identifying

⁹ Data on the results of a report on implementation of the State Anti-trafficking Programme for the period up to 2010 during 2008 (the State Programme was approved by Cabinet of Ministers Resolution № 410 from 07.03.2007) summarized by the Ministry on the Family, Youth and Sport

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children who have suffered from sexual exploitation and other forms of ill-treatment, ensure the functioning of a system to protect children from ill-treatment and carry out the relevant preventive work.

Among negative aspects of 2008, we must note the latest failure by the Verkhovna Rada to ratify the Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption.¹⁰ It envisages liability and tasks dividing countries of origin and destination countries, bearing in mind organizational differences and national legislation. One of the fundamental principles of the Hague Convention is that adoption is not a personal matter which can be left in the competence of the child's relatives, legal representatives of future adoptive parents. This is a social and legal means of protecting the child. Therefore the procedure for inter-country adoption must be the responsibility of the countries involved who must guarantee that the adoption is in the best interests of the children, as well as of the child's basic rights.

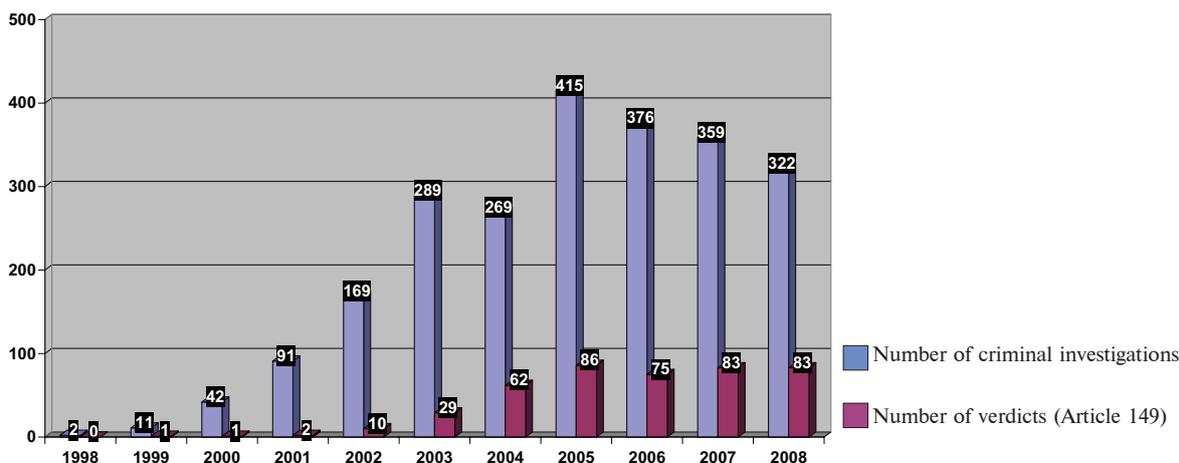
Ratification is still needed of the Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse. The Convention was signed by Ukraine back in 2007, but a law has still not been tabled for its ratification by the Verkhovna Rada.

The Convention contains 50 articles and a number of obligations for the parties to it. These include establishing criminal liability for sexual abuse, the organization of child prostitution and pornography, and the participation of a child in pornographic exhibitions, abuse of children and sexual harassment of children. It also covers methods of protection and help for victims, through, for example, help lines, including for the prevention of repeat victimization, special institutions and coordinating bodies on preventing and combating sexual exploitation and abuse of children, development of programmes and measures for correcting the behaviour of law enforcement agencies and others.

4. INVESTIGATION INTO CRIMES

Overview of the situation as regards countering human trafficking reflected in Ministry of Internal Affairs' statistics. Already in 2007 there was a fall in the level of crime. If in 2005 and 2006 over 400 trafficking-related crimes were recorded each year, only 359 such crimes were recorded in 2007. In 2008 322 crimes under Article 149 (human trafficking or other illegal agreement with respect to a person) of the Criminal Code were established, with 342 victims being returned to Ukraine, including 37 children, while 18 organized trafficking gangs were broken up.

Number of criminal investigations under Article 149 of the Criminal Code initiated and the number of cases where court verdicts were handed down¹¹



¹⁰ In March 2009 the Verkhovna Rada again failed to ratify the Hague Convention.

¹¹ «Countering human trafficking. Ukraine // IOM http://www.iom.org.ua/img_collection/IOM%20Statistics%20December2008%20Ukr.pdf

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As can be seen from the graph, the problem of court examination and the handing down of sentences to perpetrators remains a very serious obstacle to exercising the right of victims of human trafficking to fair court proceedings and moral and material compensation.

5. PROVISION OF ASSISTANCE TO HUMAN TRAFFICKING VICTIMS

2008 saw positive changes in the attitude of the State structure to the provision of assistance to trafficking victims. The Ministry on the Family, Youth and Sport and the State Social Service for the Family, Children and Young People provided assistance to the first nine victims of human trafficking. This marked a beginning to breaking down the trend where help to victims has remained the responsibility of international and civic organizations.

In implementation of Item 22 of the State Anti-trafficking Programme (Promoting employment and vocational training for Ukrainian nationals who have suffered from human trafficking), during 11 months of 2008 the State Employment Centre sent over 229,7 thousand people for vocational training, this being 17.1 thousand more than over the analogous period in 2007 (212.6 thousand). Training was provided in professionals in demand on the labour market, or which provide the opportunity of individual labour.¹² At the same time, no figures were provided in the report on implementation of the State Anti-trafficking Programme for the number of victims of human trafficking who underwent training within the system of the State Employment Centre and regional employment centres.

At the present time, with the financial support of the Internal Organization for Migration, there are 8 centres for victims (in the Volyn, Zhytomyr, Lviv regions, 2 in the Odessa region, the Chernivtsi and Kherson regions, and in Kyiv (medical – rehabilitation). The work of these centres is aimed at providing legal defence of victims, providing confidential medical examinations, social and psychological assistance. Reintegration programmes envisage training seminars, individual work aimed at future employment of trafficking victims, providing practical assistance and resolving housing and material issues.

During 2008 the Ministry on the Family, Youth and Sport, in cooperation with IOM, carried out monitoring of State and regional anti-trafficking programmes in the Western and Southern regions of Ukraine (Kherson, Odessa, Mykolaiv, Ternopil, Lviv, Chernivtsi, Transcarpathian, Chernihiv regions, and in the Crimea). The results of the monitoring are being processed for future work and the possibility of making proposals and comments, for taking into consideration in future work with the regions. They will be posted on the Ministry's site, sent to regional Departments on the Family, Youth and Sport.¹³

At the same time it should be noted that the State Anti-trafficking Programme for the period up to 2010 does not contain provisions on the need to provide assistance to trafficking victims or to create a system for organizing such help, as was already noted in previous reports. Amendments to the State Programme, initiated by civic and international organizations, together with the Ministry on the Family, Youth and Sport were not supported by the Cabinet of Ministers.

Number of human trafficking victims provided with assistance by La Strada – Ukraine (2003-2008)

	2003	2004	2005	2006	2007	2008
Number of victims	94	101	198	199	183	414 ¹⁴

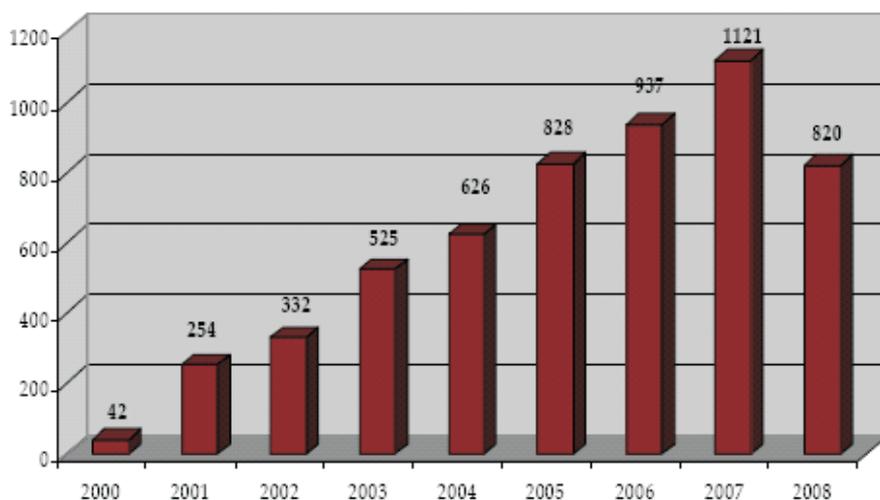
¹² Data on the results of a report on implementation of the State Anti-trafficking Programme for the period up to 2010 during 2008 (the State Programme was approved by Cabinet of Ministers Resolution № 410 from 07.03.2007) summarized by the Ministry on the Family, Youth and Sport

¹³ Data on the results of a report on implementation of the State Anti-trafficking Programme for the period up to 2010 during 2008 (the State Programme was approved by Cabinet of Ministers Resolution № 410 from 07.03.2007) summarized by the Ministry on the Family, Youth and Sport

¹⁴ Including 355 child victims of human trafficking, exploitation in the sex business, labour exploitation, cruel treatment, etc.

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Number of human trafficking victims provided with assistance by the Representative Office of the International Organization for Migration in Ukraine (2000-2008)¹⁵



Forms of exploitation which trafficking victim helped by IOM in 2004-2008 were subjected to¹⁶

Form of exploitation	2004	2005	2006	2007	2008
Sexual	403	558	597	584	392
Labour	190	232	320	500	404
Mixed	24	28	15	33	7
Begging	9	10	5	4	14
Others	—	—	1	—	3

Gender of trafficking victims¹⁷

Gender	Number of victims				
	2004	2005	2006	2007	2008
Women	540	713	761	849	625
Men	86	115	176	272	195

Breakdown of victims according to gender and form of exploitation¹⁸

Gender	Form of exploitation					total
	Sexual	Labour	Mixed	Begging	Other	
Women	961	460	40	13	0	1474
Men	12	447	0	5	3	467

¹⁵ «Countering human trafficking. Ukraine // IOM http://www.iom.org.ua/img_collection/IOM%20Statistics%20December2008%20Ukr.pdf

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

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An analysis of the data shows that there has been an increase in the number of men among victims of human trafficking who were helped by international and civic organizations.

The following organizations take an active part in the system for providing assistance to trafficking victims: «Avenir» (Zhytomyr); «Veritas» (Odessa); «Vesta» (Uzzhorod); «Rebirth of the nation» (Ternopil); «Faith, Hope, Love» (Odessa); «Volyn Prospects» (Lutsk); «Donetsk Regional League of Business and Professional Women»; «Women of Donbas» (Luhansk); «Women's Information and Consultation Centre» (Dnipropetrovsk); «Lyubystok» (Mykolaiv); «Youth Centre of Women's Initiatives» (Sevastopol); «Hope for the Future» (Simferopol); «Progressive women» (Vinnytsa); «School of Equal Opportunities» (Kyiv); «Path to Life» (Kharkiv); the Charitable Fund Caritas of the Ukrainian Greek-Catholic Church (Ivano-Frankivsk) and in Khmelnytsky; the Charitable Fund «Salyus» (Lviv) Dovira-MET (Sumy); the International Women's Human Rights Centre «La Strada – Ukraine» (Kyiv); «Women's Community» (Kharkiv); «Successful Woman» (Kherson); the Centre for Support of Civic Initiatives «Chaika» (Rivne); «Suchasnyk» (Chernivtsi) and others.¹⁹

5.1. ORGANIZATION OF ASSISTANCE TO MALE (POTENTIAL) VICTIMS OF HUMAN TRAFFICKING

In 2008 activity gained momentum in providing various types of assistance to men, both those who had suffered from human trafficking, and in order to stop people falling into traffickers' traps. This is an absolutely objective trend linked with the sharp rise in the number of men suffering from various forms of human trafficking, first and foremost, labour exploitation.

For example, from July 2008, as part of the project «Men's Initiatives on Combating Human Trafficking in the Kherson Region» which is being undertaken by the Kherson Regional Civic Centre «Men against Violence» with the support of the International Organization for Migration, a consultation office has been providing free information, psychological and legal consultations.

There are three aspects to the work. firstly, consultation of people, mainly men, who are planning to work abroad; secondly, information to male victims of trafficking and their families, referral to special institutions providing help, psychological assistance at a personal level and with dysfunctional social relations, free legal consultations, and thirdly, training of volunteers for work at the consultation office.

Specialists of this consultation office can also provide referrals to other services and institutions in order to ensure comprehensive assistance to the client, where additional social or qualified services are needed and where certain services are not available in the office. A multidisciplinary team can also take the decision to use extra resources to improve the victim's difficult living circumstances. In connection with this and in cooperation with the partner civic organization «Kherson Regional Centre «Successful Woman», a system of reintegration assistance for victims has been organized which includes the possibility of taking part in the IOM reintegration programme.²⁰

Over 60,000 people have received individual consultations, in person, by telephone or through email in Consultation Centres for Migrants with the IOM National Help line.²¹

Over 112,000 people approached the contact centre attached to the Ministry of Foreign Affairs in the first half of 2008.²² However one feels well-founded suspicion over the declared number of consultations since simple calculations indicate that the duration of each is measured in seconds.

¹⁹ Ibid.

²⁰ «Men against Violence» provide free consultation» // http://new.humanism.org.ua/index.php?option=com_content&task=view&id=349&Itemid=30.

²¹ «Countering human trafficking. Ukraine // IOM , http://www.iom.org.ua/img_collection/IOM%20Statistics%20December2008%20Ukr.pdf

²² Study on Labour Migration Issues in Ukraine, carried out with the support of the Open Ukraine Fund, Open Ukraine Report 2008.

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5.2. CREATION OF A NATIONAL REFERRAL MECHANISM FOR VICTIMS

Active efforts on building a national referral mechanism for human trafficking victims are being made by the Ministry on the Family, Youth and Sport and the Office of the OSCE Project Coordinator in Ukraine.

In 2008 work was completed on a study begun in 2007 into requirements for a National Referral Mechanism (NRM) for human trafficking victims. The study was undertaken by a group of independent consultants (one international, two Ukrainian) and commissioned by the OSCE Project Coordinator in Ukraine, at the request of the Ministry on the Family, Youth and Sport, with the financial support of the Danish Ministry of Foreign Affairs within the framework of the Danish Programme for Combating Human Trafficking in South-East and Eastern Europe. The report of the study «Assessments of the Requirements of a National Referral Mechanism for Human Trafficking Victims in Ukraine» was submitted for the consideration of the Inter-Departmental Coordination Council on Issues of Demography, Family Policy, Gender Equality and Combating Human Trafficking and was approved at its meeting on 3 July 2008.

According to the conclusions of the study and based on the decision of the Inter-Departmental Coordination Council, the Ministry on the Family, Youth and Sport approached the OSCE Project Coordinator in Ukraine with a proposal to prepare and implement a project on developing NRM using the best international experience. The project proposal was prepared and agreed for implementation over 2009-2011. The project envisages measures for improving the normative legal base in the area of identification and provision of assistance to victims of human trafficking, drawing up mechanisms of interaction and cooperation of various State bodies and services, as well as civic organizations. It is planned to iron out the practical aspects for the functioning of the NRM through implementation in two pilot regions. In determining these regions a number of factors will be taken into consideration, including differences in demographic and socio-economic position in the regions, in geographical position etc.

In addition to the above, over recent years the OSCE Project Coordinator in Ukraine has also carried out a number of other measures which indirectly promote the development of NRM in Ukraine. Among such measures we should mention seminars and training courses for representatives of different State institutions and departments, for example, district police inspector services, regional authorities, representatives of the medical community and others. During such events the issue of identification and provision of assistance to victims of human trafficking was considered. There have also been a number of publications which address among other things various aspects of providing help to such victims²³.

5.3. «LA STRADA – UKRAINE» NATIONAL HELPLINE AGAINST HUMAN TRAFFICKING²⁴

During the period **November 1997 – December 2008** there were **38 761** calls to the National Helpline.

Statistics for calls to the «La Strada – Ukraine» National Helpline from 2003 – 2008

	2003	2004	2005	2006	2007	2008
Number of calls	4851	6191	4810	4720	3943	3247

The main issues with which people call the helpline concern possibilities and conditions for finding work abroad, checking out firms which offer go-between services for finding work (45,8%);

²³ Information provided by the Office of the OSCE Project Coordinator in Ukraine

²⁴ The National Helpline on human trafficking works from Monday to Friday from 9.00 to 20.00, Saturday – from 9.00 to 16.00. It is supported by the Danish Ministry of Foreign Affairs and the DOEN Fund (the Netherlands).

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questions about people who have disappeared abroad (7%); looking for ways of returning home and help for victims who have returned to Ukraine (2%); general conditions for marrying a foreign national (2,3%); the legal consequences of divorcing a foreign national and questions related to getting children back (1,7%); the possibilities for moving abroad permanently (1,1%), consultation on court trials in cases of human trafficking (1,2%), questions regarding private tourist trips (3,2%), studying abroad (2,2%) and other issues (33,5%).

A considerable number of calls concern complaints about the dishonest activities of firms offering go-between services for finding work abroad: the firms don't carry out their duty, don't have

УВАГА! АКЦІЯ!

спільно з Департаментом боротьби зі злочинами, пов'язаними з торгівлею людьми МВС України
26 ЛИСТОПАДА, 3 ТА 10 ГРУДНЯ
з 17.00 до 19.00 пропонує консультації фахівців Департаменту
ПОДЗВОНІВСЯ В ЦЕЙ ЧАС НА НАЦІОНАЛЬНУ „ГАРЯЧУ ЛІНІЮ“
8-800-500-2250
можна отримати кваліфіковані консультації з питань:
- подання скарг на шахрайство фірм, що займаються посередницькою діяльністю в працевлаштуванні за кордоном,
- пошуку зниклих за кордоном та в Україні,
- можливих наслідків нелегального працевлаштування,
- заявлення про випадки торгівлі людьми.

the relevant State registration (licence for carrying out «intermediary services in finding employment abroad») and accompanying documents, refuse to sign a labour agreement or contract with the employer, take an advance payment for their services, and then don't return the money if the embassy turns down the visa application, and even threaten people.

An important way of approaching the Centre is through **online consultations**. From January to December 2008 the Centre gave **235 consultations**. During the entire period from **January 2004 to December 2008** there were **1,281** such consultations.

In 2008 the Centre continued to cooperate with the MIA Department on Fighting Crimes connected with Human Trafficking. Representatives of the Department took part in the action «16 days against gender violence» on the Centre's Helpline on 26 November, 3 and 10 December from 17.00 to

19.00. During this period **17 consultations** were given to people who had suffered not only from fraudulent go-between firms, but from specific individuals engaged in criminal activities.

Complaints also concerned State bodies:

– The Ministry of Internal Affairs (for inaction in getting rid of go-between firms continuing their fraudulent or criminal activities);

– The Ministry of Employment and Social Policy (for issuing licences to firms engaged in fraudulent or criminal activities, also in the refusal by the licensing department to check licences of go-between firms);

– The Ministry on the Family, Youth and Sport

– Bodies of local self-government and local State administrations

M., an 18-year-old from a school-orphanage, was underage when he became the victim of human trafficking in the form of labour exploitation. After returning to Ukraine the need arose to fix a place to live. His mother drinks and has been stripped of her parental rights. At present he has no permanent place of registration. Approaches to the relevant State structures to resolve this have not brought any success.²⁵

– The Ministry of Foreign Affairs (for dragging out cases involving searching for people who have fallen victim to human traffickers abroad;)

«How can one punish a go-between firm for deception?»

«Why do go-between firms which have licences at the present time cheat people, why does the State not control this process?»

5.4. THE ISSUE OF LEGAL CULTURE AND PUBLIC AWARENESS ABOUT HUMAN TRAFFICKING

A study carried out in 2008 gives grounds for concluding that awareness among various groups of the problem of combating human trafficking is increasing which is instead a positive trend.

²⁵ A case which La Strada – Ukraine is involved in.

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For example, a survey of students at vocation colleges showed a «fairly high» level of awareness. The students were well aware of ways you could end up in the clutches of human traffickers, as well as of how to protect yourself before the trip. Yet among the most authoritative sources of information about a trip abroad respondents named those people who had already visited other countries (68%) and relatives (57%). It is worrying that students are inclined to rely on information from those who have been abroad. It is quite possible that such a person could prove to be a recruiter.

Teachers assess the level of safe conduct skills to be on a low level.

6. RECOMMENDATIONS

1) THE MOST IMPORTANT MEASURES IN THE AREA OF LEGISLATION:

- ◆ Ratify the Council of Europe Convention on Action against Trafficking in Human Beings;
- ◆ Ratify the Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse
- ◆ Make changes to Article 301 of the Criminal Code defining the term «child pornography»
- ◆ Finalize and table for the consideration of the Verkhovna Rada a comprehensive law «On combating human trafficking»;
- ◆ Draw up and approve State standards of social services in the area of combating human trafficking;.

2) THE MOST IMPORTANT MEASURES ON STATE MANAGEMENT AND COORDINATION OF ACTIVITIES

- ◆ Complete the process of creating a separate Inter-Departmental Coordination Council on Combating Human Trafficking;
- ◆ Create separate sections on the websites of State bodies to give coverage of activities in combating human trafficking;
- ◆ Prepare and publish on an annual basis reports with an overview of the situation on combating human trafficking;
- ◆ Create an office of National Rapporteur on issues of combating human trafficking;
- ◆ Create an office of National Coordinator on combating human trafficking
- ◆ Include the these of prevention of human trafficking in the system of training and professional development of specialists working in the area of fighting human trafficking;
- ◆ Introduce monitoring of implementation of the State Anti-Trafficking Programme in accordance with the efficiency indicators drawn up.

3) PREPARE A MECHANISM FOR SOCIAL COMMISSIONING OF PROVISION OF SERVICES BY CIVIC ORGANIZATIONS FROM STATE STRUCTURES AND MEASURES FOR PROVIDING ASSISTANCE TO VICTIMS OF HUMAN TRAFFICKING

XIX. THE RIGHTS OF REFUGEES AND ASYLUM SEEKERS¹

1. OVERVIEW

Mention has been made in previous years «Human Rights in Ukraine» reports of considerable violations of the rights of refugees, asylum seekers and migrants. There were no positive changes to the situation in 2008. On the contrary, violations in this area are permanent, systematic and widespread.

According to figures from the Ministry of Internal Affairs (MIA) Department on Citizenship, Immigration and Registration, as of 1 January 2009 293,984 foreign nationals or stateless persons were registered with the police, of whom 178,859 were permanently living in Ukraine and 115,154 were in Ukraine on a temporary basis.²

In 2008 14 thousand 875 illegal migrants were detained of whom 14,334 have already been deported, including 2,495 forcibly.³

According to statistics for 2008⁴ provided by the UNHCR, as of 31 December 2008 2,178 people had received refugee status. 52% were from Afghanistan; 27% – from former CIS countries; 13% – from countries in Africa; and 8% from countries from the Middle East, Asia or Europe. Of those who received refugee status 19% were female adults; 54% – male adults; 23% – minors and 4% – elderly people. In 2008 5.8% of those who had received refugee status since Ukraine's independence, had received Ukrainian citizenship.

During 2008 2,155 applications for refugee status were submitted to migration offices, this being an increase of 5% against 2007. However, only 463 applications were considered by the State Committee on Nationalities and Religion on their merits. This was in part due to a two-month break in the work of the Committee during the summer due to the lack of clarity over the restructuring of duties between the State Committee and the MIA.⁵ The main countries of origin of asylum seekers and refugees in 2008 were as follows: Pakistan (8%), Afghanistan (18,6%), India (8,2%), Somalia (8,2%), Bangladesh (5,7%), Iraq (4,7%), the Russian Federation (2,9%). Almost 50% of all applications came from the eastern border of Ukraine. Many of them were made from temporary centres for illegal migrants which suggests that some of them may have been made after unsuccessful attempts to cross the Ukrainian border on the way to the EU. According to estimates, 265 individuals were not able to submit applications for refugee status due to procedural obstacles or out of considerations of safety.

Only 125 people were granted refugee status in 2008. It should be noted that most of these were people who had made their applications in previous years since the procedure is long and drawn-

¹ By Iryna Fedorovych, Civic Centre «Social Action»

² V. Batchaev: Protection of the rights of foreign nationals, refugees and asylum seekers – in the book «Human rights in the work of the Ukrainian police» – Kharkiv, Prava ludyny, 2009. – p. 136.

³ Ibid.

⁴ Regional website of the UNHCR for Belarus, Moldova and Ukraine http://www.unhcr.org.ua/unhcr_ukr/.

⁵ More details about the planned reorganization later in the text .

out. 95 people were recognized by the UNHCR as in need of international protection and unable to remain in Ukraine due to safety considerations. The cases of those asylum seekers were transferred to the procedure for removal to a third, safe country. 71 people were moved, including those who had applied for resettlement in previous years.⁶

Unfortunately it proved impossible to obtain official statistics from the State Committee on Nationalities and Religion. Their official website (<http://www.scnm.gov.ua>), which should contain such statistics has for some strange reason virtually not been working over the last half-year. And when you manage to half open the page with statistics, it shows only figures as of 1 January 2007, that is, for 2006. To its official request for statistics up to 2008, the Civic Centre «Social Action» received this curious response.

На Ваш лист повідомляємо, що «Статистична інформація - це офіційна документована державна інформація, яка дає кількісну характеристику масових явищ та процесів, що відбуваються в економічній, соціальній, культурній та інших сферах життя. Державна статистична інформація підлягає систематичному відкритому публікуванню. Забезпечується відкритий доступ громадян, наукових установ, заінтересованих організацій до неопублікованих статистичних даних, які не підпадають під дію обмежень, установлених цим Законом, а також Законом України "Про державну статистику". Система статистичної інформації, її джерела і режим визначаються Законом України "Про державну статистику" та іншими правовими актами в цій галузі (ст. 19 Закону України «Про інформацію»).

Статистичні дані Ви можете отримати на сайті Державного Комітету України у справах національностей та релігій www.scnm.gov.ua

З повагою,

Начальник відділу
у справах міграції



С.І Широков

With regard to your letter we would inform you that «Statistical information is official, documented State information which provides a quantitative characteristic of mass-scale phenomena and processes which are taking place in the economic, social, cultural or other spheres of life. State statistical information is subject to systematic open publication. Open access to citizens, scientific institutions, and interested organizations is provided to unpublished statistical data which does not fall under any restrictions established by this Law, or the Law «On State statistics». The system for statistical information, its sources and regime are set out in the Law «On State statistics», and other legal acts in this sphere (Article 19 of the Law «On information»)

You can receive statistical data on the website of the State Committee of Ukraine on Nationalities and Religion www.scum.gov.ua

Yours sincerely,

Head of the Department on Migration

S.I. Shyrokov

⁶ 2008: Regional Report on Belarus, Moldova, and Ukraine, UNHCR

XIX. THE RIGHTS OF REFUGEES AND ASYLUM SEEKERS

There is no State Concept Strategy for Migration Policy, with only separate and unconnected normative acts. Migration processes are viewed both at State level, and by individual officials as problems, but not the possibility for development. There is an urgent need at present for a single concept strategy which can reflect the possibility of including and integrating into society people who receive refugee status. Only in summer last year did the government take the first steps towards drawing up migration policy.⁷ The Ministry of Justice prepared and submitted for discussion a concept framework for a single State migration policy. In December 2008 this Concept was approved by the Cabinet of Ministers. In addition, on 15 December the President signed a Decree on the decision of the National Security and Defence Council [NSDC] of 7 November 2008 «On enforcing the NSDC Decision from 15.06.2007 «On directions of Ukraine's State migration policy and urgent measures to increase its efficiency»⁸. However no further steps were taken and for now the Concept Strategy remains mere declarative words.

Another significant aspect of the problem is that to this day there is no separate centralized body of executive power responsible for migration policy, but a number of disparate departments: the State Committee on Nationalities and Religion, the Ministry of Internal Affairs, the Security Service [SBU], the Ministry of Employment and Social Policy, and others. Therefore, instead of joint efforts, in practice we have constant reshuffling of duties and powers between these departments – a real battle for power resulting in violations of the rights of refugees and asylum seekers.

There have been attempts on a number of occasions to reform the State Committee on Nationalities and Religion. In summer 2008 a Cabinet of Ministers Resolution⁹ transferred part of the powers of the Committee to the MIA. However, a few weeks later, the President asked the Constitutional Court to give its judgment as to the compliance of this Resolution with the Constitution and issued a Decree¹⁰ suspending its force pending the Constitutional Court's consideration. At present no reforms have taken place.

Supporters of the transfer of the Committee's powers to the MIA say that this will promote the creation of an efficient system since there will be a single body answering for all aspects related to migration. They point to the experience of other countries which have long had such practice.¹¹

However here one should not forget that in most European countries the Ministry of Internal Affairs is not an enforcement structure as it is in Ukraine. Opponents of the move maintain that the transfer of powers to the MIA, especially in this sphere involving the granting of asylum in Ukraine will lead to a worsening of the situation for refugees and asylum seekers. After all the MIA is the same State body which more often than not violates these people's rights. This could lead to the whole institution of asylum in Ukraine being devalued. In our view there is a vital need for a separate State body dealing with all issues linked with migration and the granting of asylum.

At present the process of decision-making with regard to the granting of refugee status, just as before, remains excessively politicized and lacking in transparency. The bodies responsible for talking such decisions often base their assessment on what kind of relations Ukraine has with the applicant's country of origin. From what the «Social Action» Centre has seen, there is a 90% chance that applicants from the Russian Federation or Uzbekistan will be turned down.

⁷ Draft Law on the Principles of Ukraine's State Migration Policy № 3158 from 16.09.2008, Verkhovna Rada portal: http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=33324.

⁸ Presidential Decree № 1163/2008 from 15.12.2008, <http://www.president.gov.ua/documents/8707.html>

⁹ Cabinet of Ministers Resolution from 18 June 2008 № 558 «Some issues of State management in the area of migration policy»

¹⁰ Presidential Decree № 643/2008 «On suspending the force of Cabinet of Ministers Resolution from 18 June 2008 № 558», <http://www.president.gov.ua/documents/8125.html>

¹¹ «The Migration Service: struggle for control over it» // *Dzerkalo tyzhnya* № 34 (713) 13-19 September 2008, <http://www.dt.ua/1000/1050/64045/>.

2. REVIEW OF LEGISLATION

The Verkhovna Rada on 21 June 2001 adopted the Law «On refugees» which sets down their special legal status. It was only on 10 January 2002 that Ukraine signed the UN Convention relating to the Status of Refugees and the Protocols to it. On 31 May 2005 some minor amendments and additions were made to the Law «On refugees». However the essence of the Law remained without change, as do the numerous failings which hamper its practical application. The main criticisms which must be levelled at the system for granting asylum are its lack of structure and order. This is linked with the fact that various aspects of the issue are dealt with by different and most often unconnected legislative acts. Moreover some aspects are not reflected in any of them at all. All of this leads to numerous violations of asylum seekers' rights to abuses by employees of State bodies, in the first instance, police officers.

Article 26 of the Constitution states that: «Foreigners and stateless persons may be granted asylum by the procedure established by law. Article 106, Item 26 regarding the President's powers reads as follows: «26) adopts decisions on the acceptance for citizenship of Ukraine and the termination of citizenship of Ukraine and on the granting of asylum in Ukraine»

It is considered that this provision was introduced into the Constitution to give the chance of granting asylum (literally, refuge) to particular well-known figures at the decision of the President; No law has ever been past regarding the granting of such «refuge». Any such mechanism, which has not been.

This right is placed within the competence of the President would create unequal conditions for asylum seekers, which would be a form of discrimination. Furthermore, the text contains the term «prytulok» (asylum, refuge) which is not used at all in the Law «On refugees», and can thus not be used. The norm of the Constitution which sets out the priority of laws clearly places international agreements and conventions higher than domestic law. This does not stop executive bodies (the Prosecutor and police), as well, sometimes as the judiciary, from infringing them, using the failings of domestic legislation in those cases where norms of international law give broader scope for protecting the rights of refugees.

In 1996 changes were made to the Criminal Code removing criminal liability for people who have illegally crossed the State border if they did this in order to receive refugee status in Ukraine. However in practice, due to the lack of qualified translation, the possibility of applying for refugee status having crossed the border are minimal for asylum seekers from many countries. They are thus detained and taken to so-called temporary holding centres for illegal migrants. It is only there, with the services of interpreters and employees of nongovernmental organizations that asylum seekers can submit an application to the relevant body to be granted refugee status.

Current legislation grants refugees more favourable conditions than other foreigners for obtaining Ukrainian citizenship. In the Law «On citizenship» refugees may apply for citizenship after having living in the country for three years, whereas the period is usually five years. In practice, however, employees of State bodies are prejudiced against refugees with this leading to the procedure for gaining citizenship between significantly dragged out. Therefore less than 6% of refugees have been able to obtain Ukrainian citizenship.

3. PROCEDURE FOR RECEIVING REFUGEE STATUS¹²

The first step is submitting an application for refugee status to the district migration office. This same application may also be submitted to the Border Guard Service when crossing the border, or to a member of staff of the temporary centre for illegal migrants (the application must then be passed on to the nearest district migration office). The applicant must submit all available documents confirming his (or her) identity and story, together with the application. At this stage the mi-

¹² The procedure for granting refugee status is set down in detail in Articles 9-14 of the Law «On refugees».

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gration service issues the applicant with the first type of identity papers where later a stamp is placed for registration of the place where he is staying, a referral for a medical examination and registration with the Department on Citizenship, Immigration and Registration (DCIR). It is important to note that the medical examination is supposed to be mandatory however no steps have been taken to create the necessary conditions for this. In Kyiv there is a specialized unit where medical examinations of asylum seekers are carried out, and medical services provided at all stages of the procedure, however this is not financed from either the State or city budgets, but by the International Organization for Migration (IOM) and the UNHCR. In other cities asylum seekers have to arrange with hospitals and pay for the medical examination themselves.

Migration Service officers also interview the applicant. This stage of the procedure should take 15 working days however practice shows that it is often longer, including because of the lack of interpreters. Yet for the asylum seekers to engage his own interpreter, the person needs to have a document certifying the relevant higher education which is a problem since it is often relatives or people they know who act as interpreters. After the conclusion of the first stage, the applicant receives a written response. This is usually a refusal to accept the documents for consideration as to whether to grant refugee status. In the event of a positive response, the second stage of the procedure which should take 2 months begins.

The decision to turn down the application at that stage can be appealed, either in the State Committee on Nationalities and Religion, or in an administrative court. It is at this time that an asylum seeker's problems become acute. After being turned down, the identity document issued by the Migration Service ceases to be valid. The law envisages another type of document, confirming that a person is appealing against the refusal to accept his documents for consideration, however the legislators did not stipulate any timeframe, or, more accurately, they simply didn't pay attention to the fact that it takes time to write an appeal. Therefore, during the period while the asylum seeker is preparing his appeal and submitting it to the court, and then approaches the migration office with a copy of the appeal in order to get a new document, he remains without any document confirming that he is within the procedure, and can become a victim of police detention, or even be expelled. It is also important to note that the legislators set out fairly strange timeframes for informing of a decision to turn the application down at this first stage. According to the law, the applicant should receive a response from the migration office within 7 working days, whereas the notification from the Department on Citizenship, Immigration and Registration about the refusal should be sent within 3 days. The staff of the Kyiv Migration Service followed a special path and drew up a standard text of such a notification to the DCIR – «we would ask you to check the legality of the given's person being in Ukraine.» Thus, a check on the asylum seeker may be carried out at the place he's living before he finds out about the refusal to accept his documents and before he has time to lodge an appeal with the court, not to speak of receiving a new type of document regarding the appeal, the issue of which, incidentally, is also frequently held up without reason.

The second stage of the procedure is analogous. In all there are four types of document issued at various stages of the procedure. This leads to bureaucracy, procrastination over issuing or extending them, the impossibility of registration of place where one is staying while there is no document and numerous problems with the police during checks of documents. Police officers make use of this and often pretend that they are seeing such «strange» documents for the first time, in order to extract bribes or detain asylum seekers for so-called infringements of Article 203 of the Code of Administrative Offences (overstaying one's right to be in the country).

The practice of the «Social Action» Centre shows that the migration officers view asylum seekers a priori as potential labour migrants and people whose presence in Ukraine is highly undesirable. As a result of this, the majority of applicants are turned down at the first stage of the procedure.

One can thus state that instead of an institution for granting asylum, there is a practice of not granting it created by bodies whose duty is to provide an impartial consideration of asylum applications.

As already mentioned, the decision of the migration office is greatly influenced by the country of origin of the applicant and Ukraine's relations with that country. One has the impression of

totally politicization of the procedure for granting refugee status which is a violation of Ukraine's international obligations.

It is also important to note that in breach of the Law «On Refugees», when issuing a refusal to grant refugee status or to accept documents for consideration, migration office staff do not particularly look for arguments but merely refer to items in that same Law. There are cases where decisions are changed, when a migration office decides to grant refugee status, but then the State Committee, controlling all decisions, responds by sending a letter with a decision to turn the person down, and giving as the reason that the granting of this status «can adversely affect Ukraine's relations with the country of origin of the applicant».

♦ *In one case (where the applicant is a citizen of Uzbekistan) which was reviewed by the Lviv Migration Office it was decided to grant refugee status. In accordance with the procedure, this decision was sent to the State Committee to be approved. It was returned from there with the resolution: «The Committee has decided to support the negative decision of the local migration office and turn down the application for refugee status.»¹³*

♦ *During attempts to reform the State Committee on Nationalities and Religion (summer 2008), the «Social Action» Centre and partner organizations recorded cases where local migration offices refused to accept applications for refugee status, arguing that in the process of reform, they don't know how to work and who they answer to. This is evidence of yet another violation, after all in the Cabinet of Ministers Resolution it was clearly stated that both bodies (the Committee and MIA) would jointly prepare a mechanism for the transfer of powers by September 2008, continuing their normal work until that time. It was only after several complaints from nongovernmental organizations and the mission of the UNHCR in Ukraine that local migration offices resumed their work on taking applications.*

Besides the flaws in procedure, the Law «On refugees» also has several gaps which result in violations of the rights of refugees and asylum seekers. An important failing, in our opinion, is the lack of additional forms of defence. The law envisages only the granting or refusal to grant refugee status. If the person does not meet the set criteria, his or her application is rejected. Yet there are cases where a person may not be recognized a refugee, however he or she still needs international protection, and sending the person back to their country of origin would be in breach of Ukraine's international obligations, in the first instance, the European Convention on Human Rights and the UN Convention against Torture. . In such situations, many countries have additional forms or protection or auxiliary types of status. They can be called humanitarian, or, as in neighbouring Poland, «tolerant», or through some other time. The point is that the person who for various reasons does not fall within the category of refugee, but cannot be returned to their place of origin due to the well-founded fear that they could suffer torture and ill-treatment, or a threat to their life, receives leave to remain in the country until such time as the situation in his or her own country changes. Analogous forms of temporary status were once used in Ukraine in relation to people from Chechnya and Abkhazia¹⁴. They need to be reintroduced.

Another major failing in legislation is the lack of any social help for asylum seekers and recognized refugees from the State. It is difficult to imagine what legislators were thinking about when they designated a once-off payment of material aid to the value of 17 UAH (a little of 2 USD) for people who have received refugee status. Even more incredible is the requirement to turn up in Kyiv to receive this amount. Besides the lack of material aid, there is no mechanism for providing temporary accommodation for asylum seekers.

The law speaks of special Centres where asylum seekers and their families should live while their applications are being considered, however in practice there is only one such Centre in Odessa

¹³ Examples here and later are taken from real cases which the «Social Action» Centre and other organizations were dealing with

¹⁴ The Cabinet of Ministers issued two special resolutions regarding victims of internal regional military conflict: № 119 from 16.02.95 «On measures to provide assistance to people forced to leave their place of permanent residence in the Russian Federation and come to Ukraine» and an analogous resolution № 674 from 26.06.96 regarding people who had arrived from Abkhazia. Both resolutions have ceased to be in force.

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designed for around 250 people which is clearly not enough. Yet another flaw is the lack of any programmes of social adaptation or integration for refugees into Ukrainian society. There are no State-run Ukrainian language courses which is a particular problem for those who have come from countries beyond the post-Soviet realm.

4. UNLAWFUL DEPORTATIONS AND EXTRADITIONS OF ASYLUM SEEKERS AND RECOGNIZED REFUGEES

As in previous years there have been unlawful deportations and extradition of asylum seekers and recognized refugees.

DEPORTATION OF A PERSON WHO HAD RECEIVED REFUGEE STATUS

On 29 July 2008, in accordance with a decision taken by the Prosecutor General, the extradition took place of recognized refugee Oleg Kuznetsov (country of origin – Russian Federation). When extradited, Kuznetsov had refugee status in Ukraine, confirmed by a court.

On receiving a request for Kuznetsov's extradition from the Russian Federation, the Prosecutor General lodged an application with the Administrative Court for the decision by the State Committee on Nationalities and Religion to grant Kuznetsov refugee status to be revoked. On 22 July the District Administrative Court turned down the Prosecutor General's application and left the decision to grant refugee status unchanged. The Prosecutor General ignored this court ruling and, without giving Kuznetsov the right of appeal against the decision to extradite, handed him over to the Russian authorities.

Despite numerous protests to the Prosecutor General, the MIA, the President and Speaker of the Verkhovna Rada sent by human rights organizations¹⁵, not one of them has acknowledged that Ukraine's international obligations and refugees' rights were violated. No investigation has been carried out into the extradition and nobody has been punished.

DEPORTATION OF ASYLUM SEEKERS TO THEIR COUNTRY OF ORIGIN

In March 2008 the Ukrainian authorities forcibly deported 11 Tamil asylum seekers to Sri Lanka. They had all approached the UNHCR and were registered there. Six of them had filed applications to the migration service for refugee status in Ukraine.

At the end of January 2008 all of them were arrested by SBU officers. According to UNHCR, they were not given an interpreter or person to defend their interests. On 27 February 2008 a response came from the Khmelnytsky Migration Office turning down all six applications. The refusal was explained by technical reasons, infringements in how the applications were prepared.

On 29 February the Vinnytsa Human Rights Group received a phone call from one of the asylum seekers who said that he was being held in the Shepetivka Hotel, in the Khmelnytsky region and that before that he had been held in a police cell. He also said that they had not been given any food. He asked for help and said that they were afraid of being forcibly returned to their place of origin. All appeals from the UNHCR to the Ukrainian authorities to release all the men and grant them the possibility of using the procedure for receiving refugee status in Ukraine in full, including the right of appeal, were ignored. They were also not allowed to see the detained men.

¹⁵ The Prosecutor General has overstepped domestic and international law. What next? – Open Appeal from the Ukrainian Helsinki Human Rights Union 31 July 2008 <http://www.helsinki.org.ua/en/index.php?id=1217414538>; Position of the Ukrainian Helsinki Human Rights Union regarding the extradition of a refugee by Ukraine's Prosecutor General <http://www.helsinki.org.ua/en/index.php?id=1217838754>; President's Secretariat sees no problem in extraditing a refugee <http://www.khpg.org/en/index.php?id=1220922263>.

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At the beginning of March it became known that, in breach of the Geneva Convention on Refugees, they had been deported to Sri Lanka, despite being asylum seekers. The MIA Public Committee on Human Rights passed a decision to create a special working group to investigate this case, however this group has not yet made a single conclusion since its work is constantly being sabotaged by MIA employees.¹⁶

At 7.30 a.m. on 4 December 2008 officers from the Holosiyivsky Police Station in Kyiv arrived at the place where asylum seeker from Uzbekistan Abdumalik Bakaev was staying and took him to the police station.¹⁷ He was questioned and made to sign a protocol of detention written in Ukrainian, which he doesn't understand. People from the «Social Action» Centre were only able to find out where Bakaev was five and a half hours after he was taken away. The police station's logbook registers his detention at 14.00. Bakaev had received legal assistance with regard to the procedure for seeking refugee status and the Centre signed an agreement with a lawyer to provide him with legal assistance. However despite this agreement, it was only at the end of the working day that the lawyer was finally allowed to see Bakaev and ascertain the reason for his detention. Police officers at the station said that there was a decision from the Prosecutor's Office to detain him until the question of his extradition at the request of the Prosecutor General of Uzbekistan had been resolved. Despite a clearly fixed maximum period of 72 hours for holding somebody in custody, Bakaev was held in the police station for more than 96 hours. The police thus flagrantly violated the Criminal Procedure Code and Article 5 of the European Convention. On 8 December the Holosiyivsky District Court in Kyiv released Abdumalik Bakaev and effectively stopped the extradition given that the European Court of Human Rights has found it a grave violation of the European Convention to extradite people to Uzbekistan because of the widespread use of torture and other forms of ill-treatment in that country. Abdumalik Bakaev also applied to the European Court of Human Rights which on 18 December applied Rule 39 halting any possible extradition to Uzbekistan pending examination of his case by the Court.

It should be noted that the use of Article 39 of the Regulations of the European Court of Human Rights has been an effective means of protecting the rights of asylum seekers. The Kharkiv Human Rights Protection Group, for example, has managed in this way to prevent the extradition of 16 asylum seekers to Belarus, Kazakhstan and the Russian Federation. Ukraine's authorities have not once flouted such a ban from the European Court.

THE CASE OF LEMA SUSAROV

On 16 June 2007 Lema Susarov, a 23-year-old from Chechnya, was detained by men in civilian clothes who Susarov believes were officers of Ukraine's Security Service. His lawyer, Oleh Levytsky says that the men who detained him placed a bag over his head and he was taken away in an unknown direction, being subjected to beating and threatened with being handed over to the mercy of an «FSB Major». Susarov was only brought to a police station in the evening where he was, without any legal grounds, held until 25 June (rather than the 72 hours permitted in Ukrainian legislation). According to the official position from the police, Susarov was detained by police officers on 17 June. However a letter from the Russian Federation Prosecutor General's Office – № 81/3–383–07 from 20.06.2007 to Ukraine's Prosecutor General asserts that Susarov was detained by SBU officers on 16 June.

On 20 July 2007 the Solomyansky District Court in Kyiv sanctioned Susarov's remand in custody. On 27 July Ukraine's Prosecutor General took the decision to hand Susarov over to the Russian enforcement bodies. On 6 August the Kyiv Court of Appeal ordered that he be held in custody «pending resolution of the issue of his extradition». On 23 August the Pechersky District Court in Kyiv turned down his lawyer's application to examine an appeal against the decision of Ukraine's Prosecutor General to extradite Susarov.

¹⁶ For more information see «Painful lessons» <http://www.khpg.org/ru/index.php?id=1205238836>

¹⁷ «ALERT: Ukrainian authorities detain asylum seeker sought by Uzbekistan <http://www.khpg.org.ua/en/index.php?id=1228672482>.

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Even before coming to Ukraine, Susarov had approached the UNHCR in Baku, Azerbaijan, where he received prima facie refugee status. Already after his arrest in Ukraine, on 23 August 2007, the Ukrainian regional representative office of the UNHCR confirmed the force of the previous decision, and recognized Susarov to be a mandate refugee.

The search immediately began for a safe third country which would agree to grant Lema Susarov asylum and guarantee protection from unlawful extradition. UNHCR found a country by the autumn, and on 17 October Finland agreed to grant Susarov refugee status, yet Ukraine's government refused to free him.

Susarov also applied to the Ukrainian Migration Service for refugee status and received the standard rejection. Appeals against the decision of Ukraine's Prosecutor General to extradite him and the Migration Service's rejection of his asylum application continued for a year. It was only on 3 July 2008 that the Kyiv District Administrative Court found the decision of the Prosecutor General to extradite Lema Susarov to the Russian Federation to be unlawful. That same day the Prosecutor General's Office revoked the decision and released Susarov from custody. A few days later he began his new life in Finland¹⁸

5. VIOLATION OF THE PRINCIPLE OF CONFIDENTIALITY IN REFUGEE CASES¹⁹

At virtually the same time as the illegal extradition of Oleg Kuznetsov, the Prosecutor General's Office was guilty of yet another flagrant violation of legislation and international law, through handing the documents from confidential cases involving refugees to the country of their origin.

Kazakhstan nationals Z. Baisakov, Y. Baisakov, S. Gorbenko and A. Zhekebaev came to Ukraine in 2005 and applied for asylum. All of them received refugee status on 28 March 2006. In 2007 the Kyiv Prosecutor's Office carried out a check and found that the decision to grant them refugee status had been lawful.

On 8 April 2008 the Kazakhstan Prosecutor General sent Ukraine's Prosecutor General's Office a request for legal assistance under the 1993 Minsk Convention in which it asked for original letters of opposition political leaders of Kazakhstan attached to the person files of those four refugees.

On 15 July 2008 an SBU investigator removed from the State Committee on Nationalities and Religion originals of letters containing an assessment of the situation in Kazakhstan and a conclusion regarding the political motives for the persecution of the asylum seekers.

In addition, at the request of the Kazakhstan Prosecutor General, several representatives of the State Committee were questioned regarding issues connected with the granting of refugee status to the above-mentioned Kazakhstan nationals.

At the end of July 2008 these originals of documents on the cases of refugees and the interrogation protocols of representatives of the State Committee were handed over to the Kazakhstan Prosecutor General's Office.

At the present time these documents are evidence in a criminal case against Bolat Abilov, Leader of the «Azat» Party, Asilbek Kozhakmetov, Leader of the opposition movement «Shanirak» and Tolen Tokhtasinov, Head of the Kazakhstan Communist Party involving charges «of concealing a crime» this being reflected in providing information to Ukraine's State Committee on Nationalities and Religion.

Providing confidential information on cases of refugees is an overt breach of Article 11 of the Law «On refugees» which states that «information given by the application is confidential».

The principle of confidentiality is a foundation of protection of refugees' rights and its violation can lead to a breakdown of the entire system of protection of refugees. In its Opinion № 91(LII) – 2001 the Executive Committee of the UNHCR states that «The registration process should abide

¹⁸ The case was supported by the UHHRU strategic litigations fund. for more detail, see: "Human rights prevail in Susarov case» <http://www.khpg.org.ua/en/index.php?id=1215093514> un-sign international conventions or start observing them <http://www.khpg.org.ua/en/index.php?id=1213060810> green card for lema susarov? <http://www.khpg.org.ua/en/index.php?id=1188396854>

¹⁹ This part of the section by Arkady Bushchenko, Bar Lawyer and Head of the UHHRU Board

by the fundamental principles of confidentiality». It also stresses «the confidential nature of personal data and the need to continue to protect confidentiality»,

The passing of confidential information to the country of origin can lead to many undesirable consequences. The violation of this principle deprives refugees and asylum seekers of the possibility of freely and without fear justifying their applications for refugee status. It also prevents the competent bodies from receiving and assessing information from sources which are not under the control of the authorities in the country of origin of the people involved, since it puts any person (relatives, friends, or other observers) in that country in danger of persecution. Furthermore, as a result of the passing of information to the country of origin, the asylum seekers themselves can, from that moment, have grounds for well-founded fears of being returned to their county of origin.

6. THE MOST WIDESPREAD INFRINGEMENTS OF THE RIGHTS OF REFUGEES, ASYLUM SEEKERS AND MIGRANTS

6.1. THE RIGHT TO LIBERTY AND PERSONAL SECURITY

Refugees and asylum seekers are constantly subjected to unlawful detentions by law enforcement officers. The most common reason for detaining somebody is Article 203 of the Code of Administrative Offences on infringing the rules for being in the country. This involves the lack of registration which is often connected with not having a certain type of identify document at various stages of the procedure for getting refugee status and the fact that you can't get registration without the document. This is punishable by a fine of 340 to 680 UAH which is a fairly large amount for an asylum seeker. There is thus a situation where a legislative flaw (a system of four types of document and details in issuing them) leads to wide-scale infringements of the rights of asylum seekers and migrants.

According to figures from the Department on Citizenship, Immigration and Registration during 2008 57 thousand foreign nationals and stateless persons were penalized under that Article of the Code. 10 thousand 687 had their period of stay in Ukraine shortened, and 242 were placed in police special institutions.²⁰

In their fight against illegal immigration, police bodies often use unwarrantedly harsh punitive measures against migrants and asylum seekers. Decisions are made to expel them or prohibit their entering the country without taking into account their family or other circumstances – studies, work, etc.

For example, on 26 September 2008 the Human Rights Aide to the Minister of Internal Affairs in the Luhansk region, Valeria Arkhipova was approached by Jordanian national Mr. C. The latter stated that for an infringement of the rules of employment for foreign nationals in Ukraine, the Luhansk Regional Department of the MIA had taken the decision to expel him from the country and prohibit him from re-entering for one year. He considered the decision to be unjustified as well as cruel since he is married to a Ukrainian citizen and they have a small child, and there would be no possibility for his family to leave with them. Mr. C. was advised to appeal against the decision with the court and was given consultation on this issue. On 13 October the Luhansk District Administrative Court revoked the decision to prohibit his entry for a year.²¹

The police also often use Article 268 of the Code of Administrative Offences which makes participation in the examination of ones case mandatory, with this making it possible to detain a person before the court ruling. Such detentions often take place in the evening and therefore asylum seekers are forced to spend the night in the police station. Even having an agreement for legal services signed by the lawyer of a nongovernmental organization does not allow the lawyer to see his or her client before the court hearing.

²⁰ V. Batchaev: Protection of the rights of foreign nationals, refugees and asylum seekers (full reference above) – p. 136.

²¹ Ibid, p. 139.

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This situation leads to asylum seekers living in constant fear, hampers their free movement around the city and use of public transport, and forces them to often pay fines or bribes to police officers.

Migrants, asylum seekers and refugees of «non-Slavonic appearance» often get stopped and have their documents check for no good reason by the police (so-called ethnic profiling). No explanation is given for why they have been stopped, and their passport documents or other identity papers are taken away. Money or a «present» is then demanded for releasing the person or returning the documents.

In 2008, from 9-15 April in Kyiv law enforcement agencies carried out the latest raid against illegal immigrants entitled «Operation – migrant»²². An asylum seeker from Uzbekistan was detained by a patrol officer near the railway station. The person had a valid identity document confirming that he had applied for refugee status as well as registration. In Chernihiv where he was living at the time, together with his family (he had come to Kyiv on some business). In spite of the document, the patrol officers began threatening to arrest him and demanding money for his release..

Practice shows that most cases where asylum seekers are detained take place with various infringements of established procedure, for example:

- ◆ being deprived of the right to inform their relatives or a lawyer about their whereabouts;
- ◆ being deprived of the right to be informed about the reasons and grounds for their being detained (especially typical in cases where the person detained doesn't speak Ukrainian or Russian);
- ◆ being deprived of the right to be informed about their rights;
- ◆ being deprived of the right to read the material of their case or the protocols (this is also connected with the language problem which gives rise to yet another infringement, since the protocol is drawn up in Ukraine meaning that the asylum seeker in signing it usually doesn't understand what it says;
- ◆ being deprived of the right to independently defend themselves and argue their position'
- ◆ being deprived of the right to use the services of a lawyer (police officers frequently demand that lawyers provide a notarized power of attorney, this being impossible for various reasons, including the lack of a document certifying identity and an identification code without which it is impossible to carry out notary activities).

As MIA officers themselves say²³ the productivity of work carried out by police departments with foreign nationals is usually evaluated by the number of foreigners identified and punished through administrative procedure. In order to get figures in this area and create a positive impression as to their activities with the management, police officers are effectively compelled to use unwarrantedly harsh measures with respect to foreigners who with their actions have, in one way or another, infringed the rules for their stay in Ukraine. Changes are therefore needed in the priorities of the work of the police with respect to foreigners with these changes being enshrined in VIA normative documents.

6.2. THE RIGHT TO WORK

According to Article 26 of the Constitution, foreigners and stateless persons who are in Ukraine on legal grounds enjoy the same rights and freedoms and also bear the same duties as citizens of Ukraine. Article 8 of the Law «On employment of the population» and Article 8 of the Law «On the legal status of foreigners and stateless persons», foreigners have the right to carry out work activities on Ukrainian territory.

²² It is important to note that such raids are regular and carried out not only in Kyiv, but in other large cities. See, for example, information about Odessa at: <http://odessa.umvd.gov.ua/struktura/Vgirfo/operacyi.htm>. The victims of such raids are not only refugees or asylum seekers, but any other people who don't look Slavonic, regardless of whether they are legally in the country or not..

²³ . Batchaev: Protection of the rights of foreign nationals, refugees and asylum seekers, p.145.

Despite the penchant for enormous amounts of detail which legislators demonstrate, categories like asylum seekers (who have just lodged an application for refugee status, or those who are at various stages of the procedure or appeal) are not mentioned at all in legislation and are in practice deprived of the possibility of officially finding work. It should be noted that the period during which it is decided whether or not to grant refugee status is fairly long. All that time a person does not have the right of official work and receives no material assistance from the State.

However there is yet another legislative complexity: according to Articles 18 and 20 of the Law «On refugees», people with respect to whom there have been decisions to process documents for resolving the issue of whether or not to grant them refugee status, have the right to temporary employment. There is no special interpretation of this term in the Law however according to the general rule, this means that such people have the right to work during the period of time that they are legally resident in Ukraine.

The lack of a clearly defined mechanism for exercising the right to work for asylum seekers leads to opportunities for abuse by law enforcement agency staff and to constant refusals by employers to officially employ the person. During raids in search of illegal immigrants, police officers frequently detain asylum seekers without making any effort to distinguish between the two groups of people. They are detained on the basis of the same notorious Article 203 of the Code of Administrative Offences. It should also be pointed out that according to the Law «On refugees» it is the duty of a specially authorized State body on issues of employment and social policy to provide assistance in seeking work to people in respect of whom a decision has been taken to process documents for taking a decision on whether or not to grant refugee status.

However the text of the law contains the phrase «where possible» which allows this body to not fulfil its obligations at all. According to Article 5 of the Law, the Cabinet of Ministers should have approved procedure for finding work in the case of people who have received refugee status and those who are within the application procedure, however to this day no such procedure has been adopted or even drawn up. The said norm of the law has no meaning and exists only on paper.

6.3. THE RIGHT TO A FAIR TRIAL

Asylum seekers and refugees encounter numerous problems with regard to exercising the right of access to justice. This is first and foremost linked with the low level of competence of judges on issues involving refugees and asylum seekers, as well as a prejudiced attitude by judges against asylum seekers, their unwillingness to delve deeper into the details of the case and problems of translation.

Among the most widespread violations, the following should be noted:

- not providing an interpreter and language problems, since court hearings are largely in Ukrainian and not understood by the asylum seekers and refugees. They have the same problem with the majority of documents of the case written in Ukrainian;
- systematic refusals to hold open court hearings in cases over refugees;
- problems with the use of the services of a bar or other lawyer since in the majority of administrative cases, the court decides whether to allow a defender;
- It is impossible to organize power of attorney on behalf of an asylum seeker in order to represent their interests since you need a passport and identification code in order to get this notarized, whereas a lot of asylum seekers simply don't have these (during the application procedure their passport remains with the migration service, and you can't get an identification code without showing your passport);
- Problem situations created by the State, and not by the asylum seeker are constantly ignored.

6.4. FREEDOM FROM DISCRIMINATION

Asylum seekers and refugees constantly encounter discrimination in everyday life.

The worst consequences are as a result of unmotivated refusals by the law enforcement agencies to accept and register reports of crimes where the asylum seeker or refugee suffered from a racially

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motivated crime. Refusals to accept documents is often explained as being because the applicant is guilty, or the police officers cannot understand what's going on since after all the applicant does not know Ukrainian.

In April 2008 an underage asylum seeker from Afghanistan was brutally beaten by young neo-Nazis in Kyiv. When he was already unable to defend himself and lying on the pavement subjected to the blows from the thugs, a car with police officers stopped. One of the police officers got out and asked what was happening. He got the following reply: «We're beating a coon because the police are doing nothing to clean Ukraine of this dirt». The police officer then ordered the victim to show him his documents. At that moment the asylum seeker had received a refusal from the migration office and had appealed against this to the court, however due to the typical delays in issuing documents he was without any document. The only thing that he had on him was a letter from the UNHCR. Then the police officers released the assailants, detained their victim and took him to the police station. There the asylum seeker spent the night, receiving no medical care despite bleeding. The next day the police officers took all the money he had and drove him to another district of the city where they left him.

Besides discrimination of refugees and asylum seekers by police officers, there are cases when high-ranking officials or politicians see fit to make inappropriate statements which can create a misleading idea about refugees and asylum seekers in Ukrainian society. One can cite a prominent politician and former Head of the State Committee on Nationalities and Religion, Gennady Moskal:

«Human rights activists defended those ones from Sri Lanka. As if Ukrainians' rights weren't violated. They hung about Ukraine for a year. In a year they were caught, already packed into a van and heading for the border crossing. They all claimed to be supporters of Tamil-Ilam. Sorry, but for a year did they tell anyone about that? Who can check that in Ukraine?

Here the only refugees can be from Trans-dniester. Moldova is safe to live in, the rest are members of the European Union. Belarus, well there, maybe they persecute people. They're all here. And we are now giving all Limonov supporters (members of the Russian National Bolshevik Party founded by Edward Limonov – translator) refugee status. When they ripped down our flags in Sevastopol and chanted «The Crimea is Russia» we tried and deported them. Now the political climate has changed. We shouldn't follow the politics, we should look how this person complies with the law and the Geneva Convention? Yes? Yes/ No? – My dear, go and solve all these problems with your Government.

We should put a stop to these fraudsters. As it says in the law: a person crossing the border of Ukraine should say immediately at the border that I've come to Ukraine to get refugee status. To the State Border Guard, or the Ministry of Internal Affairs, or the migration service, anyone. Even go to the nearest village council and state it. They all talk about refugee status only when they're caught.»²⁴

Mr Moskal as a former head of a State body which deals with decisions regarding refugee status should know the procedure well (that is described above in the text and does not require making an application specifically» to the *State Border Guard, or the Ministry of Internal Affairs, or the nearest village council*) and understand that a person cannot always submit an application even to the migration office due to a lack of knowledge of procedure, or an interpreter to organize the documents and carry out an interview. It is also rather strange, not to say unprofessional, to hear thoughts from a politician about which countries refugees can come to Ukraine from, and from which they can't. On the basis of all this it is already clear that Mr Moskal does not know the Geneva Convention.

6.5. THE RIGHT OF FREEDOM OF MOVEMENT AND FREEDOM TO CHOOSE ONE'S PLACE OF RESIDENCE

Asylum seekers are deprived of the right to freely choose where they live in Ukraine after they have submitted their application for refugee status. Despite the fact that the Law does not contain a direct ban on changing one's address, in practice change of registration and transfer of a migration case from one local migration office to another is not possible.

²⁴ Gennady Moskal «At present nobody is managing migration in Ukraine» // the Internet publication ProUA.com, <http://www.proua.com/analytic/2008/09/04/085444.html>, 04.09.2008

An asylum seeker from Uzbekistan lodged his application for refugee status in Lviv. After some time due to family circumstances he moved to Kyiv. He sent the Lviv Migration Office a request to transfer his case to Kyiv. He received a refusal without any indication of the reasons.

In the Law this point is not mentioned at all and there is no mechanism for resolving it. That means that it all depends on the competence and will of the migration offices.

6.6. THE RIGHT TO EDUCATION

Legislation envisages the right of refugees to receive education however in practice this category of people cannot exercise this right. This happens before the norms of the Law «On refugees» and other normative acts regulating the status of refugees are not coordinated with those of the Law «On higher education». This law does not envisage taking the special status of the refugee into account and does not allow the possibility of receiving free higher education. They can apply to a higher educational institution only on general terms, as foreigners, which means that they can't receive free higher education or that they have to pay more than Ukrainians, since the rates for foreigners are higher than those for Ukrainians. Bearing in mind the difficult conditions they live in, the problems with finding work and the lack of social assistance or adaptation, the right of refugees to receive a higher education are mere words with no relation to reality. The only possibility for refugees or members of their family to receive access to free higher education is to wait not only until he or she gets refugee status, but also receive Ukrainian citizenship which at the most optimistic estimate will take no less than 5-6 years.

Besides the lack of access to higher education, refugees are deprived of the opportunity to learn Ukrainian since there is no State programme of adaptation of refugees and asylum seekers or free courses in Ukrainian.

7. CONCLUSIONS AND RECOMMENDATIONS

Single National migration policy needs to be created as a matter of urgency, together with a single body responsible for its implementation.

In order to ensure that the rights of asylum seekers are observed, the following **changes to legislation** should be made, (with separate legislative acts brought into line with each other):

1) Remove the present system of four types of document and create a single form where the stage in procedure would be indicated. Local migration offices would be responsible for making amendments to the document.

2) Establish a clear time frame for informing asylum seekers of a refusal to accept their application for consideration or to process their documents for receiving refugee status so that they receive such information in a timely manner and have the possibility to appeal against decisions.

3) Introduce provisions to ensure that a decision to deprive a person of refugee status may only be taken by a court²⁵ with the exception of cases where a person has received Ukrainian citizenship, or voluntarily decided to leave the country.

4) Clearly stipulate in the Law «On refugees» and other related laws the right of asylum seekers to work.

5) Introduce an effective mechanism of social adaptation for refugees, give them the opportunity to learn Ukrainian, to re-qualify. Appoint the relevant body responsible for this and made the appropriate changes to the State budget.

6) Establish the size of material assistance to asylum seekers and add the relevant articles to the State budget. This material assistance should be paid monthly

²⁵At present the decision is taken by the State Committee on Nationalities and Religion and only then can it be appealed against in court

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7) Bring into line with each other the Laws «On refugees» and «On higher education» so that refugees and their children are able to receive higher education free of charge competing for places with Ukrainian students..

8) Stipulate the duty of the State to ensure temporary social housing for asylum seekers. Establish periods and procedure for providing such housing.

Necessary changes to administrative practice:

1) Stop unwarranted detention of asylum seekers and refugees on charges of infringing Article 203 of the Code of Administrative Procedure

2) Stop the practice of forced expulsion and extradition of asylum seekers and recognized refugees. Those responsible must be punished..

3) Train staff of local migration offices to process cases of asylum seekers and collect information in a qualified manner about the country of origin of the applicants..

4) Ensure access for the legal representative of the asylum seekers during examination of their case in the migration service, police or court. Provide interpreters in such cases. Ensure full access to all material of the case.

5) Create an efficient mechanism so that asylum seekers and refugees can receive an identification code.

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In this unit gender inequality is viewed as a violation of human rights, while at the same time the issue of discrimination and infringement of women's rights is also raised. This approach is in keeping with the principles of the UN Convention on the Elimination of All Forms of Discrimination against Women and Council of Europe documents. For example, according to Council of Europe recommendations, there are two types of strategic directions focused on ensuring equality between the sexes and these should supplement each other. The first is gender mainstreaming into already existing policy, and the second involves drawing up specific policy in the area of equality and creating the relevant mechanisms. The main difference between gender mainstreaming and carrying out specific policy on ensuring gender equality is in the participants and in the choice of areas of activity. The starting point for «traditional» forms of policy is a specific problem which has arisen as the result of gender inequality, while the starting point for mainstreaming is already existing policy. In this case the political process is reorganized in order that a gender perspective is taken into account by the participants in this process and in achieving the aim of gender equality.²

1. MAIN ASPECTS OF GENDER INEQUALITY IN SOCIETY

On 19 September during a meeting of the National Press Club on establishing gender equality, the results were made public of a study carried out by the Centre for Social Expert Assessments of the Academy of Sciences Institute of Sociology. The results show that Ukrainians are aware of gender inequality in society (50% of those surveyed). At the same time 60% said that what was at issue was restrictions specifically of women's rights, while 47% considered it harder for women to get a job in bodies of State governance. The general level of gender equality in Ukrainian society was assessed as five on a scale of one to ten. This is one point higher than five years ago. There is also a very serious problem of sexism in the media where in many programmes, films and advertisements the topic of sex is exploited, and of a discriminatory attitude to women. Experts have noted that such an approach in the media creates gender stereotypes with this in turn having an adverse impact on Ukrainian families³.

The main manifestations of gender discrimination:

– Unemployment, both concealed and officially registered, is higher among women than men;

– Women's wages are 72,5% of men's;

¹ By K. Cherepakha, O. Kalashnyk, K. Levchenko, and M.V. Yevsyukova, specialists from the International Women's Human Rights Centre «La Strada – Ukraine»

² Gender mainstreaming: conceptual framework, methodology and presentation of good practices: Final report of the Group of Specialists on Mainstreaming». – Strasbourg: Council of Europe, – 1998, p. 16

³ «Problems of gender inequality in Ukraine remain an issue», the information and educational centre «Women's Network», 08.09.2008p., <http://feminist.org.ua/news/s8/example/index.php?id=183>

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- Women usually work in those spheres (education, medicine, the social sphere, etc) where salaries are considerably lower than the average for the national economy with this leading to an increase in economic inequality between men and women;
- In 20-30 years women's pay will be only 40-50% of men's;
- Yet women make up 56% of employees with a higher education
- A woman works 4-8 hours more than a man, work in the home is not considered as productive, and therefore not paid, nor is it taken into account for pension calculations;
- Women with children who have been on maternity leave become unable to compete on the labour market;
- Women make up an absolute majority of Ukraine's labour migrants;
- Women more often suffer domestic violence;
- Women are virtually not represented in the higher echelons of power and management;
- Almost one in three children is being brought up by a solo mother;
- Only three of the 179 members of the Ukrainian Academy of Sciences are women.

«Men's domination in Ukraine is near the indicators for Arab countries, Maxim Boroda, expert from the International Centre for Policy Studies said during a roundtable in the Zaporizhya region.⁴

Manifestations of gender inequality with regard to men are seen in the following:

- Life expectancy for men is on average 12 years less than for women;
- A higher mortality rate in younger years. Over 40% of all 16-year-old males are unlikely to reach retirement age due to a reduction in male life expectancy;
- It is mainly men who commit suicide;
- Over 90% of prisoners are men;
- Such diseases as tuberculosis, alcoholism and drug addiction are more common among men;
- Alcoholism is 6 times more common with men than with women;
- Over 30% of men will never have their own children due to a low level of reproductive health;
- There are three times as many men with AIDS, as women;
- Men's labour is valued higher than women's with men receiving 2.53 UAH per hour worked, while women receive 1.92 UAH;
- 92% of top positions are held by men. In the highest managerial positions in industry women make up 20.2%, while in agriculture the figure is 9.5%;
- Men retire five years later than women although their life expectancy is 12 years lower;
- Men control 90-95% of economic resources.

According to the results of an independent sociological study carried out by the Ukrainian Women's Consortium in 2007-2008, named as a discriminatory factor in society barrier architecture of the infrastructure of populated areas, including internal and external planning of buildings, means of transportation, streets, subways, roads, premises. This factor restricts or makes it impossible for pregnant women with small children as well as for people with disabilities, to move about. There are no ramps, wide aisles for children's prams and wheelchairs for people with disabilities and no possibility of taking buggies on public transport, etc This in turn leads to a restriction in access to various vital resources (hospitals, shops, educational institutions, banks, etc), cultural establishments and so forth.⁵

⁴ «The status of a woman in Ukraine is close to the situation in Arab countries» ;, the information and educational centre «Women's Network», 09.06.2008p., <http://feminist.org.ua/news/s8/example/index.php?id=85>

⁵ Alternative report on implementation of the UN Convention on the Elimination of All Forms of Discrimination against Women in Ukraine – prepared by a network of civic organizations on the initiative of the Ukrainian Women's Consortium – Ukraine, 2008 – p. 17

2. DISCRIMINATION ON THE LABOUR MARKET

It is often denied that discrimination of women is a problem on Ukraine's labour market. In fact gender discrimination is typical both for the public and private sectors. This does not at all mean that there are no jobs or that women do not want to work. On the contrary, modern Ukrainian women wish to fulfil themselves in society. However even before the job interview, women already experience discrimination in the very content of job ads in the media. There are a huge number of advertisements for jobs making demands as to age, gender and even appearance. Women are particularly often not considered when it comes to highly-paid and prestigious positions.

Such advertisements can usually be seen in job agencies or even in State employment centres. Women are very often rejected on the grounds of marital status and age. Discrimination is experienced by unmarried women, women with young children and women over 40. Education, experience and professional qualities are simply not taken into consideration. As a rule, in higher educational institutions young women study better than male students, however the latter are preferred when it comes to dividing out «portfolios».

Women with small children also have problems on the labour market. Many Ukrainian women cut short their maternity leave. In the mobile communications company «Life» 16% of female employees who have children return to work before the child is six months old, and another 20% – before the child's first birthday. In the company Kraft Foods Ukraine, most female employees return to work within 4 months of giving birth. The companies only pay maternity leave for that long. The heads of the companies explain early returns from maternity leave as being due to the employees themselves not wanting to lose their professional skills. However employees acknowledge that lengthy absence of female staff who have given birth, albeit not openly, is not welcomed. Women are forced into this in the main because they don't want to ruin a career that was not easy to develop. For some active women lengthy leave for looking after a child can turn into a real punishment, psychologists believe.⁶

There are also bureaucratic obstacles towards receiving the payments and benefits due mothers with small children. These obstacles are so serious, and the payments small anyway, that some women simply don't bother to get them. This trend which is increasing with each year has received coverage in the media.⁷

However there are also positive moves in this area. In the combined sixth and seventh State report on implementation by Ukraine of the UN Convention on the Elimination of All Forms of Discrimination against Women, submitted in 2008 to the UN Committee, detailed information is provided about benefits to pregnant women, women after childbirth and women with children. In 2008 payments to families following the birth of their first child were increased to 12,240 UAH, and the same amounts have been introduced for those families which have adopted a child. Furthermore, adopting fathers received paternity leave of 56 days.

The need to make some payments according to place of work is leading to certain problems since employers are not in a hurry to honour this right. Private employers are sometimes not informed about the fact that payments, specifically for maternity leave, looking after a child up till the age of 3 is carried out from budget and insurance funds. Due to the lack of understanding of this by employers additional problems when employing women arise⁸.

⁶ «Ukrainian women don't value maternity leave» // 04.04.2008, <http://korrespondent.net/ukraine/events/423464>

⁷ «Carefree life» // Journal «Korrespondent», 2009, № 14, – pp. 19-20.

⁸ Alternative report on implementation of the UN Convention on the Elimination of All Forms of Discrimination against Women in Ukraine – prepared by a network of civic organizations on the initiative of the Ukrainian Women's Consortium – Ukraine, 2008 – p. 38

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3. THE RIGHT TO HEALTHCARE AND ACCESS TO HIGH-QUALITY MEDICAL SERVICES

Violation of people's rights, and in the first instance women's, in the sphere of healthcare is addressed in a separate section. Free medicine as declared by legislation has long turned into a source of great expense in practice for those requiring medical services.⁹

Fees have been brought in also for gynaecological services, including for pregnant women, making access to medicine dependent on the economic position of the women or their families.

Some illnesses are also gender specific, for example, breast cancer. In Ukraine each year 16 thousand new cases are diagnosed, and 8 thousand women die of breast cancer.¹⁰ The State should finance prosthesis. In 2007 the procedure for providing breast prosthesis in the post-operative period changed. Besides medical documents, one also needs documents from the local Department of Employment and Social Policy. The number of bureaucratic obstacles has thus risen. Furthermore, women's right to privacy is infringed with their medical details being divulged, etc. There are a growing number of women who reject such free assistance and prefer to buy prosthesis themselves.

4. PROBLEMS WITH THE RIGHTS OF WOMEN IN RURAL AREAS

When speaking of violations of women's rights, mention is seldom given to women from rural areas, who make up a specific socio-demographic group. The only comprehensive study in this area was carried out in 1997-1998.¹¹ At the same time, the majority of rural dwellers are women. The poor development of infrastructure, the lack in most populated areas of plumbing, running water and gas means that women's efforts to run their homes remain on the level of last century or earlier. Engagement in hard physical labour, a low level of mechanization and production processes overload women. Disproportionately low prices for agricultural produce lead to a low level of workers employed soled in agricultural production. Rural women have worse access to medical, cultural and everyday services than their urban counterparts, For example, over recent years centres for medical assistant and midwife services have closed in many rural areas.

5. HUMAN RIGHTS ISSUES FOR ELDERLY WOMEN

Women are in the majority among those people of retirement age, due to their longer life expectancy. Nonetheless, yet one can observe a reduction in the size of women's pensions as against men's¹². According to information from «Care of the Elderly in Ukraine», elderly women also suffer from violence and ill-treatment in the family, lack of respect from people in authority, especially in the social services and medicine, from poverty and lack of money to buy food and the most basic medicine.¹³ For example, 55.1% of respondents in Ivano-Frankivsk and 54,6% in Khmelnytsky answered yes when asked if they know of cases where elderly people have been refused medical

⁹ More detail in the section on healthcare.

¹⁰ Alternative report on implementation of the UN Convention on the Elimination of All Forms of Discrimination against Women in Ukraine – prepared by a network of civic organizations on the initiative of the Ukrainian Women's Consortium – Ukraine, 2008 – p. 36

¹¹ The social position of the rural woman in Ukraine – Kyiv – UKSD – Academpress, 1998.

¹² According to figures from E. Libanova, Director of the Academy of Sciences Institute of Demography.

¹³ 1500 people aged between 55 and 97 were surveyed. Among them 66,7% were women and 33,3% – men. The survey was carried out in Cherkasy, Chernihiv, the Crimea, Ivano-Frankivsk, Kyiv, Mykolaiv, the Sumy region, Ternopil, Donetsk and Khmelnytsky.

treatment purely because of their age.¹⁴ Three thirds of those questioned in Ternopil and Donetsk had experienced this themselves. Two thirds of those surveyed were women.

6. SEXISM IN THE MEDIA AND ADVERTISING

Studies carried out from 2007-2008 continued to find set gender stereotypes in society. For example, 36,4% see such stereotypes as constant, while 45.4% say they encounter them periodically.¹⁵

Advertisements contain a huge amount of sexism and discrimination of women, including the sexualizing of women's bodies, comparison of women with the goods advertised and flagrant lack of respect for women. Women's bodies are used to advertise floor tiles, beer, furniture, cars, etc.

Numerous appeals have been made to the Ministry for the Family, Youth and Sport, the State Committee on Television and Radio Broadcasting, the President and others, but to no avail.

This is despite the fact that Article 3 of the Law «On ensuring equal rights and opportunities for men and women», names among the main areas of State policy in this area «development and promotion among the public of a respect for gender equality, and development of educational activities in this sphere», as well as «protection of society from information aimed at sexual discrimination».

One positive note is that in 2008 there were more professional and analytical articles devoted to women's rights and gender equality.

7. THE RIGHTS OF WOMEN PRISONERS

The number of women prisoners is comparatively low and is steadily falling. Although their needs are very different from those of men, the rules and regulations in penal colonies virtually do not take this into consideration. At the present time the penal system is made up of 183 penal institutions holding around 117.3 thousand prisoners. Over 25.5 thousand remand prisoners and 7.7 thousand convicted prisoners are held in 32 pre-trial detention centres. In some of these institutions, as well as in medical units, there are 6.5 thousand convicted women prisoners of whom 100 are underage, and most are of child-bearing age.

The situation is difficult for pregnant women and mothers with children in penal institutions. Clearly this situation is stressful both for the unborn children, and for children living with their mother in these conditions.

At present women prisoners are held in 11 penal colonies, a corrective centre and the Melitopol Educational Colony for Juvenile Offenders. In Odessa and Chernihiv there are facilities for women with children up to the age of 3. in 2007 71 women prisoners had babies.

A significant step in improving the provision of services to pregnant HIV-positive women prisoners was the addition to the Inter-departmental Order «On measures aimed at organizing prevention of transmission of HIV from mother to child, medical assistance and social accompaniment of HIV-positive children and their families» from 23 November 2007 of an Instruction «On procedure for prevention of transmission of HIV from mother to child in institutions of the State Penal Service of Ukraine».¹⁶ There is also an urgent issue regarding timely examination and provision of the relevant medication for antiretroviral therapy of pregnant women in colonies, as well as a problem with pregnant HIV-positive prisoners being poorly informed on HIV issues, this making it difficult to form a positive approach to the therapy. There is also insufficient psychological accompaniment. More needs to be done to raise staff motivation to create the conditions for pregnant women to be

¹⁴ «Discrimination of the elderly in Ukraine» p. 3

¹⁵ Alternative report on implementation of the UN Convention on the Elimination of All Forms of Discrimination against Women in Ukraine – prepared by a network of civic organizations on the initiative of the Ukrainian Women's Consortium – Ukraine, 2008 – p. 16.

¹⁶ Ministry of Health website, <http://www.moz.gov.ua/ua/main/press/?docID=11460>

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able to carry out measures aimed at preventing HIV being passed to the child. The use of caesarean operations should also become more widespread for women who are transported under guard to healthcare institutions to give birth. There is urgent need for a concept strategy for protecting the reproductive health of women prisoners of child-bearing age and formulating a positive and responsible attitude to parenthood and family values

Although women prisoners, especially mothers, are viewed as vulnerable, the penal system has still not developed comprehensive measures for their full socialization. A major factor in combating dangerous infections is the fact that prisoners are held in premises with up to 100 prisoners together. In this Ukraine differs from other European countries where prisoners are held in cells, with 3-5 in each. These issues were discussed at an international conference on «Healthcare of women in places of deprivation of liberty» held in Kyiv in November 2008.¹⁷

There are civic organizations which give attention to women prisoners' rights, like for example, the Information and Consultation Women's Centre in Kyiv [the Centre] and other organizations. The Centre published its study «Women and mothers with children in prison». The following were given as the main infringements of women prisoners' rights:

- ◆ Within the penal system women and mothers with children are still not viewed as a vulnerable group with special needs and problems
- ◆ In penal institutions mothers and children do not live together as family units;
- ◆ After leaving the colony, women with children are not provided with assistance although it is well-known that women experience more problems of a social and material nature than men on release.¹⁸

A study carried out by the civic organization «Convictus-Ukraine» in 8 regions in order to choose a region for a pilot project «Comprehensive programme of reintegration into society of released prisoners» recommended the Kharkiv region as most suitable. The project is aimed at developing a system of social adaptation for released prisoners in one region, then drawing up and creating a model of a Centre for Social Adaptation for people about to be released from imprisonment. During preliminary visits, members of «Convictus-Ukraine» examined premises of a former hospital which it is intended will house the Adaptation Centre.

8. DISCRIMINATION AGAINST MEN

One group of men whose rights are violated are those bringing up children alone with legislation not allowing them the same rights as those of mothers.

This can be seen by an analysis of a number of laws including the Law «On State assistance to families with children» and «On leave». This was published in 2008 by the Programme for Equal Opportunities and Women's Rights.¹⁹

For example, according to Article 1 of the Law «On State assistance to families with children», all Ukrainian citizens in families where children are being raised or are living have the right to State assistance, in cases and under conditions set out in the Law and other laws. Thus Article 1 does not discriminate between men and women, however later in the text a separate type of assistance is allowed for: «assistance to children of single mothers», thus excluding single fathers.

There are norms discriminating between men and women in some articles of the Law «On leave» and in the Code of Labour Laws.

For example, according to Article 19 of this Law and Article 73 of the Code of Labour Laws, a women who is working and has two or more children under 15, or a disabled child, or has adopted

¹⁷ The international conference on «Healthcare of women in places of deprivation of liberty» is underway // Ministry of Health website, 14.11.2008., <http://www.moz.gov.ua/ua/main/press/?docID=11460>.

¹⁸ Women and mothers with children in prison – Kyiv, 2008, pp. 5-6.

¹⁹ K.B. Levchenko: Methodological approaches to carrying out gender and legal assessments of domestic legislation – UNDP

a child; a father who is bringing up a child without its mother (including where the mother is in hospital for a long period), as well as a person who has taken a child into his or her care, is entitled to 7 calendar days extra fully-paid annual leave. If there are several grounds for providing this leave, the overall amount may not exceed 14 calendar days. These articles thus treat men and women with family commitments differently.

In defence of their rights several hundred single fathers held a rally in Kyiv on 20 September 2008 demanding that State officials pay heed to their problems. The event was organized and run by the All Ukrainian Association of Brave Dads. The men called for the introduction of paternity leave, as well as a nationwide Fathers' Day on 27 October.

According to legislation a woman bringing up a disabled child is entitled to retire five years early. Men do not have this right.²⁰

In Kharkiv the women's organization «Krona» submitted for public discussion men's social problems. Researchers into gender issues have reached the conclusion that equality of rights and opportunities for men and women needs to be considered from both sides.²¹

9. OVERVIEW OF AMENDMENTS TO LEGISLATION PERTAINING TO GENDER EQUALITY

In April 2008 the Verkhovna Rada with a large majority passed the Law «On amendments to some legislative acts in connection with the adoption of the Law «On ensuring equal rights and opportunities for men and women».

The law adds a provision to Article 20 of the Law on citizens' associations stating that such associations are entitled to take part in drawing up draft decisions on issues of gender equality adopted by the authorities and bodies of local self-government; to delegate their representatives to consultative and advisory bodies on ensuring gender equality created by the authorities and bodies of local self-government and to carry out monitoring in this area.²²

However analysis of specific changes made to legislation shows that they do not move society any closer towards an affirmation of gender equality since they effectively repeat already existing norms. At the same time the changes really needed were not discussed at all. This includes for example the creation of a mechanism and system for complaining about sexual harassment at the workplace, establishing liability of legal entities and individuals for sexual discrimination, the creation of the office of Ombudsperson on issues of equal rights and opportunities for men and women, etc.

According to experts, there are major problems with application of the norms of the Law «On ensuring equal rights and opportunities for men and women» due to the difficulty of applying the norms and the lack of sanctions in cases of gender discrimination.²³ A good example of this is Article 23 which says that a person is entitled to material and moral compensation for damages as the result of sexual discrimination or sexual harassment. Moral damages are compensated regardless of material losses and are not linked with the size of these losses. The Article goes on to say that the procedure for compensating material losses and moral damages in such cases is established by law however there is still no law setting out this procedure.

One should, nonetheless, note that at the initiative of the Department of Family and Gender Policy of the Ministry for the Family, Youth and Sport, at the end of 2008 an expert working group

²⁰ Single fathers in Kyiv protested against infringements of their rights // The information and educational centre «Women's Network» 21.09.2008., <http://feminist.org.ua/news/s8/example/index.php?id=181>

²¹ «Lack of protection for men's rights criticised in Kharkiv» // Deutsche Welle, 25.06.2008.; «Women in the Kharkiv region come out in defence of men's rights // 25.06.2008, <http://glavnoe.kharkov.ua/news/n7582>

²² «The Verkhovna Rada has changed the concept of gender equality // 15.04.2008, <http://news.liga.net/news/N0819713.html>

²³ Alternative report on implementation of the UN Convention on the Elimination of All Forms of Discrimination against Women in Ukraine – prepared by a network of civic organizations on the initiative of the Ukrainian Women's Consortium – Ukraine, 2008 – p. 8

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was created to draw up provisions on procedure for receiving complaints regarding gender discrimination and sexual harassment, as defined in law, as well as preparing an expert commentary to the Law On ensuring equal rights and opportunities for men and women»

In the Ministry of Internal Affairs, in implementation of a decision by the MIA Public Council on safeguarding human rights in police activity № 8 from 24 January 2008, and in accordance with a proposal of the Ministry for the Family, Youth and Sport 28 April 2007 № 5.2/3876 and with the MIA action plan on the State Programme for affirming gender equality in Ukrainian society for the period up till 2010, a working group was set up for implementing a gender approach. It is made up of 10 specialists from the MIA, higher educational institutions of the MIA and civic organizations (Instruction № 105 from 6 February 2008). A meeting took place from 18-20 February 2008 in order to draw up a department concept framework for a Programme on ensuring gender equality in police stations.

In accordance with this concept framework, in 2008 the Department for Monitoring Human Rights in the Police Force drew up a draft Programme for ensuring gender policy in the Police for the period up to 2011. This Programme was approved by the MIA Public Council on 12 June 2008, Protocol № 9)²⁴.

10. RECOMMENDATIONS

1. On countering gender discrimination on the labour market.

The recommendations put forward in the Human Rights Watch study on eliminating discrimination against women on the Ukrainian labour market remain valid. They include the following calls:

1.1. High-ranking public officials should publicly condemn discrimination and organize nationwide anti-discrimination training programmes, both for civil servants at all levels of power, and for trade union figures and employers.

1.2. The Verkhovna Rada should take steps towards changing legislation so as to ban job advertisements specifying a particular sex, and removing gender restricts when providing concessions for those taking care of a child.

1.3. The Ministry of Employment and Social Policy should carry out work-based investigations regarding employers suspected of gender discrimination.

1.4. The State Employment Service should refrain from any practice based on supporting employment dependent on gender.

1.5. The EU should cooperate with Ukraine in order to bring the latter's legislation and practice into line with EU anti-discrimination norms.

1.6. The relevant UN bodies overseeing compliance with agreements should investigate whether the Ukrainian government's actions are in accordance with its commitments on gender equality.

1.7. International financial institutions should recognize the role discrimination plays in restricting economic opportunities for women and among the poor and make their level of support for Ukraine dependent on its reasonable progress on eliminating discrimination on the labour market.

2. According to the results of a comprehensive study on sexual harassment carried out by the International Women's Human Rights Centre «La Strada – Ukraine», a number of measures need to be carried out in order to combat sexual harassment at work. The following should be implemented:

2.1. Comprehensive State policy against discrimination in the workplace should be created, including though widespread information campaigns.

2.2. Carry out awareness-raising and educational work with representatives of trade unions and employers' associations in order to protect the interests of victims of sexual harassment

²⁴ Programme for gender development of Internal Affairs structures <http://umdpdpl.info/index.php?id=1233847268>.

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2.3. Improve legislation in this sphere, including preparing a mechanism for implementing the provisions of the Law «On ensuring equal rights and opportunities for men and women» with regard to complaining about sexual harassment at work

3. Protection of the rights of women prisoners

In the study «Women, mothers with children in prison» there are a number of recommendations.

3.1. Changes to legislation regarding conditions for women and mothers with children in prison should be of first priority in making changes.

3.2. There is an urgent need to draw up special prison police with regard to mothers and children based on international standards and norms, including the Convention on the Rights of the Child.

3.3. Analyze the viability of changes to legislation on giving equal opportunities to fathers and mothers in bringing up their children if one of the parents is serving a term of imprisonment.

4. Creation of a system (or mechanism) for complaints of gender discrimination.

4.1. Draw up and introduce amendments to the Law «On ensuring equal rights and opportunities for men and women» with regard to specifying a mechanism for complaining about cases of gender discrimination.

4.2. Draw up and approve provisions on the procedure for receiving and dealing with complaints about cases of gender discrimination by subdivisions of the Ministry for the Family, Youth and Sport.

4.3. The Human Rights Ombudsperson should make public information about reaction to complaints about cases of gender discrimination.

4.4. In preparing an annual report, the Human Rights Ombudsperson should provide a separate section on fighting gender discrimination and protecting women's rights.

5. Teaching in the field of women's rights and gender equality

5.1. Carry out monitoring of the State programme for establishing gender equality with regard to carrying out training for civil servants on gender equality.

6. Information support for establishing gender equality and breaking down gender stereotypes in the media and advertising

6.1. Devote one of the meetings of the Interdepartmental Coordination Council on Family and Gender Policy to problems of gender discrimination in the media and advertising.

6.2. The State Committee on Television and Radio Broadcasting, the Ministry for the Family, Youth and Sport and civic organizations should carry out regular monitoring of advertising and the media for gender stereotypes and discrimination. An analytical report should be prepared on the results.

6.3. Add sections of gender policy to the official websites of the central authorities.

XXI. PRISONERS' RIGHTS¹

1. GENERAL INFORMATION

This section reviews some aspects regarding the rights of people imprisoned in penal institutions and investigative isolation units [SIZO – also referred to as pre-trial detention centres] of the State Department for the Execution of Sentences [hereafter the Department], As 01.01.2009 145,715 people were held in the Department's places of confinement. These included 109,961 convicted prisoners in 136 penal institutions and 34,148 people held in SIZO (against 32,110 the previous year). The number of convicted prisoners fell by 3,744 prisoners (2.65%). In 2005 there had been a 9.31% drop; in 2006 – 5.97% and in 2007 – 6.87%².

In 2008 40,702 were imprisoned in penal institutions, and 41,856 released, including 25,798 on parole. 12,886 people were released from SIZO, including 3,810 whose sentence had been served, or who were released on parole. Clearly the reasons for people being released from SIZO were also the imposition of punishment not linked with deprivation of liberty, or due to a small period of imprisonment which the person had already served in SIZO. These figures show that the use of remand in custody as a preventive measure with respect to people accused of a crime is unwarranted and excessive. The number of acquittals remains pitiful – a mere 0.2% of the total number of verdicts passed.

As of 1 March 2009 there were 6.3 thousand female prisoners, of whom 103 were minors. There are also around 2 thousand women being held in investigative isolation units and 15.5 serving punishments not linked with deprivation of liberty. There were 1.5 thousand juvenile offenders, including 101 young women, in 11 educational colonies.

The number of life prisoners rose by 92 and on 1 March 2009 constituted 1,555 prisoners.

2. PROBLEMS OF THE PENAL SYSTEM

The new Penal Code [kryminalno-vykonavchy kodeks] came into force on 1 January 2004, with internal normative acts of the Department for the Execution of Sentences being adapted to bring them into line with the new Code. Application during the first five years of the new Penal Code's existence make it possible to state with certainty that the new normative legal acts have proved to be ineffective, contradictory and not in line with international standards regarding the treatment of prisoners. They have not met expectations and require considerable overhauling. The problems of the penal system can be divided into conceptual, defining the legal position of deprivation of liberty and the main directions in the activity of the State authorities with regard to applying sentences, and practical, arising during the process of serving sentences, with both types caused by failings in penal legislation.

¹ By Yevgeniy Zakharov, Co-Chair of KHPG. Material used from «Issues related to ensuring prisoners' rights in Ukraine's Penal System» // V. Badyra, A. Bukalov, A. Hel, M. Romanov and I. Yakovets, Kharkiv, 2009 and the Donetsk Memorial Fourth Annual Report «Prisoners Rights in Ukraine – 2008».

² www.kvs.gov.ua

The first category includes conditions in SIZO; the creation of conditions which are additional and independent punishment; the contradictory status of the Penal Service; the lack of mechanisms of public control, and others. One can include in the second category safeguarding of the right to legal aid; the use of coercion and physical force; measures of incentive and penalty with relation to convicted prisoners; the impossibility of complaining against the actions of the penal administration; infringement of prisoners' economic and social rights – to work, to pension provisions, medical care, etc.

We will consider some of these problems in more detail.

3. THE CONDITIONS IN SIZO

Article 62 of the Ukrainian Constitution states that a person is presumed innocent of committing a crime and shall not be subjected to criminal punishment until his or her guilt is proved through legal procedure and established by a court verdict of guilty.

This means that no one should suffer restrictions tantamount to criminal punishment unless their guilt has been established by the appropriate body in accordance with the relevant procedure. A person is considered innocent until proven guilty and therefore his or her treatment should not differ from the treatment of a free person not facing criminal proceedings.

According to the Law «On pre-trial detention» people remanded in custody have the rights enjoyed by Ukrainian citizens with restrictions established by the said law and other normative legal acts however in other provisions of the same Law restrictions are set which are difficult to explain from the point of view of the presumption of innocence.

Take, for example, the provision regarding the duration of the daily walk, this being restricted to one hour a day. The rule is incomprehensible especially given the number of people held in investigative isolation units. The European Committee for the Prevention of Torture [CPT] found the number in some cells to be excessive (in one cell of no more than 10 square metres up to seven people were held). What is more, not all suspects have their own beds. With such a lot of people in a small space dirty and unsanitary conditions are inevitable. There is obviously a lack of fresh air which can be deemed a form of ill-treatment. These conditions are worse even than those in which convicted prisoners are held and pose a real danger to health.

The next baffling restriction is on the possibility of spending money to buy food items and basic necessities. The amount allowed by law equals the minimum wage. Yet what is the point of such a restriction? You could understand restrictions on the range of products and other items, this being linked with the specific nature of an institution holding a large number of people of the same sex. Yet why a person who has not been convicted by a court cannot spend the amount of money that he or she wishes is difficult to understand. Furthermore investigative isolation units are not able to ensure normal food and material provisions for those held in them. This provision, therefore, also contradicts the principle of the presumption of innocence.

Nor is this principle complied with in the procedure for suspects' or defendants' correspondence and their right to send appeals and letters to international organizations and State bodies. It is infringed also as regards the right to receive visits. These rights may only be exercised with the written consent of the investigator or investigation unit dealing with the case. Such restrictions are incomprehensible and cannot be explained by the objectives pursued in remanding a person in custody. This consent is all the more bafflingly redundant given that procedure for sending letters envisages their mandatory scrutiny while visits to a suspect or defendant are held in the presence of SIZO administration staff.

The norms of the Law «On pre-trial detention» with regard to sending complaints or applications to the Prosecutor are also contradictory. According to the general rule such applications or complaints are to be sent within 24 hours to the addressee and are not subject to scrutiny. However if such complaints pertain to the conditions in pre-trial detention centres, then they are sent within three days. This means that all complaints or applications to the Prosecutor need to be inspected

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in order to identify those regarding the conditions in pre-trial detention centres, and only then will some of them be sent in adherence to the 24-hour time limit, and others can wait another two days. Thus the rules of the Law «On pre-trial detention» do not just flout the principle of the presumption of innocence, but they contradict each other.

The next failing lies in the material conditions. Since people held in pre-trial detention centres do not have convicted prisoner status, then the principle of the presumption of innocence should apply in full measure and their conditions should be those or as close as possible to those of people at liberty. Yet the conditions are even less appropriate than those for convicted prisoners.

According to the law, people remanded in custody are assured everyday conditions which meet sanitation and hygiene rules. This in practice is not the case. The CPT inspections of pre-trial detention facilities demonstrated that sanitation and hygiene standards in Ukrainian SIZO are not met. A number of infringements and shortcomings were identified, and in some SIZO the lack of natural light, as well as artificial light turned on during the hours of darkness; lack of ventilation or of access to fresh air. It is the failure to observe these international normative acts that has led to an increase in the number of cases of people contracting tuberculosis in SIZO. Furthermore, the premises in which suspects and convicted prisoners are held in SIZO are in a terrible state. Many require repairs and reequipping. The toilets were in an unsanitary state and were not partitioned off from the living part of the cell. Furniture is extremely poor and does not meet minimum human requirements for comfort.

The Law stipulates that there must be no less than 2.5 square metres per remand prisoner, while for a pregnant woman or a woman with her child the norm is 4.5 square metres. International acts demand that in places of imprisonment there should be 4 square metres for person. The difference is clear and requires no commentary. Domestic standards are almost half that of international ones.

The Law states that medical care, as well as preventive medicine and anti-epidemic work in places of pre-trial detention are organized and carried out in accordance with legislation on health-care. The procedure for providing medical assistance, the use of hospitals, etc, the involvement for this purpose of their medical personnel and the holding of medical expert assessments is stipulated by the Department for the Execution of Sentences, the Ministry of Defence and the Ministry of Health. In the final analysis medical care for people held in pre-trial detention centres is carried out according to the rules and norms regulating the process of serving terms of imprisonment. Here the main problem is that these SIZO are the most over-crowded and least properly equipped, and it is therefore impossible to ensure proper conditions in them. This is particularly important given that people are held in these places who have not had the question of their guilt or innocence established by a court.

The principle of the presumption of innocence is thus basically not safeguarded in Ukraine since people with the status of defendant or suspect who have been remanded in custody are in conditions much worse than those for convicted prisoners and most of the norms applying to deprivation of liberty and the status of a convicted person apply to them.

It is not so much that domestic legislation is contradictory and not in accordance with international norms. The problem lies elsewhere. The declaration of the principle of the presumption of innocence and mechanisms for following it demonstrate the attitude of the State and society to this guarantee. Equating suspects and defendants with convicted individuals shows the categorically punitive nature of all criminal policy and of the State system. The requirements of the law do not transcend the level of the imperative and show that the presumption of innocence is purely declarative and has no mechanisms for ensuring and exercising them.

4. PUNISHMENT THROUGH THE CONDITIONS

Punishment through deprivation of liberty places first the task of creating the kind of conditions which will leave convicted prisoners in no doubt where they are and what place, from the moment they begin their sentence, they occupy in society. This situation is a direct violation of Article 102

of the Penal Code which states that the regime should minimize the difference between conditions in penal colonies and at liberty.

The everyday conditions in penal institutions do not encourage awareness of personal dignity and do not orientate a person towards respect for him or herself, and for those around. The overcrowding of some institutions, squalid and dirty premises, inadequate material and everyday provisions, the form of dress and external appearance stressing the situation and status of a prisoner are a by no means comprehensive list of the features typical of conditions for serving sentences.

A considerable part of the punitive effect of deprivation of liberty is specifically in the conditions. The law includes among other measures of influence on prisoners the following: work, socio-educational training, general education and vocational training. Among means of influence the living conditions are the most evident and tangible for prisoners. They are not always provided with work, studies are not compulsory and not of a sufficiently high quality, and socio-educational training is not always based on the individual (and more often has a certain ideological or situational colouring).

The conditions are of a pronounced punitive nature which the prisoners encounter on a day to day basis. They can without exaggeration be considered degrading and humiliating. It is, for example, difficult to explain the need to make all prisoners have a short haircut and wear the same badly-sewn and dreadful clothes. Constant references to insufficient funding have long not been current and truthful since the Penal System has normal funding which allows it for some reason to increase staffing of State bodies and penal institutions. If this is the case, why is it not sufficient for those others involved – the prisoners?

This can only be explained as deliberate influence aimed at demoralizing people and making them passive and obedient. It would seem that the main aim of punishment is the wish to humiliate people, make them guilty for their entire lives.

The creation of these conditions in penal institutions in fact discredits such aims of punishment as reform and resocialization. No positive changes can take place in the prisoner himself if he is in conditions not suited for holding people. The chances of reform are thus extremely dubious, and the same can be said of resocialization. Since the legislators have created an indissoluble link between these two categories, there can be no resocialization without reform. Furthermore, it is difficult to imagine how a person held in inhuman conditions can be reinstated in their social status as the law requires. The conditions basically make the aims of punishment unattainable and render meaningless the content of penal system activities.

Ukrainian society at the present time sees material comfort as a fundamental value and deprivation of this is accordingly most tangible and painful. Other values such as liberty, freedom of communication and movement, the choice of a form of activity, etc, are for the moment not clear, independent and so valued that prisoners should acutely feel their deprivation and try to avoid such restrictions. Ukraine's penal concept sets prisoners as «beyond society», as people who must be punished and «reformed» by means of an impersonal system which fails to take into account the individual and is not aimed at respect. The main focus of Ukraine's penal law is on the serving of sentences.

The paradigm and sense of punishment in West European countries are quite opposite. International acts require the establishment of a number of minimum standards for all those aspects of managing prisoners which are of vital importance for ensuring human conditions and proper treatment of prisoners in contemporary and progressive systems. Thus the main aim of normative acts is to formulate those requirements and criteria which should be met by the conditions for prisoners in any institutions. They are the minimum requirements in any place where people experience restrictions of their rights. What is involved, moreover, is rather more than the individual's rights, but also a sense of respect for the person's human dignity and attitude to him or her as a person.

Items 64 and 65 of the «Standard Minimum Rules for the Treatment of Prisoners» state that since a prisoner has been deprived of his liberty, this is in itself punishment. Therefore the conditions and prison regime should not exacerbate the suffering, except in cases when this is warranted by the need to isolate a person or to maintain order.

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It is also necessary to make efforts to introduce regimes in penal institutions aimed at:

- a) ensuring that conditions meet the requirement of human dignity and the norms recognized in society;
- b) minimizing the adverse effects of imprisonment and the difference between life in prison and in the outside world which weaken prisoners' sense of personal dignity and responsibility;
- c) supporting and strengthening those links with relatives and the outside world which best serve the interests of prisoners and their families;
- d) ensuring prisoners the opportunity of developing vocational skills and ability, which will enhance their prospects for social reintegration following their release.

The most significant and painful losses for prisoners are in the very fact of being deprived of their liberty, and this is punishment enough. Legislators and penal practice should not be aimed at punishing prisoners through inappropriate deprivation of fundamental requirements as regards comfort and sanitary conditions. Punishment should not be aimed at humiliating a person, diminishing their sense of worth and imposing a feeling that they will carry a stigma all their lives. Prisoners lose the ability to move about freely, to choose where to live, and their form of activity, as well as the opportunity to make decisions for themselves, and determine their own actions. It is deprivation of these vital components that constitute the greatest punishment.

The European penal concept is based on the conviction that even a person who has committed a crime remains a person and should be able to return and become a part of society.

This difference is major and determines the direction and style of punishment in Ukraine and West Europe. Without a readjustment in thinking at this conceptual level and greater recognition of the importance of such values as liberty, autonomy, responsible, freedom of communication and of movement, fundamental changes and the transformation of the system and practice of those bodies and institutions responsible for restricting rights and freedoms, are impossible.

5. THE EQUIVOCAL STATUS OF UKRAINE'S PENAL SERVICE

By joining the Council of Europe on 9 November 1995, Ukraine took on various commitments, including implementation within stated periods of a number of specific duties listed in Opinion № 190 of the Parliamentary Assembly of the Council of Europe. One of the latter was to demilitarize the Penal Service and transfer it to the control of the Ministry of Justice. .

This voluntarily made State commitment has not been kept. On 22 April 1998 the President issued Decree № 344/98, which created the State Department for the Execution of Sentences [the Department]. Another Presidential Decree № 248/99 from 12 March 1999 withdrew the Department from temporary subordination to the Ministry of Internal Affairs [MIA] and it has since then existed as an autonomous central body with special status. The management of the Department considers that by the withdrawal of the penal system from the jurisdiction of the MIA Ukraine's commitments to the Council of Europe have been fulfilled. This is not, however, the case as is confirmed by Item 8 of the Parliamentary Assembly of the Council of Europe [PACE] Resolution № 1346(2003), where it is clearly stated that: the Assembly urges the Ukrainian authorities to complete transfer all the entire penitentiary system to under the control of the Ministry of Justice, while Item 13.7 of PACE Resolution № 1466 (2005) on the honouring of commitments and obligations by Ukraine, points to the need to «finalise the transfer of the State Department for the Execution of Punishments to the Ministry of Justice as required by Opinion № 190 (paragraph 11.VII)»

Cabinet of Ministers Resolution № 683 from 17 May 2006 «On amendments to the list of central authorities whose activities are directed and coordinated by the Cabinet of Ministers through the appropriate ministers» stated that the work of the State Department for the Execution of Sentences was directed and coordinated by the Cabinet of Ministers through the Minister of Justice. From the content of the Resolution it is difficult to understand what is meant by «coordination of activities» since according to the Law «On the State Penal Service» the Department has the status of a central

executive body on penal issues. It has no relations of subordination with the Ministry of Justice, with the two bodies being equal.

At the beginning of 2007 a draft law was prepared which envisages subordination of the Department to the Ministry of Justice, however due to the difficult political events and the dissolution of the Verkhovna Rada this was not given consideration

Throughout 2007 the process of transferring the Penal Service to the Ministry of Justice was inconsistent and contradictory. The Cabinet of Ministers on 11 July 2007 passed Resolution № 916, which approves new Provisions on the Department, however, with his Decree № 667/2007 from 28 July the President suspended the force of this Resolution, justifying this on the grounds that the activities of the Department must be regulated by law, not by a Cabinet of Ministers Resolution. In Decree № 401/2008 from 25 April 2008 the President presented a «gift» to the Department for its tenth anniversary by passing a Concept Strategy of the State Penal System which was clearly prepared by the Department itself. Despite all the rhetoric, this effectively retained the existing situation where the Department, in the words of its Head Vasyl Koshchynets, is a law enforcement body and is at the forefront in fighting crime. The Concept Strategy was prepared and presented to the President not only without the properly public discussion envisaged by law, but without even real professional discussion or consideration in the National Commission for the Strengthening of Democracy and the Rule of Law. An important point in this Concept Strategy is the total lack of mention of future subordination of the System, despite the fact that the Department has to turn into a civil service, totally subordinated to the Ministry of Justice. Clearly with this there must also be retention of the norms regarding social protection of penal staff.

Unfortunately at the present time penal institution workers do not enjoy high social prestige. Since public safety is dependent on the quality of penal institutions, the public ought to be the most interested in personnel qualitatively influencing prisoners and therefore having impact on public welfare. After all their activities ought to be directed at ensuring that prisoners return to society after serving their sentences as law-abiding citizens.

Socially unprotected, with a fairly low salary and without career prospects, penal institution employees are not capable of transforming criminals into law-abiding citizens observing legal and social norms of the State and society.

The aim and justification for a court sentencing a person to imprisonment is, in the final analysis, to protect society and prevent crimes. This objective can be achieved only where prisoners, after being released and returning to normal life in society, prove not only ready but also capable of reintegration into society, to self-disciplined law-abiding behaviour and independent generally accepted socio-normative life.

Affirming that deprivation of liberty is an exceptional measures which should be applied in cases where the State and society face real danger, the personnel of penal bodies and institutions should accordingly seek to ensure public safety by using sentences not only as punishment, but in order to achieve reform and resocialization, as well as to prevent the prisoners and other individuals from committing crimes.

The need for a complex of organizational-legal and economic measures aimed at ensuring social protection of penal staff is determined by the specific features of their duties, linked with risk to life and certain restrictions on the right to earn material wealth to ensure a satisfactory standard of living for themselves and their families. This includes: free medical care; sanatorium treatment and health-restoring holidays; the provision of housing or payment of compensation for renting accommodation, concessions on housing expenses, fuel, telephone and communal services. Restriction of benefits, compensation and guarantees to Penal Service staff will lead to a drain in the professional core of practical employees who organize and carry out reform of prisoners.

One of the reasons for the existing situation regarding legal and social protection of managerial staff and ordinary employees of the Penal Service is the fact that the latter has ceased to be of interest to those in power. During the post-Soviet period it became apparent immediately that the result of slave labour could not survive competition on the market. In the modern market economy there is no place for Penal Service enterprises. The Penal Service is urgently in need of reform. Such re-

forms were carried out in all countries of Central and Eastern Europe, and in the Baltic Republics, back in the 1990s. In Ukraine the old Soviet GULAG has remained without reform. The State has generally lost interest in financing the Penal Service, retaining for itself the function of enforcing sentences of imprisonment. The system is mentioned only when prisoners protest against inhuman or degrading treatment, inflict injuries upon themselves en masse or declare hunger strikes.

6. THE LACK OF MECHANISMS FOR PUBLIC AND INTERNATIONAL CONTROL

6.1. PROBLEMS OF COOPERATION BETWEEN THE DEPARTMENT AND SUPERVISORY COMMISSIONS

An important mechanism for ensuring human rights in places of confinement is public control over what goes on in penal institutions. According to Article 25 § 2 of the Penal Code this function is vested with supervisory commissions which act in accordance with Regulations passed by the Cabinet of Ministers.

Such commissions have existed since the mid 1960s however in recent times they have functioned in a largely formal capacity. Significant changes in legislation and in the priorities of the State's demanded change. The new version of Regulations on Supervisory Commissions was prepared by the Department and approved by Cabinet of Ministers Resolution № 429 from 1 April 2004. The Regulations state that the commissions should include representatives of civic organizations. For this reason the procedure for determining the makeup of these commissions and their effective functioning as bodies carrying out public control over the activities of penal institutions is highly relevant. The commissions have virtually no experience of work with such priorities. However the specificity of the position of supervisory commissions is determined by the fact that it is only they that the legislators have assigned the right to carry out public control over penal bodies and institutions.

During visits by representatives of international organizations, such as the Council of Europe, CPT, the UN Committee against Torture, etc, Ukrainian high-ranking officials, especially representatives of the Department stress the existence of public control. They produce the norms of legislation which set out public control, cite the number of supervisory commissions in the country, claiming that these work and ensure such control.

At the same time aside from general assertions, no specific details are given. For example, there is no indication of the number of cases when it has been specifically the intervention of a supervisory commission that led to reinstatement of prisoners' rights. At the present time there is no real picture of the actual work of supervisory commissions, and it is therefore impossible to assess their effectiveness.

In fact this situation is linked with the fact that the very Regulations did not by definition allow for the possibility of creating an effectively functioning mechanism of control over the Department's institutions. This, it would seem, entirely suited the Department management, and continues to do so. As a result, there is no public control over Department institutions. A side effect of this lack can be seen in the numerous incidents in Department institutions over the past year with suicide attempts by prisoners in protest at ill-treatment. In no case during public discussion of these incidents of which there have been dozens was there any mention of supervisory commissions and their role in ensuring prisoners' rights.

In a letter on changes to the Regulations proposed by the civic organization Donetsk Memorial, the Department responded that it regards as «illogical the regulation making the implementation of the commission's decisions and resolutions on removing failings in the work of Penal Service bodies and institutions mandatory». According to the Department's logic, if an institution which by Law is appointed to carry out public control over observance of prisoners' rights, i.e. the supervisory commission, finds failings in the work of Penal Service bodies and institutions and passes the relevant decisions to have these rectified, the body or institution is not obliged to implement the measures. This comment from the Department would seem to reflect the dream of certain heads of the De-

partment of total lack of public control, or if there must be such control, then it should be the sort that you don't have to listen to, and whose demands you don't have to meet.

Isolated attempts to study the question of public control over human rights observance in penal institutions have shown that the practical activities of the commissions are confined to providing assistance to the penal institutions, agreeing with penal administrations on cases of early conditional released, and also providing assistance to people released.

Without doubt the work of supervisory commissions in helping people who have been released is important and of social significance. In the absence of a real mechanism of post-penitentiary accompaniment for people released from imprisonment, they are perhaps the only structure among the authorities which provides real care for these people.

However it should be noted that despite fulfilling such important functions, these commissions do not give attention to public control. This means that the effective circle of issues and problems which they deal with does not include the issue of public control over observance of prisoners' rights as set down in Article 25 § 2 of the Penal Code.

The attitude of the heads of regional divisions of the Department towards the work of supervisory commissions which work, and do not merely exist on paper, can be illustrated by the example of the Volyn Regional Division of the Department and the Regional Administration's supervisory commission. The Deputy Chair of this commission is the head of the charity «Rehabilitation» which provides regular humanitarian assistance to prisoners serving their sentence in the region's institutions. It also endeavours to help prisoners in issues concerning their rights however it is often, under various pretexts, refused entry to the penal colonies.

Even when the Regional Prosecutor's Office issues a submission regarding violations of penal legislation the management of the Division insists that its actions were correct. Such wilful disregard for the work of the supervisory commission and impunity for infringements of norms of legislation can only be with the management of the Department being supportive or turning a blind eye. In order to restrict access to penal institutions by members of the public, the Department issued Instruction № 3/4-2329 from 30.05.2007 p., restricting visiting times to penal institutions to weekends. The Prosecutor General's Office found this Instruction to be unlawful and forced the Department to revoke it.

Nonetheless, the very fact that the Instruction was issued reflects the Department management's conviction that it can do what it wants with the supervisory commissions, the only legally stipulated body of public control.

Another example of the activities of regional supervisory commissions is that of the Donetsk Regional Commission. In 2004 it was created solely from representatives of the authorities. It did not provided information in response to formal requests from civic organizations and in order to find out about its activities it proved necessary to lodge a complaint with the court. The latter found that the failure to provide information about the commission's activities was unlawful. After a period of increased activity, the commission effectively ceased to function. Members of civic organizations which were appointed to the commission tried for several months to bring about the next meeting. Over a year there have been only one or two meetings.

The effectiveness of the supervisory commissions' activities can also be gauged by statistics on violations of human rights which they have identified. At the end of 2008 Donetsk Memorial sent an information request to all regional supervisory commissions. They were asked to provide information as to how many instances of human rights infringements the regional commission had registered during that year. Answers were received from the supervisory commissions of more than half Ukraine's regions (oblasts). All but one stated that the specific regional supervisory commission had not recorded one human rights violation in the region's penal institutions. The supervisory commission for the Chernihiv Region, on the contrary, had recorded 26 cases where the rights of prisoners or penal institution personnel had been violated during the year. This was hardly because the institutions of that region are the worst in the country. It is clear that if the commission works, it gets results, and vice versa.

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To a large extent this is due to the fact that the commissions are largely made up of State body employees, civil servants who through their status do not have to conceal themselves with public control. They have no experience of such activities, do not understand its tasks and do not know methods for carrying out such control.

According to data from regional divisions of the Ministry of Employment and Social Policy, there are 657 supervisory commissions in the country, with over 6,400 people working in them. Normative documents are presently being adopted promoting resolution of problems faced by released prisoners, and there is support for the adoption of new documents aimed at protecting the rights of this vulnerable group. It would seem expedient to also adopt an updated version of the Regulations on Supervisory Commissions more in keeping with the situation at the present time.

Supervisory commissions remain an excessively weak mechanism for protecting prisoners' rights. To a large extent this is due to the fact that the activities of commission members are unpaid. It is therefore impossible to demand responsible work in such structures especially when the workload is quite great as is the case with commissions in places where penal institutions are located.

Public control exists not so much when members of the public have access to closed institutions, but when the information that they receive becomes public knowledge. Therefore an integral part of public control is passing on to the public the information which its representatives receive in the course of carrying out such control. For this reason reports from supervisory commissions should form a mandatory part of their work.

We should also point out the professional inability of most civic organizations to carry out a proper level of public control without turning it into a mere search for negative features in the work of penal institutions. Unfortunately in Ukraine there are still too few civic organizations capable of undertaking such control activities without creating artificial obstacles for the work of penal institution staff. In view of the not especially supportive attitude of Department management to real control by the public, the overwhelming majority of civic organizations which cooperate with penal institutions confine their cooperation to educational and charitable work, legal assistance and support following release. This enables them to avoid conflict with penal institution administrations.

The fact that their fears are not without foundation is demonstrated by the attitude of the Department's management to those civic organizations which raise issues regarding observance of prisoners' rights, circulate information about violations and demand investigations into such cases. The present management resorts to circulating nonsense, explaining such a stand by human rights defenders as supposedly being «at the instigation of criminal elements». This was how the Head of the Department V. Koshchynets reacted to two open letters from human rights defenders in February and June 2008.

It should be stressed that no liability is envisaged for inactivity by supervisory commissions in protecting citizens' rights. Only public attention to this important link in the activity of penal institutions, civic activity and society's concern over infringements of anybody's human rights, including the rights of those who have broken the law and are serving a sentence behind bars can significantly improve the situation.

Where public control is being carried out there have been cases of unreasonable refusals to allow members of supervisory commissions to speak with prisoners. Such practice cannot be considered lawful. It follows from Item 6 of the Regulations on Supervisory Commission that members of these commissions during visits to penal colonies can meet with prisoners and have personal audiences. Therefore restrictions of such visits on the basis of Item 46 of the Rules of Internal Procedure of penal institutions are unlawful. The latter concerns the procedure for granting prisoners' visits and telephone conversations with relatives and others, and not the procedure for a personal audience.

Moreover neither current legislation, nor Departmental normative legal acts give the administrations of penal institutions or territorial offices of the Department's management the right to independently take decisions to restrict the activities of supervisory commissions (including with regard to public control over observance of prisoners' rights). Such action is in direct breach of Article 25 of the Penal Code.

Supervisory commissions agree all decisions (submissions and resolutions) of the administrations of penal colonies regarding changes in the conditions of those sentenced to terms of imprisonment (both within a single penal colony, and through transfer to a penal colony with a different level of security), as well as giving or revoking permission for convicted women prisoners of the appropriate category to live outside the colony. The procedure for taking decisions on the above-mentioned issues is given in detail in Articles 100 and 142 of the Penal Code. Thus all decisions of penal colony administrations involving changes in conditions which could have impact on a change in the range of rights restrictions, imposed for those sentenced to terms of imprisonment, must be agreed with the supervisory commissions. This is regardless of whether the changes will improve conditions, or make them worse, which in our view cannot be considered expedient and in line with the basic task of the supervisory commissions. Certainly in those cases where the decision of the penal administration will worsen a prisoner's legal status, it is undoubtedly advisable and necessary for this to be agreed with the supervisory commission since in that way the latter can provide a certain amount of control overseeing whether the actions of the penal administration are lawful and justified, as well as observance of the rights and legitimate interests of the prisoners. However in cases where the changes proposed will improve the prisoners' conditions and reduce the range of restrictions (for example, by transferring a prisoner from units of resocialization to units of social adaptation; transfer to a penal colony with a lighter level of security; giving permission for convicted women prisoners of the appropriate category to live outside the colony) mandatory agreeing of these with a supervisory commission can scarcely be considered justified and in line with commonsense from the point of view of ensuring control over observance of the rights and legitimate interests of prisoners.

Supervisory commissions have the exclusive competence to submit to the court a joint application, together with the administration of the penal body or institutions regarding the granting to particular prisoners of early conditional release (parole); release from further serving of ones sentence (Article 81 of the Criminal Code); a change of the unserved part of the sentence to a more lenient regime (Article 82 of the Criminal Code). and the release from serving their sentences further of pregnant women and women with children aged up to 3 (Article 83). At the same time, Articles 407 and 407-1 of the Criminal Procedure Code regulating the procedural issues for the court examination of these issues state that only such a joint application forms grounds for consideration of the merits of the case by the court. Thus a refusal by the Supervisory commission to file such a joint application for one or other reason generally makes examination by the court of the relevant issue on its merits which directly contradicts the interests of the prisoner.

Going by current legislation one can draw the following main conclusions regarding regulation of the activities of supervisory commissions.

1. The functions of supervisory commissions as bodies of public control over observance of the rights and legitimate interests of prisoners set down in the Regulations do not fully meet the general aims of the supervisory commissions and are not capable of ensuring their proper implementation;
2. In view of the main task of Supervisory commissions, they should have competence with regard to agreeing only those decisions of penal administrations which envisage a worsening of the prisoners' legal position.

6.2. INTERNATIONAL CONTROL OVER THE ACTIVITIES OF PENAL INSTITUTIONS AND NATIONAL PREVENTIVE MECHANISMS

Bearing in mind the commitments which Ukraine gave in joining numerous international organizations, an institution of international control over the implementation of these obligations by the State is needed, as well as the establishment of a mechanism for carrying out such control.

At present there are not many bodies of international control which exert influence on the Penal Service. The most authoritative and influence organizations able to carry out such control are the UN Committee against Torture and the European Committee for the Prevention of Torture. These bodies make visits to places where convicted prisoners, where people are remanded in cus-

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tody, as well as those against whom other measures of influence have been applied. They examine the conditions and study facts which could suggest that torture was applied, as well as informing the wider public and the State authorities about the situation with regard to prisoners' rights and about identified cases of torture. In accordance, for example, with Article 2 of the European Convention for the Prevention of Torture, members of the European Committee [CPT] have the right to visit any places where people have been deprived of their liberty by the State.

Moreover, in accordance with both the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and the Optional Protocol to this, and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, countries must provide responses to the relevant Committee on questions and facts which the latter identified in the course of such checks.

Practice demonstrates that these structures have some effect since the identified violations and use of torture can at least be stopped. Therefore international control and the application of national preventive mechanisms are needed with regard to implementation of criminal punishment and ensuring the rights of people held in conditions of restriction or deprivation of liberty, and convicted prisoners. The relevant Committees are most often assisted in this by civic organizations.

However, unfortunately, Ukraine's legislation does not allow for such an institution as international control in this sphere. Nor is the activity of national preventive mechanisms allowed for, and there is accordingly no mechanism of control.

Maximum effectiveness of such control needs to be ensured through the creation of national preventive mechanisms, the establishment of mandatory and unobstructed visits by the staff of bodies of international control and national preventive mechanisms to penal institutions, as well as liability (both of the penal bodies or institutions, and of the State) for failure to implement the legitimate demands of such controlling bodies. The activities of these institutions should be open, and this can be achieved by making public the results of checks of penal bodies and institutions. International control and national preventive mechanisms should become a component part of controlling and overseeing institutions for the activities of the penal system and such control needs to become regular and mandatory.

7. THE RIGHT TO LEGAL ASSISTANCE

One of the fundamental and inalienable rights of prisoners is undoubtedly the right to receive legal assistance.

Prisoners' right to legal assistance is set down in several articles of the Penal Code. It is mentioned in Articles 8 § 2 and 107 § 1 among other rights. These norms also stipulate the circle of people who can provide such assistance: bar lawyers or other specialists in the field of law who, according to the law, have the right to provide legal assistance in person, and by power of attorney of a legal entity. Article 110 of the Penal Code speaks of there being no restriction on the number or duration of meetings with a lawyer or other specialist in the field of law.

Although the Penal Code does not contain direct restrictions on the exercising of this right, practice suggests that it is effectively impossible to exercise it, and that there are many ways used to obstruct a convicted prisoner from enjoying this right. This is due to a number of circumstances.

This is, firstly, the general situation with legal aid in Ukraine,³ and secondly the lack of a mechanism set down in legislation for providing legal aid, this being complicated by the specific features of serving sentences involving imprisonment. The main feature of any right is that it always corresponds to a relevant duty of a State body or official. Declaring the right of prisoners to legal assistance, the Penal Code contains nothing about duty of the penal administration to ensure that such assistance is provided. There is no mention of this either among the duties of officials and civil servants in penal bodies and institutions, or in investigation isolation units, listed in Article 18 of

³ There is more information on this in the unit on the right to a fair trial.

the Law «On the State Penal Service of Ukraine», nor in any departmental normative act. The only provision which could fairly loosely be deemed the duty of the administration to ensure that the right to legal assistance can be exercised is Article 134 § 15 of the Penal Code which stipulates that in imposing a penalty on a prisoner, the penal «administration shall provide the possibility according to established procedure to notify close relatives, a lawyer or other specialist in the field of law who in accordance with law have the right to provide legal assistance in person, and by power of attorney of a legal entity...». However the procedure for such notification is also not set out in any act, meaning that this legislative norm is in practice not implemented.

Article 110 of the Penal Code stipulates that to receive legal assistance prisoners are allowed to meet with a lawyer on the written application of the prisoner, his relatives or civic organizations. However in order to exercise this norm, one has to first get in contact with the same lawyer, relatives or civic organizations. Prisoners, however, are virtually deprived of such options. Deprivation of liberty, as defined in the Criminal Code, involves the prisoner's isolation, with his being held for a certain period in a penal institution. Thus one of the main features of punishment of this time is specifically isolation. Deprivation of liberty involves the use of fairly considerable rights restrictions with respect to the prisoner, these being capable of significantly changing the person's legal status. The most considerable element of isolation is the restriction for the prisoner in communicating with people in the outside world. The Penal Code envisages communication with relatives thanks to which they can in some cases exercise the right to legal assistance (it is relatives who can find a lawyer or turn to human rights organizations). However contact with relatives is seriously limited (there are certain numbers of visits and telephone calls, while letters take time to reach the addressee). As a result of this people in places of confinement cannot receive legal assistance in an efficient and timely manner. It is even hardly to receive the necessary legal assistance when prisoners do not have relatives or are not in contact with them, or when they are not able to take independent actions due to physical or other difficulties. This is like a vicious cycle: the penal administration is able, but not obliged by law to ensure the right to legal assistance (or more simply, to look for and ensure contact between the prisoner and the lawyer or other specialist in the field of law. The prisoner has such a right, but cannot objectively exercise this since he is isolated and all actions need to be carried out via the administration. The norm, therefore, on legal assistance remains deadweight, and prisoners – unprotected, including from the arbitrary behaviour of the administration.

It is perhaps for this reason that the Penal Service remains perhaps the only structure which has not once raised the question of there being a need to create a mechanism and regulation of the procedure for paying for free legal aid for prisoners.

The third factor is the possibility of correcting the legislatively set out rights and procedure for exercising them at the departmental level and artificial restrictions in legislation on the granted rights. Even where the prisoner has through means independent of the administration endeavours to exercise the right to legal aid, there are quite some number of opportunities for obstructing this.

This is, on the one hand, linked with the vagueness of legislative stipulations. It follows from the content of the Penal Code that legal assistance can be provided by either a lawyer or another specialist in the field of law who in accordance with law have the right to provide legal assistance in person, and by power of attorney of a legal entity. Yet established practice shows that at least with regard to prisoners only lawyers may be involved, and then not any, but only members of a bar lawyers' association.

Article 110 § 3 of the Penal Code state that a meeting with a prisoner is granted to a specialist in the field of law on presentation of «another relevant document». In the Rules of Internal Procedure of penal institutions, approved by Department Order it is stated that a visit is granted by the penal administration on presentation by a lawyer of written instruction, and to other specialists in the field of law who in accordance with law have the right to provide legal assistance in person, and by power of attorney of a legal entity, an agreement or power of attorney of a legal entity, as well as ID.

This is entirely justified since being in any association does not give a bar lawyer any advantages. However the Department in approving the Rules of Internal Procedure unwarrantedly and un-

lawfully restricted the list of documents on the basis of which a lawyer is allowed to see a prisoner, with this being exclusively a written instruction which only a member of a bar lawyers' association can have. Thus the authority of bar lawyers to provide legal aid are determined by the Law «On the Bar», and narrowed by a departmental act which is unacceptable.

Nonetheless, even if one bears in mind that for a specialist in the field of law an agreement is sufficient grounds for being granted a meeting, in practice the person is not permitted to see the prisoner. The possibility of such actions follows from the Resolution of the Plenum of the Supreme Court on 24.10.2003 № 8 «On the application of legislation safeguarding the right to defence in criminal proceedings.» This states that «In resolving the question of whether specialists in the field of law have the authority to carry out defence in a criminal case, it must also be established which particular law gives them the right to take part in criminal proceedings as defenders. To find correct the practice of those courts which, in the absence of a special law, do not allow such specialists to carry out defence in criminal cases» (Item 5). Given that there is no special law in Ukraine at present which provides any specialists with such a right, the norm regarding their participation in penal proceedings is deadweight. As of today, there is also no norm which in any way defines the term «specialist in the field of law». Bearing in mind that a norm on the possibility and grounds for participation of a specialist in the field of law is contained in both in criminal procedure, and in penal legislation, on the basis of the above, specialists in the field of law at the stage of enforcement of criminal punishment are not allowed to take part in this activity.

Thus ensuring participation of a specialist in the field of law, rather than a bar lawyer, in defence of prisoners' rights is not only difficulty, but downright impossible which significantly restricts the process of exercising the prisoner's right to legal assistance, especial to free legal aid, since bar lawyers' in the vast majority of cases work for a fee.

On the other hand the situation is exacerbated by the presence in penal legislation of grounds for «artificial» restrictions of the right to legal assistance. For example, even under the most favourable circumstances – a prisoner has a lawyer who is a member of a bar lawyers' association, has written an application asking for a meeting with this lawyer and the latter has arrived at the penal institution – the administration can still refuse to allow the meeting on lawful grounds. For example, as stated in Article 134 § 11 of the Penal Code, prisoners are not allowed visits while being held in disciplinary isolation or punishment units, or solitary confinement. On the basis of this norm precisely those prisoners most in need of legal assistance are denied it. At the same time, another problematical issue arises. As already noted, the law envisages that a prisoner may inform a lawyer that a penalty has been imposed on him. This norm is undoubtedly aimed at ensuring efficient reaction to possible violations of prisoners' rights through the use of disciplinary measures. Nonetheless, how even a lawyer is to ensure legal defence if s/he has no personal contact with the person concerned remains a mystery.

The Rules of Internal Procedure also make it possible to cancel a visit in the case of an epidemic, natural disaster or other exceptional circumstances which hamper the normal activities of the penal institution. With such wording, virtually any visit can be cancelled since current legislation does not make it compulsory to provide a specific reason for a refusal to grant a visit.

Difficulties in providing legal assistance also arise when a lawyer has been approached not by the prisoner himself, but by his relatives or representatives of a civic organization. In this case the penal administration, as a rule, refuses to allow a meeting referring to the lack of an application from the prisoner himself, as envisaged by Article 110 of the Penal Code. No account is taken in this of the fact that the prisoner is effectively deprived of the possibility of receiving information about an agreement having been made with a lawyer, and cannot therefore submit an application to the administration.

Amendments are therefore needed to departmental normative acts of the Department with regard to regulation of the procedure for providing legal assistance which will make it possible to exclude the above-mentioned violations and difficulties.

8. THE USE OF COERCION AND PHYSICAL FORCE AGAINST PRISONERS

8.1. THE EXISTENCE AND ACTIVITIES OF SPECIAL FORCE UNITS AND SWIFT RESPONSE GROUPS

Article 6 of the Law «On the State Penal Service of Ukraine» includes within the State Penal Service militarized formations. As stated in Article 12 of this Law, militarized formations are units which in accordance with law act within the makeup of penal bodies and institutions, investigative isolation units, and are intended for security, prevention and stopping of actions which disorganize the work of the corrective institutions. Article 392 of the Criminal Code states that actions which disorganize the work of the corrective institutions are the terrorizing in corrective institutions of prisoners, or an attack on the administration, as well as the formation for this purpose of an organized group or active participation in such a group, carried out by individuals serving a sentence involving restriction or deprivation of liberty. In criminal law the term terrorizing of prisoners is understood as meaning the use against them of physical force or threats to use such force, while an attack on the administration is the committing of violent action against it, or the threat to do so.

Thus the first key moment in the functioning of militarized formations in the Penal Service is the sphere of their designated purpose, confined to two spheres: 1) security for places, 2) prevention and stopping of the actions set out in Article 392 of the Criminal Code. Thus any utterances or other infringements of order and the conditions for serving sentences, including failure to comply with regime requirements do not fall under the sphere of influence of militarized formations. Another key point is the need for a special law to set down the functioning of such special purpose units.

The only legislative grounds for this at present are the Law from 20.03.2003 «On fighting terrorism». According to that act, terrorism is a socially dangerous activity constituting the conscious and deliberate use of violence through the seizure of hostages, arson attacks, murders, torture and intimidation of the population and authorities or other attempts against the life and health of innocent people, or threats to carry out criminal actions in order to achieve criminal aims. A terrorist act is criminal action in the form of use of weapons, the causing of an explosion, arson or other actions, the liability for which is set out in Article 258 of the Criminal Code. Article 4 of the Law stipulates those engaged in fighting terrorism, with the list including the Department.

In other words, within the limits of its competence, the Department may fight terrorism. Article 5 § 6 of this Law envisages that the Department shall use measures on preventing or stopping crimes of a terrorist aim on Penal Service sites. And such prevention is undertaken by a special anti-terrorist unit, the regulations for which were approved by Department Order № 167 from 10.10.2005 (registered with the Ministry of Justice on 16.02.2006 as № 138/12012). All apparently fine except that Item 3.5 of this Order includes among the functions of the anti-terrorist unit the carrying out of checks and searches of prisoners and people remanded in custody, their things, checks of other people and their things, vehicles on the territory of penal institutions, enterprises of these institutions, and on adjacent territory, as well as the removal of prohibited items and documents. It is this that has, in practice, become the main work of the anti-terrorist unit.

The decision to register the Order has now been cancelled, On the basis of Ministry of Justice Opinion № 15/88 from 24.12.2007 Order № 167 was struck out of the State Register of Normative Legal Acts on 14.01.2008. However practice shows that the cancellation of State registration of the act on special purpose units in no way indicates the dissolving of the latter, at least this can be seen from official Department statements. For example, a press release regarding media reports about the events in the Manevytska Penal Colony (№ 42) on 25 October 2008 (10 months after the cancellation of the Order, reads: «Special purpose units and swift response groups were not deployed in the penal institution⁴. The existence of special purpose units is also confirmed by Item 58 of the Rules of Internal Procedure for penal institutions, passed by the Department on 25.12.2003, № 275 (reg-

⁴ http://www.kmu.gov.ua/punish/control/uk/publish/article;jsessionid=939E951CE93797AC5D859DA4039BE981?art_id=62604&cat_id=47123

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istered with the Ministry of Justice on 31 December 2003 as № 1277/8598), which has remained without the relevant changes. This item allows the Department to assert that the special purpose units provide assistance in carrying out searches of prisoners, without any use of physical force.

In view of the above, we can conclude that the special purpose units of the Department continue to exist, however without any legal regulation for their creation and functioning, and therefore without control over their activities. Of particular cynicism have been cases where these units are called on «to help» in «subduing» prisoners who express disgruntlement with the conditions or endeavour to stand up for their rights. This is a direct violation not only of domestic legislation, but of Ukraine's international obligations, as well as a failure to act on the recommendations of international experts, for example, the UN Committee against Torture which in its Conclusions and Recommendations following its consideration of Ukraine's Fifth Periodic Report, stated that: «The Committee is also concerned with the reported use of the anti-terrorist unit inside prisons acting with masks (e.g. in the Izyaslav Correctional Colony, in January 2007), resulting in the intimidation and ill-treatment of inmates» It went on to say that «The State party should also ensure that the anti-terrorist unit is not used inside prisons and hence to prevent mistreat and intimidation of inmates». In general, until proper legal regulation for the Department's anti-terrorist unit in accordance with the tasks vested with it in current legislation (and exclusively within its limits without unwarranted intrusion in the sphere of penal relations), there can be justification for the existence of such a formation.

However anti-terrorist special units are not the only militarized formation within the Department used for «establishing order» in the colonies. Of even greater concern is that fact that in order to carry out analogous unlawful tasks, so-called «swift response groups» created in 2000 through a secret Department Order are used. Later swift response groups have been mentioned as a separate part of special purpose units despite the fact that they militarized formation. This is indirectly confirmed by Item 5.3.7 of the cancelled Department Order № 167 from 10.10.2005: «To provide suggestions to the management of penal institutions and investigative isolation units regarding improvement in them of the operational situation and training of swift response groups». That is, swift response groups and special purpose units are different formations which are nonetheless drawn in for similar functions – punishment recalcitrant prisoners. It is perhaps because of the equating of these formations that after the cancellation of State registration of the Order on special purpose units, people had the impression that these formations had also been cancelled. However this is absolutely not the case. Attention is not usually focused on swift response groups, yet the Department effectively confirms their functioning (albeit in commentaries and press releases on its official website which state that such formations were not deployed).

Article 105 § 2 of the Penal Code envisages that to stop group unlawful actions by prisoners and for the liquidation of their consequences, at the decision of the Head of the Department, and the head of the territorial division of the Department, the forces and means of the colony, penal bodies and institutions are used. Where necessary, and with the permission of the Minister of Internal Affairs, the Heads of the Central Department of the Ministry of Internal Affairs in the Autonomous Republic of the Crimea, in Kyiv city and region, the Head of the Department of the Ministry of Internal Affairs in the region and in Sevastopol – bodies and units of the Ministry of Internal Affairs are used. It is through this norm in informal discussions that the existence of swift response groups is excused, with these supposedly being needed to stop «group unlawful actions by prisoners». However such a state of affairs cannot be deemed in line with current legislation or international norms.

Firstly swift response groups are armed formations. Therefore, in accordance with Article 12 of the Law «On the State Penal Service of Ukraine» there should be a special law regulating its functioning. There is no such law. Department officials claim that swift response groups («combined» units) are formed in the light of an existing need from operational and other employees of various penal institutions in order to maintain order in the institutions when conflict situations arise between prisoners and the administration. However there are also no legal grounds for this. Formally the Rules of Internal Procedure mentioned above speak of the possibility of involving «personnel

from other penal institutions» in measures. It is not however envisaged that personnel should belong to any formations on a permanent basis.

Secondly, no normative act at the present time has provided a definition of what exactly is meant by «group unlawful actions by prisoners». As a result the administration of penal institutions may decide at their own discretion what such group unlawful actions are with this leading to numerous violations of prisoners' rights (for example, two prisoners can be considered a «group»). And bearing in mind that the activities of swift response groups are also not fixed in normative documents, and not covered in open sources, this leads to unwarranted and unreasonable use of force and special means.

It should be noted that the norms of the Rules of Internal Procedure of penal institutions provide some adjustment to the norm of Article 165 § 2 of the Penal Code, effectively giving personnel the right to use force and special means without the decision of the Head of the Department or the head of the territorial division of the Department. For example, Item 61 of the Rules states: «The personnel of the institution have the right to independently use tear gas, rubber batons and physical force where stopping mass riots and group insubordination by prisoners; where detaining or bringing prisoners who have committed flagrant violations of the regime to disciplinary isolation units, punishment cells or solitary confinement, if the said individuals show resistance to the personnel of the shift, or if there are grounds for believing that they could harm others or themselves; where putting an end to resistance presented to the personnel of the shift, the guards, or administration of the institution. Where teargas, rubber batons and physical force have been used, the personnel write up a report which is later considered by the head of the institution or person fulfilling his duties, registered in a special journal and added to the personal file of the prisoner.»⁵. Given the lack of regulation regarding the term «flagrant violations of the regime», a prisoner can be subjected to measures of physical influence for virtually any action (for example, for refusing to carry out the demand of a member of the administration regarding change of bed linen, meals, stopping work in order to resolve labour or other conflicts, being impolite to personnel, etc), since the assessment of the action is at the discretion of the administration employee. It is, moreover, impossible to establish a violation of procedure for the use of force given the lack of a mechanism for detailed documentation of this procedure and of a check into whether it was necessary to react in such a way to a violation.

Thus at the present time the Department is continuing to use unlawful levers of influence on prisoners' behaviour, created through adjustment of current legislation through department acts, mechanisms of intimidation and the use with impunity of physical force. Reports of such cases are received by human rights organizations fairly often, but it is not as a rule possible to check them because of the impossibility of getting into the penal institution. The following are some examples.

1. According to reports which require confirmation, in the Manevytska Penal Colony № 42 (Volyn region) a hunger strike has been declared in the high security unit. According to some information, 120 prisoners are involved while other information says the number is considerably lower, but more than ten. The hunger strike is most probably a protest against alleged inhuman treatment of prisoners and systematic use of physical and psychological violence.

Some prisoners began a hunger strike on 20 October 2008. There are reports that in the evening of 22 October around 30 men in masks and camouflage gear arrived at the colony. It is alleged that the regional division of the Department is trying to maximally restrict the spread of information about the events in the colony. The prisoners themselves consider these events to be a reaction by the prisoners to the actions of the First Deputy Head of the Volyn Regional Division of the Department, I. Stefanovsky, who is supposedly waging a battle in this manner with criminal traditions.

According to information needing confirmation, after the events of 20 October around ten prisoners were taken on 22 and 23 October away from Colony № 42.

⁵ We would note that there is no requirement to inform the prosecutor's office of such actions in Item 6.1 of the Rules.

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According to the latest information received from prisoners of the colony, which requires confirmation, in the evening of 24 October and on 25 October, I. Stefanovsky summoned prisoners, and using unlawful methods of detective inquiry, demanded to know who had mobile telephones and who had phoned outside the colony informing of what was happening inside.⁶

2. According to unverified information, in the Zamkova Colony № 56 (Iziaslav, Khmelnytsky region) several prisoners have begun a hunger strike. This took place after several prisoners were allegedly beaten by personnel, according to one version – for refusing to give the pin codes of confiscated mobile telephones. The hunger strike cannot be officially confirmed since, as a rule, the penal administration refuses to register the statement announcing the hunger strike, and after a check it is supposedly established that there were no hunger strikes.⁷

3. The Kharkiv Human Rights Protection Group has received information that on 18 March, a spetsnaz [special forces] unit of around 10 men in masks and full fighting gear was deployed in Penal Colony № 55 (Sofiyivka, Volnyansk raion, Zaporizhya region).

According to the information received, they severely beat prisoners in the SHIZO [punishment isolation unit] and PKT [cell-like units, also a form of punishment], as well as prisoners serving life sentences. They allegedly kicked the prisoners, beat them with their fists and with rubber batons, hung them from an exercise bar, and some had their heads thrust into the toilet. Some of the prisoners are claimed to have had water poured on them after the beating to bring them around. Three people are said to have suffered particular: Viktor S. and Yevhen B. who were in the SHIZO and Ruslan A. who was in the PKT.

It is not possible to verify this information and KHPG has therefore appealed to the Human Rights Ombudsperson and the Prosecutor General to investigate the situation..⁸

4. According to KHPG's information, in March 2008 in the Temnivska Colony № 100 prisoners used self-inflicted injuries in order to protest at alleged inhuman conditions. The situation in the colony was volatile. On 28 March KHPG representative, Ludmila Klochko was allowed into the colony where she met with the prisoners who had inflicted injuries upon themselves. The prisoners most often complained that «they're not treated like people», are neglected and that the norms of the Penal Code are not followed. Some had not been allowed short visits, others complained that they had been deprived of a long-term visit when their relatives came. One of the prisoners alleged that the parcel which his wife had sent him was not given to him for several days and the food items had gone off. He was clearly very aggrieved that his wife should spend the last money she has to buy him food, and it goes to waste.

There were a lot of complaints about medical care: a person suffering from asthma complained that he wasn't allowed to have his inhaler with him; an HIV-positive prisoner said that he was not receiving any treatment at all. Several people complained that they were not allowed to have medicine with them, and the medical unit was far away – you wouldn't manage to get there in time. They gave an example when a 30-year-old prisoner had died without reaching the hospital. Many mentioned a high mortality rate – «in our unit over a short period of time three people died». Others claimed that they are paid very little for their labour in the work zone. «They work till seven in the evening and receive a pittance». There were also complaints that «as soon as benefits arrive, they provoke or simply invent infringements of the regime». There were also allegations of frequent use of special means, including a straitjacket, with this, in addition, being put on a person wet, with a person suffering terrible torment when it dried.

The next day, 29 March, KHPG representatives were not allowed into Colony № 100, with the reason given being that representatives of the Human Rights Ombudsperson, N. Karpachova, were there.

On 31 March information emerged that a spetsnaz had beaten prisoners, that they had renewed their hunger strike and were again resorting to self-inflicted injuries. Other sources reported that during the night from 30 to 31 March several dozen prisoners had been taken away from Colony № 100, it was not known where. There is no way of checking this report.

⁶ <http://www.ukrprison.org.ua/index.php?id=1224947829>

⁷ <http://www.ukrprison.org.ua/index.php?id=1221200027>

⁸ <http://www.khpg.org.ua/en/index.php?id=1206447908>

There needs to be normative provisions for visits by independent observers to penal institutions. The legal grounds for this are there in the Optional Protocol to the UN Convention against Torture [OPCAT] ratified by Ukraine back in July 2006. Yet the country's leaders are demonstrating no wish to do this, and this can only result in constant repetition of such conflicts.⁹

5. At the end of March 2008 in Penal Colony № 77 (Berdyansk, Zaporizhyya region) during the night from Saturday to Sunday a prisoner Andriy K., was brutally beaten and later died from his injuries. He was the senior orderly in the quarantine room. He was in a room by himself that night and the other prisoners claim that they had nothing to do with the beating. The colony administration is adamant, however, that it was the prisoners who beat him to death. During the day, 15 members of a spetsnaz unit in masks and full fighting gear were brought into the colony. They took away 2-3 prisoners from 6 units in turn, beat them, and in the evening all were taken away. It is not known where, but their possessions remained in the colony. 15 prisoners, the names of 14 of whom are given, were involved in total.

It was soon learned that at least some of the prisoners were in the Zaporizhyya SIZO. According to one of them, the spetsnaz beat them thoroughly, without leaving marks, while one prisoner – Roman A. – was for some reason beaten very badly.

The Head of the colony Yury Zavhorodny explains the men's removal as being due to the need to check whether they are suffering from tuberculosis since the equipment for this in the colony is broken. This explanation is extremely dubious. At around 15.00 the spetsnaz men allegedly began brutally beating four prisoners – Oleksandr M., Volodymyr D., Oleh B. and Oleh R., demanding that they give evidence as to who beat up Andriy K.. According to the prisoners, one of the men, Oleksandr M., could not endure the beating and slashed his wrists and stomach

We are unable to verify these events. One can assume that the information about the removal of some prisoners is correct.

During the same days we were informed of beatings of prisoners and suicide attempts as the result of terrible beatings in colonies № 84 in the Volyn region and № 100 in the Kharkiv region. A few days earlier there were similar reports about Colony № 55 in the Zaporizhyya region. We are convinced that if the system were more open and it was possible to meet with the prisoners and try to understand their problems there would be much less conflict.¹⁰

It should be noted that information from the Department about measures of response to incidents virtually never contain an analysis of the reasons for them arising, nor an assessment as to human rights infringements during such events, and there is no indication of how much personnel or prisoners are to blame. For example, on 4 April 2008 an operational meeting was held at the Department with the participation of the management of the Department, the Department's Divisions for the Zaporizhyya and Kherson regions, as well as of the Berdyansk (№ 77), Kharkiv (№ 43), Temnivska (№ 100) and Pervomaiska (№ 117) Penal Colonies regarding the incidents which occurred in those penal institutions during March 2008.

According to the results of the meeting, the officials responsible faced disciplinary liability, additional measures were assigned for ensuring proper law and order in penal institutions, timely identification and prevention of negative manifestations and conflict situation among prisoners.¹¹

What exactly constituted the fault of the officials, what additional measures were used, or indeed any specific information is not contained in the report of the Department, making it impossible to give an objective assessment of the incidents.

8.2. STATUS OF PERSISTENT VIOLATORS OF THE PENAL REGIME

According to Article 133 of the Penal Code, persistent violators of the established procedure for serving sentences are prisoners who do not carry out the legitimate demands of the administration; unwarrantedly refuse to work (at least three times in a year); who stop work in order to resolve

⁹ <http://www.khpg.org/index.php?id=1206975257>

¹⁰ <http://www.khpg.org.ua/en/index.php?id=1207126581>

¹¹ <http://www.ukrprison.org.ua/index.php?id=1208509674>

labour or other conflicts; consume spirits, use narcotics, psychotropic substances or their analogues; or other intoxicating substances; prepare, keep, buy or circulate prohibited items; take part in table or other games for material or other gain; are guilty of petty hooliganism; systematically avoid treatment for a disease posing a threat to the health of others; commit more than three other infringements of the regime in the space of a year, on condition that for each of these infringements, in accordance with a decision by the head of the colony or the person fulfilling the head's duties, a penalty was imposed which was not withdrawn early or cancelled according to legally established procedure.

As can be seen from the above definition, the legislators list infringements of the penal regime, however do it with reference to the actual prisoner. It is the person – the «persistent violator of the regime» who has specific features, i.e. the term is used about the person, not their actions [the adjective in Ukrainian used is also that for «malicious» – *translator*]. It becomes immaterial what the infringements are, they could be anything. This practice runs counter not only to commonsense, but also to basic legal principles according to which liability, including disciplinary, can only be for an action committed with unlawful consequences and on condition that there is a cause and effect link between the action and these consequences.

The Article is constructed in such a manner that one could conclude that a «persistent violator» is a certain legal status (position) of the person, like the status of citizen, civil servant, prisoner, etc. The latter all have substance and meaning, which is clearly not the case with «persistent violator». The law establishes no such legal status. It is therefore unclear why the Article is formulated in such a way, and what the term «persistent violator of the regime» actually implies.

The wording therefore of Article 133 of the Penal Code is unsatisfactory. The definition of a persistent violator of the regime is a typical example of stigmatization, with the person being labelled, not his or her actions. Interestingly the previous version of the Penal Code (1970) was more correct, focusing on persistent offences, not a persistent violator.

It is also worth noting that it is only in Article 133 that the term «persistent violator» is used, with all other cases referring to the use of disciplinary liability or the possibility of changing a prisoner's conditions, the term «persistent infringement» is applied.

Being labelled a persistent violator can result in the prisoner being moved from a social rehabilitation unit to another unit, from a medium security colony or from the normal living area of the colony to a high security unit or cell-like conditions in a maximum security colony.

Furthermore, it is only persistent violators who can face penalties in the form of a disciplinary fine. This is imposed in accordance with a decision passed by the head of the colony or person fulfilling such duties, which is read to the prisoner who must sign that he was notified. The fine is paid to the State.

There is thus a situation which provokes officials and other employees of penal institutions to sue the concept of persistent violator of the regime in order to manipulate prisoners, their behaviour and the conditions they are held in.

9. THE IMPOSSIBILITY OF COMPLAINING ABOUT THE ACTIONS OF PENAL ADMINISTRATIONS

Prisoners' right to complain about the activities or decisions of penal bodies or institutions is set down in several norms of current penal legislation, but there is unfortunately no clear procedure for this. The legislators for example stipulate the procedure for prisoners to appeal against the decisions of the Regional Commissions on assigning prisoners to particular penal institutions. However this regulation is so inconsistent and unclear, and also has such restrictions, that it becomes effectively impossible to lodge such an appeal.

With regard to other decisions by penal bodies and institutions, appeals against them are of a highly dubious nature since the mechanism for making them is extremely complicated.

Since the adoption of a Code of Administrative Justice it is clear that this category of cases should be examined specifically by administrative courts yet as of the present time there is no such court practice.

Penal legislation mentions the right of prisoners to submit suggestions, applications and complaints to the administration of penal bodies and institutions, to bodies above them, to the Human Rights Ombudsperson, the European Court of Human Rights, as well as to other international organizations of which Ukraine is a member or participating state; to the authorized representatives of such international organizations, to the court, the Prosecutor's Office, to other State bodies or bodies of local self-government, and to civic associations. This right is established and regulated by Articles 8, 107, 113 of the Penal Code.

With regard to this right, the Minimum Standard Rules contain provisions according to which prisoners must be ensured the right to make an appeal or complaint to the penal administration where they are being held, to make complaints and applications without the head of institution being present to people inspecting the institutions; to submit complaints and applications to the highest body of MIA and other relevant bodies in confidentiality. The right of prisoners to make appeals should be ensured by means of immediate consideration.

During their inspection of Ukrainian penal institutions, CPT pays considerable attention to the possibility for prisoners to make complaints since effective complaints procedure and checks into these complaints are a main guarantee against unlawful and ill-treatment in places of confinement.

On the results of its visit, CPT stressed that prisoners need to have the possibility of making complaints about particular actions, both within the Penal Service, and beyond it, and they should be able to do so in confidentiality. The procedure for effective consideration of complaints as well as for checking such complaints, are the main guarantees against ill-treatment in penal institutions. PCT particularly stresses the need for regular visits to all such institutions by an independent body with the authority to consider complaints from prisoners, and inspect all premises. Such bodies can, among other things, play an important role in improving interrelations, and in removing contradictions arising between prison administration and prisoners.

In its Fifth Period Report on implementation of the UN Convention against Torture, the Ukrainian Government asserted that since the State Department for the Execution of Sentences had been removed from subordination to the Ministry of Internal Affairs, appeals from citizens regarding ill-treatment in penal institutions had been an exception. It added that they were all thoroughly checked, and where violations were identified which could lead to inhuman treatment, measures had been applied to rectify the situation.

It would seem as though the possibility for a prisoner to approach the competent bodies, institutions, organizations with the above-mentioned documents is set out and regulated. Yet there too there is a flaw seen in the first instance in the fact that people deprived of their liberty are not given help in preparing appeals, applications and complaints. They may be written by prisoners in such a way that it is impossible to understand what exactly the prisoner wants, and the latter doesn't always know who the appeal, application or complaint should be addressed to. This can mean that an appeal is either not considered (with a fob-off response being given) or it doesn't get to the right addressee. In cases where appeals, applications or complaints are restricted in time, the time limits may be missed. Given that at liberty anyone can turn for assistance in drawing up such documents to a lawyer or other specialist, it is necessary through legislative means to prevent discrimination against prisoners and ensure equality before the law, to stipulate the duty of penal institution officials to provide prisoners with the necessary assistance in drawing up appeals, applications or complaints. Such rules of procedure will also help to resolve the issue of «scrutiny» of correspondence of prisoners which is, incidentally, another problem area in the system for people in custody submitting appeals, applications or complaints.

International standards stress confidentiality as one of the most vital features of a system for submitting appeals, applications or complaints. International acts do not, admittedly, define the limits of this confidentiality, however the concept of «scrutiny» [perehlyad] of prisoners' corre-

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spondence which is in breach of both the Ukrainian Constitution and international norms. Legislation does not stipulate the scope of this concept which makes it impossible to talk of ensuring the right to correspondence or of the possibility of its violation since it is impossible to establish whether «scrutiny» of correspondence is a violation of the conditions of correspondence, or not. Section 4 of the Instructions on organizing the scrutiny of correspondence of people held in penal institutions and investigative isolation units, makes it possible to conclude that prisoners' correspondence is read which clearly prevents confidentiality. This situation is a violation of international normative acts.

In general the system for submitting appeals, applications or complaints is set up in such a way that with the help of «scrutiny» any appeals, applications or complaints may be sent or not sent to the addressee, permitted or not, depending whether they pose a «threat» to penal institution personnel or not.

In view of the above, one can state that current legislation does not ensure prisoners the opportunity of submitting appeals, applications or complaints to the competent bodies, institutions, organizations, public officials and civil servants, since no effective mechanisms for this are in place.

A profound flaw in current penal legislation, as M. Minayev pointed out, is the almost total lack of possibility for using court defence.¹²

Access to justice for prisoners is ensured only with regard to questions of the legality of procedural measures and punished applied against them, this being through the institution of court appeal against the decisions of bodies of detective inquiry [diznannya], criminal investigation and the court, as well as through appeals against a ruling of a first instance court.

. The possibility of a person with one of the types of procedural status listed above lodging a complaint with the court regarding improper treatment by the personnel of the relevant institution follows from Article 55 of the Constitution as a norm of direct force. However the procedure for such a court appeal is not directly set down in any law or subordinate normative legislative act. An application to the court and correspondence with a bar lawyer are not protected by law from «scrutiny» (as are appeals to the Prosecutor and to the Human Rights Ombudsperson, as well as to the European Court of Human Rights), and this places the parties in unequal positions.

Another failing inherent in the mechanism for allocating prisoners to a particular penal institution is the procedure for appealing against a decision of the Commission on allocating, moving and transferring people sentenced to terms of deprivation of liberty (the Commission) regarding the type of institution allocated. The appeal procedure is regulated by Regulations on the State Department for the Execution of Sentences Appeal Commission on the same issues as above. The legislators, in set out the appeal procedure, confined themselves to the instruction that its submissions and consideration were carried out in accordance with the procedure stipulated by the Law «On citizens' appeals». This provision effectively brings an appeal against a Commission decision to the level of any other appeal. This in turn results in the following: a very drawn out period of review of the complaint – appeal (30 days); a different form of response – an answer to the appeal, with the submission of a complaint – appeal not suspending the force of the act appealed against. And most importantly, such an appeal and the procedure for its consideration make the complaint not a procedural document, giving it a different legal status and in the final analysis taking it out of the jurisdiction of the administrative courts where it is possible to appeal against the acts of State bodies (those in authority). Thus such procedure is not an appeal but rather a letter from the prisoner to the Appeal Commission. Incidentally, the Regulations on the Appeal Commission contain reference to Article 113 of the Penal Code as being the grounds on which prisoners appeal against the Commission's decisions, while this Article in its turn is a law which regulates the procedure for prisoners to send letters.

Therefore, in view of the above, one can state that the procedure for lodging appeals with the Appeal Commission is ineffective and it would be better for a prisoner to appeal against a Commis-

¹² M. Minayev: Analysis of penal legislation on the right of prisoners to appeal against the decisions, actions and inaction of employees of the law enforcement agencies and penal system // Against Torture / KHPG – Kharkiv: Prava Ludyny, 2007 – p. 153

sion decision directly to the administrative court. Yet there are not many prisoners, unfortunately, who know their rights, and the level to which they are informed is not very high.

In addition, as is demonstrated by official answers from the Prosecutor's Offices, virtually no complaints received by such offices are found to be justified. One can assume on the basis of this that the violations identified by the Prosecutor's Office, referred to in official letters, either do not directly pertain to prisoners' rights, or are concealed by bodies of the Department..

10. INFRINGEMENTS OF PRISONERS' SOCIO-ECONOMIC RIGHTS

10.1. GENERAL OVERVIEW

The possible restrictions which follow from a court sentence do not as a rule impinge upon the main economic and social rights of prisoners. If a prisoner has certain specific features and has been granted special status (for example, a pensioner, special status as a person who suffered as a result of the Chernobyl Disaster, etc), he should retain this status while serving his sentence. This is clear since the punishment is for a specific crime and should have clearly defined limits. It should not, therefore, impinge upon those legal relations not linked with the specific offence. This situation should reflect a certain guarantee according to which liability is merely for the crime and confined by its «parameters».

However the practice in cases involving sentences paints a different picture. Prisoners are in fact unable to enjoy the preferential elements which a particular status gives them. Or they cannot make use of the advantages of the relevant status due to the lack of a mechanism for ensuring this status in conditions of confinement.

The Ukrainian Constitution states that citizens have the right to social protection that includes the right to provision in cases of complete, partial or temporary disability, the loss of the principal wage-earner, unemployment due to circumstances beyond their control and also in old age, and in other cases established by law.

Article 122 of the Penal Code states that «prisoners have the right on general grounds to a State retirement pension, a pension if disabled, due to the loss of the breadwinner, and in other cases envisaged by law». However paragraph 3 of this Article contains a provision which renders meaningless the assertion in paragraph 1: «the time which prisoners spend working while serving their sentence is calculated towards their work record in order to receive a work pension after their release on condition that they have paid insurance contributions to the Pension Fund according to the procedure and in the amount envisaged by legislation.»

The wording is also unclear of Article 122 § 4 according to which prisoners who ceased to be fit for work while serving their sentence have the right to a pension and compensation for damages only after their release. The given norm thus deprives prisoners of their right to compensation for damages while they are serving their sentence. The obvious discriminatory nature of this norm supposedly becomes lawful due to Article 7 § 2 where it is stated that «prisoners enjoy all human and civil rights with the exception of limitations stipulated by laws of Ukraine, and this Code, and established by court verdict.»

In this version of the Article mentioned the issue is not resolved as to pension provisions for people who reach retirement age while serving their sentence. Why is work done by prisoners counting towards their work record which entitles a person to a pension, while the actual right to the pension according to the Penal Code arises only after release from imprisonment? And that is where in Article 8 § 1 of the Penal Code the right to receive a pension is presented at one of prisoners' main rights.

The above-mentioned provisions of the Penal Code seem inconsistent, discriminatory and in breach of a person's right to pension provisions. If a prisoner has the right to pension provisions on general grounds, then why is the real possibility of receiving this dependent on being released? It is unclear why the legislators refuse to let a prisoner of retirement age receive a pension, thus dooming them to «life in debt» while in the penal institution. Such a situation prompts a prisoner to seek

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other means of existence in the colony (especially if the person cannot work, or doesn't have relatives) and complicates the formalizing of the process of receiving the pension after he is released. The penal administration needs to gather documents for such people and send them to the relevant divisions of the Pension Fund to enable the right of the prisoner to receive his pension.

According to the Law «On mandatory State social insurance», the insurers are employers and other people who, in accordance with this Law, pay insurance contributions for mandatory State social insurance,

The Penal Code envisages that prisoners should work in places and during jobs assigned by the penal administration (Article 118 § 1). Bearing in mind the above-mentioned version of the Penal Code norm regarding prisoners' work, no work contract is established with the latter, this giving grounds for considering that they are not liable for mandatory insurance contributions. In penal colonies the institutions do not deduct pension contributions from their pay. It is therefore not by their will, but as a result of the actions of a State structure – the penal institution – that prisoners effectively lose the right to a pension while working in a penal colony if they do not pay the contributions into the Pension Fund for that period following their release. As a rule this is difficult or even impossible for them to do. Therefore, in practice their right to a pension during time of work in a penal colony ends up with the lack of real possibility for exercising this right. This is yet more evidence that in practice the promise of Article 102 § 2 «to reduce to a minimum the difference between conditions in the colony and at liberty» turns into a violation of their rights and creates problems for prisoners making their social adaptation more difficult after their release.

The deduction of contributions from prisoners to the Pension Fund is generally not envisaged in any departmental normative legal acts either. The Department Order № 191 from 04.10.2004 «On approving instructions on remuneration for the work of people sentenced to restriction or deprivation of liberty» in the list of deductions does not mention contributions to the Pension Fund.

Thus prisoners who have the right to pension provisions cannot enjoy this right since in the absence of payments into such funds, the prisoner does not gain the status of a person insured.

It should be noted that prisoners also lose the right to tax social benefit on such grounds (they are given in State Tax Administration letter № 3736/7/17-0716 from 24.02.2007). The State Tax Administration considers that the wages of people deprived of their liberty does not correspond to the definition of wages in the understanding of the Law on taxes from individuals, and that the said persons are not employed workers in accordance with current labour legislation since the rules for being employed or dismissed, transferred to another job are not regulated by legislation on work. Therefore there are no grounds for the application of a tax social benefit to their income.

On the same grounds prisoners are not recognized as subjects of a) unemployment insurance (the Law «On mandatory State unemployment insurance»); b) mandatory State social insurance in connection with temporary loss of the ability to work and expenses connected with burial (Law «On mandatory State social insurance in connection with temporary loss of the ability to work and expenses connected with burial»), etc.

There is a similar negative situation with regard to the possibility of enjoying specific legal status – participants in military actions, those who suffered as a result of the Accident at the Chernobyl Nuclear Power Plant, etc. Prisoners are effectively not able to enjoy the preferential circumstances that a particular status gives, or they can't use the benefits of the relevant status due to the lack of a mechanism for enjoying such status while deprived of their liberty. A prisoner cannot receive payments due him as a Chernobyl survivor because the penal institutions do not work in collaboration with the relevant social security bodies (for example, they are not assigned the duty to promote the receipt of different benefits, and the prisoners do not have the possibility of applying for them by themselves).

The provisions of the Penal Code which state that the regime should provide for the legitimate interests of prisoners are unclear and inconsistent. Bearing in mind that the legitimate interests are those blessings which are in line with current legislation and whose attainment a person would aspire to, but do not constitute the duty of another person to seek for them, it is difficult to imagine how the regime can ensure such legitimate interests. An example of this can be seen in the entering of a

prisoner into marriage. In order to achieve this «wish», a prisoner must, according to Article 33 of the Family Code of Ukraine, which regulates issues linked with place of registration of a marriage, personally appear at the State Register Office and conclude the marriage in the presence of the relevant official. Later on this Article states that the marriage is registered in the State Register Office premises. Yet the law does not allow for the possibility of a prisoner receiving a short trip outside the penal institution in order to resolve such issues.

There is an exception from the general rule. At the application of the couple, registration of the marriage can take place at their place of residence, at a place where inpatient medical care is provided **or in another place** if they have compelling reasons for not being able to come to the State Register Office.

Thus in order that an official from the State Register Office can come to the penal institution the prisoner must make an application asking that such a person be called, and stating the reasons why the prisoner could not conclude the marriage formalities in person.

This state of affairs demands that the possibility for a prisoner of entering into marriage is made as difficult as possible and it entirely depends on the good will of the officials and staff of the penal institution. The regime does not thus ensure that an entirely legitimate interest regarding entering into marriage is satisfied.

People sentenced to restriction of liberty who are serving their sentence in corrective centres form an exception. However here whether a person is able to make a trip away is dependent on the administration's decision. The situation entirely depends on the administration and how officials and employees of the centre understand the concept «other vitally necessary circumstances».

The given problem is linked not only with the impossibility of fulfilling a legitimate interest and the failure by the regime to provide for such legitimate interests. The state of affairs described here is also in the way of the prisoner's being able to establish positive links with the outside world. Penal law and legislation do not meet halfway those prisoners who wish to change their lives. It is possible to change the situation by drawing up and adopting the appropriate changes to current legislation.

10.2. PRISONERS' WORK

Key points in international normative legal acts regarding prisoners' labour is that it must not be slave labour, should be paid and not bear the hallmarks of punishment and humiliation. Prisoners must not be punished through work.

Ukraine's penal legislation leaves a very great deal of scope for abuse by the penal administration regarding the prisoners' right to work and a sufficient level of pay, and practice confirms this. There are not just isolated cases in the penal institutions of unlawful manipulation regarding prisoners' work. One can cite as an example cases when the documentation formalizing the prisoners' work does not correspond to the real circumstances. Such a situation arises when a brigade of 50 people are taken to work, whereas the contract for carrying out certain work is formalized for 5 people. This effectively means that 45 people carried out forced and unpaid work which in general carries the hallmarks of slave labour. On the other hand for the prisoner this means that wages are not calculated in his name, and his work record could be in doubt since there are no deductions into social security funds. Legally this means that the prisoner is not insured, and his record, needed to receive a pension will not have the period of time he served in a penal institution calculated.

At the same time work remains one of the main levers of influence on a prisoner. Its importance is explained by the fact that work in penal institutions is viewed as a positive element of reform, vocational training and management by the institution. It is generally acknowledged that work is an important and strong means of influence on a person, his consciousness and way of life. Therefore normative acts envisage the need to involve prisoners in work, endeavouring through work and other means, to achieve positive changes in the person prompting them to consciously renew their social status, return to independent socially adapted life in society. Sufficient amounts of work should be ensured so that prisoners are actively engaged during a normal working day. Work also enables prisoners to meet their own demands and needs, and pay for services they are provided.

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The Penal Code contains a number of provisions regarding the work of prisoners which show, in our view, a certain lack of consistency.

The main difference between prisoners' work and work in the outside world is in its subordination to the purposes of penal legislation, specific features of some legal relations and the organization of the work of people deprived of their liberty.

International normative acts contain the rule that prisoners should receive fair remuneration for their labour. With respect to this the norms of Ukraine's penal law have provisions which are complicated and muddled, make it possible to interpret them very loosely and manipulate prisoners' wages. For example, Article 120 of the Penal Code envisages a minimum wage which is to be paid to prisoners. Under any circumstances prisoners should receive remuneration in the following amounts:

1. In penal colonies into the personal accounts of prisoners who fulfil production norms or set tasks, and do not violate the regime, 15% should be paid, regardless of all deductions. Not less than 50% of the monthly wages should be paid into the personal accounts of male prisoners over sixty; women prisoners over fifty five; prisoners with first and second group disability status; people suffering from an active form of tuberculosis; pregnant women; women who have children with them in the children's home attached to the penal colonies. This provision immediately raises the question of what happens if the production norm is not met. Are they then not paid? On what basis is the amount not paid, and what means of influence is this that the amount could be not paid in total? Penal legislation gives no answers to these questions. In practice such wording of a normative act makes it possible under certain circumstances to pay a prisoner an amount after deductions have been made in full on various grounds (clothes, communal services, and so forth).

2. In the case of prisoners who are serving their sentence in educational colonies, social rehabilitation units of penal colonies, low security colonies with less severe conditions, as well as convicted women who are permitted to live outside the penal colony, no less than 75% of the monthly wages independent of all deductions shall be paid into their personal accounts

3. From the amount of the allocated pension paid by bodies of the Pension Fund of Ukraine according to the place of his sentence of a pensioner sentenced to deprivation of liberty, no less than 25% of the pension shall be paid into his personal account (regardless of the amount to compensate expenses for his upkeep).

Deductions from the wages of prisoners are made for an economic purpose, or for the prisoner to fulfil his obligations. For example, prisoners pay compensation from their wages, pension and other income for their food, clothing, footwear, linen, communal and other services, besides the cost of special uniforms or special food which prisoners can be given in accordance with labour legislation.

From prisoners who persistently avoid work, the cost of food, clothing, footwear, linen, communal and other services is deducted from the money in their personal accounts.

Compensation by the prisoner for expenses on his upkeep is deducted after the deduction of income tax and alimony. Deductions pursuant to a bailiff's writ of execution and other enforcement documents are carried out according to legally established procedure.

Item 4.1 of the Department's Instructions, approved by Order № 191 from 04.10.04 in general establishes the following order for deductions from a prisoner's wages:

- income tax;
- alimony
- the cost of food, clothing, footwear, linen, communal and other services (besides the cost of special uniforms or special food);
- according to writs of execution in favour of individuals;
- according to writs of execution in favour of legal entities;
- compensation for material damages inflicted by the prisoner upon the State while serving his sentence.

In practice this order for deductions from wages and other money which the prisoner has effectively results in the prisoner either receiving nothing at all, or receiving the sort of amount which

is not sufficient for spending in the middle of the institution, let alone sending any money to their relatives and providing for at least some means of existence after their release.

Such a situation is not only in breach of international acts, but also Ukraine's Constitution (the right to decent conditions of existence, fair remuneration for work) and other acts and programmes passed by State bodies (the programme for overcoming poverty and others).

In international standards (the European Prison Rules) the rules on remuneration are formulated clearly and unequivocally. Item 76.1 states that a system of fair remuneration for prisoners' labour needs to be introduced. Penal Legislation envisages an exception regarding the possibility of involving prisoners in work without paying them. These are cases where the prisoners work on tasks connected with improving the environment of the colony and adjacent territory, as well as improving the living conditions of prisoners, or on auxiliary work to provide the colony with food. Prisoners are engaged in such work on a rota system, during non-working hours and not more than two hours a day. This provision of national legislation is in breach of international acts and makes it possible to deprive a prisoner of free time altogether since work on improvements to the environment are possible in their free time and its duration can equal the maximum possible duration of the prisoner's free time.

There are additional restrictions on the right of prisoners to rest and social protection. For example, the regular annual leave is not granted a prisoner. Furthermore a number of articles allow for the use of prisoners' labour as punishment (Articles 68, 82, 132, 145 of the Penal Code). This is a direct breach of international standards for the treatment of prisoners since a penalty like being «assigned to an extra duty shift cleaning premises and the territory of the colony» infringes Item 34.1 of the European Prison Rules, which state that prisoners should not be punished in disciplinary procedure through work serving the institution itself.

Unfortunately, the present practice of engaging prisoners in work is virtually not aimed at prisoners perceiving it in a positive light, and remuneration for work is not made dependent on economic indicators such as quality and quantity of what is produced. The work accordingly does not have the reforming effect which legislation stipulates for it.

10.3. MEDICAL AND SOCIAL, EVERYDAY PROVISIONS FOR PRISONERS

These areas are very little regulated by law this allowing practicing Penal Service personnel to remain within the boundary of the law without any effort, while at the same time not providing the prisoner with even the minimum needed to maintain a person in conditions of physical isolation.

The provisions in penal legislation on medical care for prisoners directly correlate with prisoners' right to healthcare. The right to healthcare is one of the most important in the national penal system. Its violation has elicited the most negative response from the European Committee for the Prevention of Torture. The declarations formulated in the law claim that «healthcare of prisoners is ensured by a system of medical-sanitary and prophylactic-health restoring measures, as well as through a combination of free and fee-paying forms of medical care. However these declarations are not reflected in reality. Healthcare for prisoners in fact boils down to periodic medical check-ups which are ineffective, and the diagnosis of some diseases. The inadequate state of medical services in penal institutions is demonstrated by the fact that the level of both somatic and psychological illness among prisoners is very high. A person who has served a term of imprisonment can always be recognized by their missing teeth and sickly skin colour.

Investigating the medical and legal aspects of tuberculosis in penal institutions, particularly in the Lviv region, it was established that most cases of infection were among prisoners aged between 20 and 39 (73%). Among prisoners 14% were diagnosed for the first time as having tuberculosis. 39% of those with two or three convictions had the disease, while the percentage for those with four convictions was 47%. At present in penal institutions there are seven times more people with tuberculosis than in the outside world.¹³

¹³ «Sentenced to tuberculosis» 11/04/2008, <http://ukrtime.com/node/952>

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The provisions in legislation are thus not being implemented and cannot be. The version of all articles and items pertaining to healthcare of prisoners is of an excessively dispositive nature and does not set out procedure for medical services for prisoners, its mandatory nature, periodicity and scope. Furthermore, penal legislation does not contain provisions on the liability of officials or other personnel of the Penal Service for inadequate medical care of prisoners and for damaging their health.

It would be desirable to introduce strict liability for causing the death of a prisoner through inadequate conditions since in the majority of cases it is precisely the conditions which are the cause of disease among prisoners. Other reasons are ineffective medical check-ups, and ineffective or inadequate treatment of prisoners. Incidentally a prisoner who has «not undergone a full course of treatment» from diseases which pose a threat to people around, is restricted in some rights and does not receive, for example, the chance to be transferred to the social rehabilitation unit. As for officials and penal institution personnel, they bear no liability for not providing the proper medical care to prisoners.

National legislation confines itself to establishing general rules which are inflexible and do not allow for individualization and response to the actual circumstances. The provisions of normative acts regulating healthcare, do not, therefore, comply with the requirements of international legal acts. This can also be explained by the fact that penal legislation does not allow for mechanisms to ensure the exercising of the right to healthcare, as well as the liability of officials of the Penal Service who fail to ensure this right of the prisoner. Incidentally, Article 9 of the Penal Code which sets out prisoners' main duties, in paragraph two states that non-fulfilment by prisoners of their duties leads to liability as set down in legislation. These provisions stress the lack of equality of those involved in penal relations, including with regard to liability.

In the field of healthcare in penal institutions there are a lot of other problems. The State, if it has taken on the function of punishing people and limiting their ability to move around, by placing them in a specialized institution, must provide the possibility for such people to undergo medical treatment and check-ups. This is due to the fact that a person's ability to move around is restricted not by the conditions which lead to loss of health, but by the very fact of placing him in special institutions, isolated from access to the good things which society can provide. It is therefore the duty of the State to provide such people with the possibility of and access to medical care and to return a physically healthy person to society.

The Penal Code contains a provision which states that prisoners have the right to turn for consultations or treatment to institutions which provide fee-charging medical services. Such services and medicines needed are paid for by the prisoners or their relatives. Although this provision is very progressive, it remains mere declaration since it is very difficult to bring about given the relevant regime prohibitions and restrictions which effectively prevent prisoners from exercising this right.

Another problem is the lack of funding for penal institutions, this causing the medical units to not be fully equipped with medicines and technology, and to also not have sufficient qualified staff.

Yet another circumstance needs to be borne in mind. At the present time the medical service working in penal institutions is to a large extent dependent on this system. Medical service personnel are effectively subordinate to the penal administration. Their work and activity are coordinated and directed by the penal institution's officials and other staff. In view of this medical care becomes ineffective since it is also manipulated in order to achieve specific aims. It loses the function of providing medical care to prisoners and the function of treating illnesses and takes on a nomenclature, ideological and administrative colouring. Medical intervention is carried out in order to isolate and subdue those at odds with the actions of the administration or, on the contrary, in order to identify infringements of the regime and so forth.

It would therefore be desirable to create a medical service which does not answer to the penal administration. Such a medical service should carry out planned and ad hoc supervision of the health of prisoners and their full check-ups. The conclusions and treatment of prisoners by an independent medical service should be governed only by the aim of restoring the health of people who have fallen ill. Medical personnel must not become «included» in the process of enforcement and serving of sentences. The only demand and restriction which may be formulated is that medical personnel observe the regime conditions which apply for a specific prisoner.

11. CONCLUSIONS

The system of execution of sentences in Ukraine needs a radical overhaul. There need to be changes in the philosophy of punishment; the fundamental prisoners of the functioning of the State Penal Service, penal legislation and practice. The State Penal Service should be demilitarized and turned into a civil service within the Ministry of Justice with retention and enhancement of social protection for its staff. Observance of the human rights of both people accused and convicted prisoners on the one hand, and personnel on the other should become the Services priority. The Penal System should become open to effective supervision over human rights observance, and mechanisms and procedure for public and international control need to be created. The reform of the Penal System must receive adequate funding.

12. RECOMMENDATIONS

1. Complete the process of transferring the Department to the Ministry of Justice as called for in PACE Resolution № 1466 (2005)

2. Carry out a comprehensive analysis of all current penal legislation and practice to determine whether they comply with international standards. .

3. Rework the Concept Strategy for reform of the penal system in accordance with the Concept Strategy for reform of the criminal justice system, involving in the reworking and discussion wide circles of specialists, and ensure the holding of independent expert assessments of the Concept Strategy and its public discussion.

4. Cancel provisions of current normative legal acts of the Department which violate human rights.

5. On the basis of a new Concept Strategy for reform of the penal system, draw up a draft law on amendments and additions to the Penal Code in line with international standards; a draft law on amendments and additions to the Law «On the State Penal Service»; a draft law «On the disciplinary charter of the State Penal Service of Ukraine; draft Cabinet of Ministers Resolutions «On the procedure for serving in the State Penal Service» and «On the procedure for making a one-off payment in the event of death or crippling injury of an employment of the State Penal Service, and compensation for damages to his property when carrying out his official duties».

6. Review the tasks and legal basis for the activities of special units within the system and do not use them for carrying out searches and other actions within penal institutions.

7. Draw up and implement procedure for effective and swift response to reforms of possible human rights violations in penal institutions, in cooperation with leading human rights organizations.

8. Draw up and implement mechanisms and procedure for visits to penal institutions in accordance with the Optional Protocol to the UN Convention against Torture.

9. Promote the creation of other mechanisms of public control over the work of penal institutions

10. Introduce a real and working system for submitting complaints; put an end to the practice of punishing prisoners for attempts to appeal against the behaviour of the penal administration.

11. Prepare an exhaustive list of actions which will incur disciplinary penalties

12. Scrupulously check all possible cases of corrupt activities by employees of the system. Publicly express the position of the Department with regard to all cases found to have substance

13. Introduce research programmes and projects, including projects of civic human rights organizations on observance of prisoners' rights and the penal system as a whole.

14. Improve the level to which the public are informed about the activities of penal bodies and institutions, about the situation and problems of the Department. Create a press service for the Department in each region.

15. Transfer medical services to the Ministry of Health.

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We never take any payment for the assistance we provide. This is in fact effectively prohibited by current legislation however in the vast majority of cases those people whom we help would simply not be in a position to pay anything.

This unfortunately entails considerable expenditure with all the costs linked with running an organization and paying staff.

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