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Ukraine

Written submission
Torture and other forms of ill-treatment in Ukraine

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 lessoned, 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.

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 (no. 32092/02, 12 June 2008),

Kobets v. Ukraine (no. 16437/04, 14 February 2008),

Ukhan v. Ukraine (no. 30628/02, 18 December 2008),

Solovyov and Zozulya v. Ukraine (no. 40774/02, 4048/03, 27 November 2008),

Spinov v. Ukraine (no. 34331/03, 27 November 2008),

Ismailov v. Ukraine (no. 17323/04, 27 November 2008),

Mikhaniv v. Ukraine (no. 75522/01, 6 November 2008),

Soldatenko v. Ukraine (no. 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 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 Kopiychuk, 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 Kopiychuk to the police officers. Kopiychuk 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]

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]

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, 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;

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.

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.

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

[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

[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.

[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

[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.