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STATEMENT

by the Kharkiv Human Rights Protection Group to the OSCE Annual Human Dimension Implementation Meeting (Warsaw, 2 to 13 October 2006)

During the last few years Ukraine joined main international documents against torture, accepted the authority of the UN Committee against Torture (CAT) and ratified the Istanbul Protocol. The next step is to implement norms stipulated in these international documents in the domestic legislation and law-enforcement practice, as well as to create effective mechanisms for the prevention of torture. Unfortunately, not all steps taken by the Ukrainian government in this direction can be considered consistent. There are several causes why the practice of ill-treatment still persists and is wide spread in Ukraine.

Implementation of international standards for the prevention of torture in the national legislation

The existing law that is a foundation for eradicating the practice of ill-treatment toward detained and convicted persons is still unsophisticated, as well as various recent amendments to it are inconsistent.

Though the Ukrainian Parliament recently adopted the new *corpus delicti* "torture" in the Criminal Code (section 127 of CC), Parliament did not put it to CC's paragraph "Official Crimes." This circumstance conditions the common practice of its application as to a general subject. Paragraphs 3 and 4, stipulating punishment for torture committed by law-enforcement officers, have been in section 127 for two years. We know about only one criminal case opened under § 3 of this section, though. As there is no law-enforcement practice of this norm to date, it is very difficult to predict how occurrences of complicity toward torture or its use with the knowledge or tacit consent of officials will be assessed.

The inconsistence of steps taken by the government lies in the fact that Ukraine still fails to adopt a new Code of Criminal Procedure (CCP), which is to establish basic guarantees for persons under criminal prosecution. CCP's recent draft, which has passed a first reading to date, fails to meet many standards. It received negative comments from both national and international experts. If CCP be adopted in this form, it would not only change the situation for better, but, to the contrary, it would slow down the process of positive movement in criminal procedure.

Another substantial shortcoming in the legislation is a lack of the procedure for excluding evidence obtained through the use of torture. Courts believe that the exclusion of confessions from the evidence of the use of torture or ill-treatment should be established by a court decision. Therefore, in cases where there is indisputable evidence that the defendant was subject to unlawful investigative methods courts commission prosecutor's office to examine the defendant's complaints about his or her being a victim of torture. As a rule, this examination is carried out by the same unit of the prosecutor's office that supported the charge against the defendant in the main case. Consequently, the successful investigation of the defendant's complaint concerning the use of torture could lead to the prosecution's loss of the case in court.

As a rule, the result of prosecutor's examination is a rejection to open a criminal case. Even if the investigation was started, the prosecutor's office uses every effort in order to close the criminal case. As soon as a court obtains from the prosecutor's office a decision rejecting to open a criminal case or to cancel it, the court turns down the defendant's claims about torture and interprets them as a way to avoid punishment.

As a result, most involuntary confessions are not excluded from the evidence. This situation encourages sustaining the use of unlawful pressure on defendants, including torture.

Implementation of international standards for the prevention of torture in the law-enforcement practice

Along with the changes in legislation, the implementation of international standards for the prevention of torture in the law-enforcement practice is of no lesser significance. The Ministry of Interior (MI) demonstrates that it is most willing to cooperate in this area with human rights organizations. The Ministry of Justice (MJ) is also open for cooperation. However, the Department of Correction (DC), as well as its subordinate agencies, remains practically off-limits for public control.

Cooperation of the Ministry of Interior with human rights organizations on the prevention of torture

Although the general problems related to ill-treatment in law-enforcement agencies persist, we are encouraged by recent measures, which give hope for the better. MI managed to improve the contraction to torture and ill-treatment within its own ranks. For example, there are more cases when law-enforcement officers are prosecuted for their crimes. According to MI's press-center, the number of its officers who were criminally prosecuted in 2005-2006 is four times higher than in 2004; about 500 criminal cases were opened for the facts of ill-treatment. As Deputy Minister O. Novikov noted at a recent press-conference, earlier for this kind of crimes police officers were not prosecuted at all, because they "showed good records." He underlined that "today they are punished and this not a request from the leadership." He also told that there are specific measures to combat this phenomenon: in particular, police work in each region is assessed not with respect to a number of cleared or prevented crimes, but with respect to the public perception of the police there.

In 2005, MI created *public boards* with the Ministry and its several regional departments. The boards are to provide expert, methodological and other kind of assistance concerning the observation of human rights.

Also, under the Ministry, there are active permanent *mobile groups* consisted of representatives of MI and public organizations. The mission of these groups is monitoring of the observance of human rights in police. Mobile groups are entitled to inspect detention centers, familiarize themselves with documentation and materials related to administrative offences, inspect offices and question detainees. After the monitoring the group members compile a report, which is presented to the leadership of MI. Conclusions in the monitoring reports become a basis for conducting obligatory official examinations; on their basis, the Public Board develops recommendations how to improve police work.

Cooperation of the Ministry of Justice with human rights organizations

MJ, with the assistance of several donors, started a program to effect the concept of forming free legal aid. Under this program, in 2006 an office of free legal aid to detained person was opened in Kharkiv.

Relationship with the Department of Corrections

In contrast to MI, DC remains an establishment closed for public control. The flow of information about torture and ill-treatment in penitentiaries is still strong; however it is practically impossible to obtain official information, on which basis one could make a conclusion about the scale of torture. The main source from which we can make conclusions about the scale of this phenomenon is information coming unofficially through non-governmental organizations and media from isolated messages sent by inmates, in most cases illegally. The existence of such violations is also evidenced by frequent mass protest actions by

inmates, which become known to the public despite the attempts by the government to conceal them.

For example, in spring of 2006, a wave of protests by inmates rolled through Ukraine. Then many persons cut their veins in protest against ill-treatment toward them. Recently we have learned about inmates' huger strike at an investigative ward in Dnipropetrovsk. According to our information, the inmates have been protesting against unhygienic living conditions, systematic persecutions, beatings by special units of DC, and the lack of medical assistance. Unfortunately, through the closeness of such establishments, it is impossible to verify this information. We can assume that these protests are only a tip of the iceberg evidencing how wide spread ill-treatment really is.

Human rights organizations regularly receive complaints concerning the conduct in correctional colonies various "trainings" by special units of DC. We believe that these "trainings" possibly indicate to the state policy to intimidate inmates. According to unofficial data, these "trainings" are the cause for most protests.

From an appeal from inmates, who were directly involved in them, we know details of such "trainings" in the Zamkova Colony carried out on 29 January and 30 March 2001. Here is an excerpt from the message:

"[They] broke into our cells and ordered us to lie on the floor. When we did that, they trampled us down and beat us all over with their feet and batons. Then they ordered us to get up and forced to run along the corridor between the lines made up of members of their special unit; when we ran between the lines, the officers beat us again with their batons and feet. Then we were ordered to stand beside the wall and pull our legs as far as possible, and the officers walked along and beat us again on our kidneys, backs and even heads. ..."

Over one hundred inmates were involved in these "trainings." The victims claim that a prosecutor was present at the spot.

Judging from a so called *Plan* for the aforementioned trainings, officially approved by DC, its aim was "to train practical actions, including the imitation of mass disturbances and/or mass disobedience, train skills in the use of force."

On 8 September 2003, DC issued Order No.163 "On creation of special units within the corrections system, approval of its staff and regulations for these units," which it later replaced with Order No. 167 of 10 October 2005 "On approval of regulations for special units." Only the last order was published. After analyzing all these documents, we came to conclusion that the real goal of DC was to carry out trainings not on how to react to mass disturbances, but on how to prevent real disturbances among inmates through their intimidation.

As we can judge from these documents, DC was not at all going to stop conducting these "trainings," but rather attempting to make them look lawful.

Noteworthy that Ukraine has ratified the Optional Protocol to the UN Convention against Torture in September of 2006. This protocol provides for the implementation of national mechanisms to prevent torture in penitentiaries. These mechanisms have to create a possibility to establish an effective public control over the penitentiaries. However, we do not see purposeful steps to implement these mechanisms in Ukraine so far.

WRITTEN RECOMMENDATIONS

by the Kharkiv Human Rights Protection Group
to
the OSCE Annual Human Dimension Implementation Meeting
(Warsaw, 2 to 13 October 2006)

The Government of Ukraine should do the following:

- To start the work on creating national preventive mechanisms provided by the Optional Protocol to the UN Convention against Torture;
- To determine in the legislation the starting point of detention and not to tie the determination of that moment with a formal action by an executive authority;
- To provide clear procedure of immediate notification of relatives and close friends of a detained person;
- To abolish legislative provisions that limit a circle of people, who can be notified about suspect's detention; refusal in notifying a person, pointed out by a detainee, must be substantiated with reference to the legal grounds;
- To abolish legislative provisions, which stipulate meetings of a detained person with his lawyer for the discretion of the prosecution at access of a lawyer to his or her client must be streamlined as much as possible, while practical issues of lawyer's access to a detainee must be dealt with by an independent person;
- To widen a circle of people eligible for free legal aid and set up clear criteria for determination of indigent status of accused persons;
- To set up fair fees for lawyers, who provide legal aid at the expense of the state finances;
- To allocate sufficient funds for reimbursement of free legal aid;
- To abolish from the legislation any provisions that directly or indirectly allow delays in the bringing to a judge longer than it is prescribed by the Constitution;
- To clearly define in the criminal legislation elements of crime "unlawful taking into custody, detention, or arrest;
- To introduce amendments to the Ukraine's Code of Administrative Offences, which would provide accused in the offences entailing administrative arrest, with the guarantees of fair court procedure;
- To provide in the legislation a possibility for detained person's access to a physician at his or her own choice;
- To introduce in the legislation provisions that validate as evidence conclusions prepared by experts at "detained person's own choice equal as those prepared by experts assigned by the prosecution;
- To clarify in the law a subject matter of consideration at first appearance in court, as well as during the following detention hearings;
- To provide in the legislation the right for a detainee to initiate a periodical judicial review of the legality of his or her detention during the whole period of his or her being in custody;

- To authorize a judge to initiate investigation of detained person's claims about tortures, if in the course of any court consideration, the detainee claims about the use of tortures, or other circumstances point to it;
- To carry out training of investigators on methods of effective investigation of tortures;
- The legislation and court practice should not tie the decision on admissibility of confessions with the decision on personal responsibility of persons, involved in the use of tortures; the admissibility of confessions must be decided on the basis of independent criteria and the obligation to prove voluntary nature of confession must be incumbent on prosecution;
- The legislator and higher judicial authorities should develop, and courts should follow a context- sensitive approach to assessment of the credibility of the statements made by accused persons about their being subjected to torture and other forms of unlawful coercion.
- To create legislative provisions, which make it impossible to apply amnesty and parole for people who have committed actions, which have elements of «torture» in the understanding of Article 1 of the UN Convention against Torture;
- To create effective mechanisms of public control over investigations into allegations of torture and ill-treatment, which take place in law enforcement agencies and other closed institutions;
- To establish a clear presumption in favor of a person's release and provide that the onus of providing proof about grounds for detention be shifted to the prosecution;
- To introduce provisions which would exclude remand in custody or its extension on the basis of purely hypothetical assumptions that a person could abscond, hamper the establishment of truth in the case, or continue his or her criminal activity;
- To review the legislative framework of forensic examination in order to provide the involvement of non-state experts and expert bureaus;
- To exclude from legislation those provisions which make it impossible or complicated for victims and their legal representatives to obtain documents containing medical information concerning victims, including conclusions by medical experts, regardless of the title and nature of those conclusions;
- To prepare procedure, this would encourage the use of bail instead of detention.

NGOs of Ukraine should do the following:

- To actively participate in the work on creating national preventive mechanisms provided by the Optional Protocol to the UN Convention against Torture and monitoring how the government fulfill its obligations under this Protocol.

OSCE is invited:

- To contribute to the work on creating national preventive mechanisms provided by the Optional Protocol to the UN Convention against Torture and efforts on the part of human rights organizations to create such mechanisms and monitoring how the government fulfill its obligations under this Protocol;
- To encourage the government to the quickest creation of such preventive mechanisms.