HUMAN RIGHTS IN UKRAINE – 2007

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UKRAINIAN HELSINKI HUMAN RIGHTS UNION

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This book considers the human rights situation in Ukraine during 2007, 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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Yevgeniy Zakharov, Volodymyr Yavorsky

OVERVIEW OF VIOLATIONS OF RIGHTS AND FREEDOMS IN 2007[1]

After 2004 there was a noticeable improvement in observance of rights and liberties. This process, however, proved more to do with a weakening in the regime itself which had made a conditional step towards the people which increased the level of freedom. There were various factors involved including fear of the new people in power who expressed the wish to punish criminals, significant reshuffling of those in positions of authority, as well as many others.

The weakening of pressure brought to bear by the State on the individual resulted in greater opportunity to exercise those rights and freedoms which the State must not interfere with as it pleases, for example, freedom of speech, freedom of association, the right to free elections, freedom of business enterprise and so forth.

Yet where the State had a duty to do something to improve the situation (fulfil its positive duties, for example, by ensuring proper investigation into cases of torture, enforcement of court rulings, etc), the situation could not change radically since nothing was done to achieve this.

This explains the trends in 2007 when the factors which brought about a reduction in the State's pressure on the individual gradually faded.

We can speak at present of a consistently bad situation as regards the prohibition of torture and ill-treatment; the right to life in the context of investigations into cases where life was taken; the right to a fair trial; the right to privacy; the right of access to information; and others.

The heightened political struggle in 2007 resulted in a general lowering in the level of political freedom which is gradually being eroded away. Political rights, for example, the right to be elected, are being undermined. This right can effectively only be enjoyed by members of political parties who make up less than 4 % of the voters. In a democratic country party membership cannot be a precondition for standing for electoral office. The demand to introduce the imperative mandate which is in essence the guarantee of strict factional discipline also has an adverse effect on political freedom. Our parties are becoming ever more reminiscent of the Communist Party of the Soviet Union. All political forces violate the principles of the sovereignty of the law, for example, by putting pressure on the courts.

Of concern is an increase in hate crimes. The number of racially-motivated murders and physical attacks has risen significantly in recent years. At present there are no effective steps towards overcoming the problems of discrimination, racism and xenophobia.

There are also no major changes in safeguarding socio-economic rights. The growth in the economy has not been reflected in an increase in the income of a large percentage of the population and has only led to a still greater divide between the incomes of rich and poor. According to official statistics, a third of the population lives below the poverty line. The problem was particularly exacerbated through the considerable increase in communal charges and rise in inflation since the system for protecting the poor against such increases is inadequate.

[1] By UHHRU Executive Director Volodymyr Yavorsky.

Against this background a positive move was the judgment by the Constitutional Court to prohibit the suspension of rights through the annual law on the Budget.[2] Making it clear that the force of rights as opposed to privileges cannot be suspended, the Court clearly confirmed the prohibition on any narrowing of the constitutional rights of citizens. Unfortunately, the government did not understand this judgment and yet against suspended the force of rights in the Budget for 2008, although this Budget was then also found to be unconstitutional by the Court for exactly the same reasons. The government thus demonstrates a lack of will to comply with the judgments of the Constitutional Court on protecting socio-economic rights.

As far as observance of human rights is concerned, two key issues can be identified which to a large extent influence the safeguarding of other rights and freedoms, these being the right to a fair trial and the activities of the law enforcement agencies.

Without court protection any right is doomed to exist only on paper, and therefore many rights become meaningless where the right to a fair trial is not ensured.

This mechanism for protection of rights is still not as effective as it should be. The courts are overloaded and judicial examination of cases goes beyond any reasonable timescale. Judges are too dependent on figures of authority, or even on those in charge of the judiciary, with this placing a question mark over their impartiality in examining cases of public importance, especially when one of the parties is a State body. Furthermore, even those court rulings which come into effect are often not enforced. When virtually two thirds of all court rulings are not enforced, it is difficult to speak of real protection of ones rights through the courts.

We should add that this problem is also pointed to by the European Court of Human Rights. 2/3 of its judgments against Ukraine and there are not less than 80 per year, concern violation of the right to a fair trial.

Under such circumstances it would be logical to hope for political will to change the situation. In 2006 indeed, the President announced a year of court reform and spoke on many occasions of the need for such reform. This was supported by the leading political parties in their pre-election programmes at the 2007 elections.

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 standards[3], 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[4] 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.[5] Some of those who had taken a direct role in drawing up

[2] Judgment by the Constitutional Court following a constitutional submission by 48 National Deputies asking whether the following articles complied with the Constitution: 29, 36, 56 § 2, 62 § 2, 66 § 1, Items 7, 9, 12, 13, 14, 23, 29, 30, 39, 41, 43, 44, 45, 46 of Article 71, Articles 98, 101, 103, 111 of the Law on the Budget for 2007 (the case of social guarantees for citizens). The judgment is available here: http://www.ccu.gov.ua/pls/wccu/P000?lang=0. while information about the ruling can be found on both www.helsinki.org.ua and www.khpg.org.ua

[3] Presidential Decree from 10 May 2006 № 361/2006.

[4] See, for example, «Head of the Supreme Court Vasyl Onopenko is concerned that judicial reform in Ukraine could contradict its main objective, improving the justice system and making it meet people's needs, and is asking the President to withdraw the draft Law «On amendments to the Law «On the judicial system of Ukraine» // Information on the Verkhovna Rada website from 22 March 2007 http://www.scourt.gov.ua/clients/vs.nsf/0/F2D409AA21601D74C32572A6004C76A3; See also the Appeal from the Council of Judges of Ukraine to the President from 9 February 2007.

[5] 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.

the Strategy Concept and the relevant draft laws were removed, and some currently serving judges and employees of the judiciary were included. The new members of the Commission immediately created a subcommittee with the task of revising the Strategy Commission passed by the President. These actions in practice prove that the President has renounced his attention to introduce the Strategy Concept he approved despite the fact that it received favourable assessments from international experts from the Council of Europe, scholars, human rights defenders and judges of lower level courts.

The fate of judicial reform is now in the hands of parliament and the President who have, under pressure from the Supreme Court, virtually rejected its introduction. On the other hand certain political forces are aspiring to revise the content of the judicial reform in order to gain new levers of influence on the courts.

Another problem remains the activities of the law enforcement agencies. It is through their actions that violations occur of the right of freedom from torture and ill-treatment, the right to life In the context of a lack of effective investigation, the right to liberty and personal security in the context of arbitrary detention and arrest, the right to privacy as regards the use of investigative operations measures (for example, wiretapping, surveillance over Internet users, covert searches, etc) and the collection of personal data, as well as many other rights and freedoms.

After 2004 a sharp reduction was observed in human rights violations by the law enforcement agencies. However the situation has gradually and in part got worse again.

There are quite often reported cases of torture, cruel or inhuman treatment by police officers. There are also often cases of ill-treatment in places of confinement controlled by the State Department for the Execution of Sentences. Yet, with rare exceptions, there is virtually never an effective investigation resulting in those guilty being punished. There are numerous cases where there is no investigation into suspicious deaths, whereas such investigations are the duty of the State in safeguarding the right to life. There is particular procrastination in cases where the person suspected has links with high-ranking public officials. The classic example is the failure to bring to conclusion virtually any investigation into the deaths in road accidents where the car responsible was driven by somebody with connections.

Although surveillance of individuals has decreased since 2004, it remains at an excessive level. For example, the number of permits for wiretapping has fallen from around 40 thousand to 12 thousand per year however this figure is approximately 3-4 times greater than in countries of Central and Western Europe or the USA.

We should, however, note certain progress in the Ministry of Internal Affairs. This can be linked with the development of the work of public councils attached to the MIA and its regional departments; the development of mobile groups which monitoring human rights abuse in places where people detained by the police are held; as well as the creation of a separate Human Rights Department within the MIA system. There is also clear progress in the behaviour of the police with regard to safeguarding freedom of peaceful assembly, with cases where meetings are dispersed being isolated.

Against certain progress in the MIA, no improvements took place in the Department for the Execution of Sentences or the prosecutor's office, with the behaviour of these bodies being more repressive than aimed at protecting human rights.

In view of this it is vital to implement the Concept Strategy for Reform of Criminal Justice.[6]. One would not want the fate of this to be similar to the process of judicial reform. Yet there is no evidence of great enthusiasm among politicians for implementing this.

The work of the Authorised Human Rights Representative of the Verkhovna Rada of Ukraine (the Human Rights Ombudsperson) remains not effective and unsystematic. Although the Ombudsperson's Secretariat has received proper financing over recent years, its influence has not grown. To a large extent the Ombudsperson's reputation and trust in her were undermined by her political engagement, participation in the elections as number 2 on the candidate list of one of the political parties, and then her combination of deputy mandate with her position. Yet even if we do not consider this, then with the exception of some isolated cases, her activities have not been effective.

[6] Approved by Presidential Decree No. 311/2008 On the decision of the National Security and Defence Council from 15 February 2008 «On the process of reforming the system of criminal justice and law enforcement agencies»

It has been three years since either parliament or the public saw reports from the Ombudsperson on human rights in the country, although this should be a systematic summary of the problems regarding human rights observance. The Ombudsperson virtually does not use the important instrument of constitutional submission. The Ombudsperson's Secretariat does not have a register of complaints, and no results of the review of open proceedings are evident. Furthermore, the majority of complaints are simply sent to other authorities, the police, prosecutor's office or Department for the Execution of Sentences, etc. Nor is the confidentiality of the applicant preserved this placing the person who complaints at direct risk from the people against whom he/she is complaining. The Ombudsperson is thus not using the most effective mechanisms for influence. It must however be said that there has been an increase in the amount of information provided about her activities.

The Ombudsperson explains her insufficient activity as being due to shortcomings in legislation. However when she submitted a draft law on broadening her mandate[7], one could not observe ways for extending her powers. The Ombudsperson proposes that she be given the procedural right to appeal as a party in court proceedings which cannot fail to elicit bemusement. The Ombudsperson cannot provide a substitute for the system of legal aid to members of the public, and on the other hand this leads to a clear infringement of the principle of equality of parties in any court process. For example, appearing on the side of the victims in a criminal case, she is effectively taking part in the prosecution which is anything but the function of this structure. Such rights can be simply called a form of pressure on the court. It is clear that the Ombudsperson's office has to this day not understood that the importance of its role lies in its own proceedings and administrative methods of human rights protection. What is vital to achieve is that decisions of the Ombudsperson become mandatory for the authorities[8], and if the latter don't agree with them, they can appeal against them in an administrative court. That is, it would be worth strengthening the significance of the decisions of this body.

Last year the Ombudsperson finally decided to create a network of regional representatives. However it is paradoxical that in this she will be assisted by the heads of local State administrations – representatives of the local authorities[9], over whom these representatives should be watching. The clear conflict of interests does not bother the Ombudsperson, yet one can hardly hope for effective work.

It is thus clear that the court and parliamentary systems for defending rights and liberties are weak and often not effective.

Last year we spoke of the government standing still on observance of human rights. However, considering the authorities' tendency towards violations of human rights, it can be said that it is standing still on a slope and gradually sliding towards an abyss. Without significant reforms therefore, the achievements of the last years will be totally lost. Yet the possibility for these reforms is being blocked by a long-term political crisis effectively generated by the constitutional reforms of 2004. In conditions of permanent conflict within the regime it is impossible to achieve reform. One need only mention the rule that with a change in Government, all government draft laws already drawn up are definitely spent to be agreed against with all interested ministries and departments. Within the executive branch of power, therefore, it is virtually impossible to draw up draft laws and implement any policy because of the almost annual change in government and the re-agreeing over

[7] Cf. Draft Laws № 1302 from 7 April 2008 on amendments to the Code of Administrative Procedure of Ukraine (on participation in a case of the Authorised Human Rights Representative of the Verkhovna Rada of Ukraine), http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=31246; № 1301 from 07.04.2008 Draft law on amendments to the Civil Procedure Code (on participation in a case of the Authorised Human Rights Representative of the Verkhovna Rada of Ukraine), http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=31245, № 1299 from 28.12.2007 on amendments and additions to the Criminal Procedure Code on providing the Authorised Human Rights Representative of the Verkhovna Rada and representatives with the possibility for court defence of human rights and freedoms, http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=31243.

[8] There is an attempt at this in Draft Law № 2569 from 27 March 2008 on introducing amendments and additions to the Law «On the Authorised Human Rights Representative of the Verkhovna Rada» (on the binding power of decisions by the Ombudsperson on eliminating violations of citizens' rights and freedoms), http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=32619.

[9] Cf. for example, Viktor Yushchenko: «The influence of the institution of the Ombudsperson on decision-making in the country should be heightened» // http://www.president.gov.ua/news/9641.html.

years of the majority of draft laws. The President in turn is absolutely inconsistent in his policy, changing his views on the basis of political expediency (for example, over the judicial reform).

Euro-integration plans of politicians remain fine words only since they are impossible without reforms on ensuring rights and freedoms. The EU-Ukraine Cooperation Plan in the part considering human rights has not been implemented at all. For over two years already all measures on its implementation have been postponed by the Ministry of Justice till the following year.

Recommendations from UN bodies, the Council of Europe and OSCE are practically not being implemented and are ignored, and State representatives at meetings of these bodies look feeble since they have virtually nothing to talk about barring certain progress in the MIA.

We must report therefore that there is no systematic policy at all on improving observance of rights and freedoms.[10]. Under such conditions an improvement in the situation is not a point of orientation of the regime and achievement of this goal remains therefore elusive. This will become even more evident in the next year when the fate of the reforms to the judicial system and system of criminal justice becomes clear.

[10] An exception is the Presidential Decree № 39/2006 «On an Action Plan for fulfilling Ukraine's duties and commitments arising from its membership of the Council of Europe» Available at http://www.president.gov.ua/documents/3854.html, as well as the Concept Strategy for Judicial Reform and reform of criminal justice.

I. THE RIGHT TO LIFE[1]

1. THE STATE'S DUTY TO PROTECT LIFE (POSITIVE DUTY)

The right to life entails the obligation of the State to ensure that this right is protected via the national legal system. This demands an effective system of laws and of law and order; the appropriate actions of representatives of the police, prosecutor's office, the courts, as well as the imposition of a system of punishment for crimes against life. The taking of a human life should be prohibited expect in cases legally stipulated.

The State is responsible for the actions and inaction of its representatives, including the law enforcement agencies, military and the personnel of prisons. The State does not, however, bear responsibility for the actions of private individuals which caused a person's death.

The State is also obliged to ensure the enforcement of those rules which guarantee proper investigation of all suspicious cases involving the taking of life. These investigations must be carried out swiftly, without delay and need to be effective and independent.

The State must also take measures to protect life in the case of a real and urgent threat which it is aware of or should be aware of, for example, in the case of manmade disasters and industrial incidents.

In 2007 there were no recorded killings carried out by representatives of the authorities for political motives.

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

The number of deaths from external causes in everyday life between January and December 2007 (broken down by cause of death and type of location)[2]

	Urban and rural populated areas		Urban areas		Rural areas	
	Total number	**per100000 head of population**	**Total number**	**per100000 head of population**	**Total number**	**per100000 head of population**
Total No. of deaths from external causes	**64 326**	**138,3**	**40 156**	**126,6**	**24 170**	**163,5**
This including:						
– pedestrians suffering as the result of a transport-linked accident	4 670	10,1	2 999	9,4	1 671	11,3
– people involved in car accidents	3 644	7,8	2 538	8,0	1 106	7,5
– other t*ransport-linked accidents*	2 976	6,4	1 638	5,2	1 338	9,0
– from falls	3 365	7,2	2 413	7,6	952	6,4
– from chance action of inanimate mechanical forces	474	1,0	2 82	0,9	192	1,3

[1] Prepared by Volodymyr Yavorsky, UHHRU Executive Director.

[2] The number of deaths from external causes in everyday life between January and December 2007. Express issue of the State Committee of Statistics No. 40 from 21 February 2008

– from drowning or immersion in water	4 274	9,2	2 170	6,8	2 104	14,2
– from other accidents preventing breathing	2 720	5,9	1 579	5,0	1 141	7,7
– *Accidents involving smoke or fire*	2 660	5,7	1 349	4,3	1 311	8,9
– accidents caused by natural factors	4 149	8,9	2 703	8,5	1 446	9,8
– accidental poisoning or the influence of alcohol	8 007	17,2	4 525	14,3	3 482	23,6
– from other accidental poisoning from toxic substances	3 095	6,7	1 959	6,2	1 136	7,7
– from deliberate self-injury (including suicide)	10 020	21,5	5 620	17,7	4 400	29,8
– from the results of an attack aimed at killing the person or inflicting injuries	4 200	9,0	2 864	9,0	1 336	9,0
– from cases of injury without clear intent	8 777	18,9	6 782	21,4	1 995	13,5
– other causes	1 295	2,8	735	2,3	560	3,8

According to figures from the State Committee of Statistics the mortality ratio remains high (16.4 people per 1000 head of population), this including the mortality rate for infants up to 1 year (11.1 per 1000 babies born, or 5,188 infants in 2007). The coefficient for child mortality is lower than in the 1990s however it has risen significantly in comparison with 2003-2004. The number of those dying per 1000 head of population has been rising inexorably by the year (1990 – 12.1, 1998 – 14,4, 2006 – 16,2 per 100 head of population). With a low birth rate, there continues to be a negative coefficient in natural increase of the population (-6.4 per 1000 people). The population last year decreased by over 290 thousand. However in comparison with past years a positive aspect is an increase in the birth rate from 9.8 in 2006 to10,3 per 1000 head of population.

It is also worth analysing the situation with protecting the right to not be unlawfully deprived of life. For this, statistics on crimes linked with unlawfully taking of life should be considered.

Crimes causing the death of the victim[3]

			Crimes registered			Percentage solved, %		Crimes investigated (uncovered)[4]			Unsolved crimes
			2006	2007	Change, %	2007	Change, %	2006	2007	Change, %	
Particular types of crimes	Murder (or attempted murder)		3220	2906	-9.8	93.3	93.7	3256	2990	–8,2	200
	Intentional grave bodily injury		5283	5486	3.8	87.6	88.8	4912	5189	5.6	654
	including	Those resulting in a fatality	1689	1850	9.5	90.3	92.8	1637	1802	10.1	140
	Infringements of road safety		11937	13526	13.3	66.0	65.8	8892	10193	14.6	5295
	including	Those resulting in a fatality	3255	3569	9.6	61.9	64.8	2131	2581	21.1	1402

[3] MIA official statistics for 2007, available at the MIA website http://mvs.gov.ua/mvs/control/main/uk/publish/article/53966;jsessionid=5EB104DD6E1A35F769081F68D229D60E.

[4] 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 CPC), this being approximately 6-8 % of the total number of criminal investigations

The number of cases of homicide fell (from 3,220 to 2,906 or a 9.8 % drop). There was, however, an increase in the Ivano-Frankivsk (+41,7 %), Dnipropetrovsk (+20,5 %), Kherson (+9,0 %), Khmelnytsky (+5,6 %) and Volyn (+2,3 %) regions. 200 murders remained unsolved against 230 the previous year. Most were in the Donetsk region (51), the Crimea (18), the Dnipropetrovsk (15), Luhansk (14), Kyiv (12), Kharkiv (10) and Lviv (9) regions and in Kyiv (14).

We should add that the number of registered crimes gives the statistics only for criminal investigations initiated. However it is not uncommon for investigations to not be initiated, especially in contradictory cases or where the investigators have a certain interest in this. Refusals to initiate a criminal investigation are particularly common in cases of deprivation of life by a law enforcement officer, deaths in hospital, fatalities from a road accident, deaths in places of confinement, etc.

In implementation of the Law «On amendments to Article 112 of the Criminal Procedure Code of Ukraine from 19 April 2007 which came into force on 1 July 2007, a separate category of crimes against the person, including over cases of killing, were transferred from the prosecutor's office to the jurisdiction of Ministry of Internal Affairs (MIA) pre-trial investigation bodies. Over 7 thousand homicide investigations were handed over.

In order to properly organize implementation of this Law, the Prosecutor General and the Acting Minister of Internal Affairs issued a joint instruction on 21 June 2007 regulating rules of procedure for deciding on reports and information about such crimes and their investigation.

Last year the prosecutor's office concluded investigations into 2,250 murder investigations, with 2,152 being passed to the court (71 % of the total number of cases investigated by the investigation units of the prosecutor's office and the pre-trial investigation units of the MIA). At the same time, Internal Affairs bodies concluded 938 cases, with 875 being passed to the court.[5]

At the same time problems remain with organizing examination of the place of an event in cases of violent death when instead of Internal Affairs investigation units it is not uncommon for officers with little experience of such work to be sent, this resulting in an unqualified examination and to serious complications in investigating the cases.

Prosecutor's offices have taken measures to increase the level of prosecutor supervision over the investigation of criminal investigations into road accidents, especially where fatalities were involved.

Scrutiny of such criminal investigations led to the Acting Minister of Internal Affairs issuing a submission on 30 August 2007 on the basis of which police officers faced disciplinary charges and measures were taken to remove the infringements identified.

According to figures from the State Judicial Administration, in 2007 3,170 prosecutions were submitted to the court over murder, with another 1,077 not having been examined from previous years. The courts examined 3,162 criminal prosecutions with verdicts being passed in only 2,605 cases.

There was particular publicity over deaths in pre-trial detention centres [SIZO]. According to checks carried out by the Prosecutor General and the Kyiv Prosecutor's Office, in connection with two killings and other deaths in the Kyiv SIZO during the second half of 2007, 5 documents of prosecutor's response were issued, disciplinary charges were brought against 23 public officials, with two being dismissed. A criminal investigation was initiated against the Deputy Duty Assistant Head of the SIZO by the Kyiv Prosecutor underder Article 367 § 2 of the Criminal Code (negligence, with grave consequences – translator), this being passed to the Shevchenkivsky District Court in Kyiv. In addition, on the basis of rulings from the Kyiv Court of Appeal and the Shevchenkivsky District Court with regard to the people who killed O.H. Orlov and O.V. Postnikkov in the Kyiv SIZO, in view of their not being legally answerable, compulsory measures of a medical nature were taken in accordance with Articles 92-94 of the Criminal Code.[6]

[5] Information «On the level of lawfulness in the country in 2007 (in accordance with Article 2 of the Law «On the prosecutor's office») // The Prosecutor General of Ukraine. Official website 10.03.2008, http://www.gp.gov.ua/ua/vlada.html?_m=publications&_t=rec&id=12985.

[6] Checks carried out by the Prosecutor General's office into deaths in SIZO // The Prosecutor General of Ukraine. Official website 10.03.2008, http://www.gpu.gov.ua/ua/news.html?_m=publications&_t=rec&id=12345&fp=61.

The situation with protecting the right to life in the Armed Forces should also be mentioned. Civic organizations receive information about cases of ««didivshchyna» [bullying or worse of conscripts by those senior to them], including cases leading to 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.

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

It should be noted that there is no law to protect the interests of victims of medical error. Yet the main problem is not even the fact that this or that article of the Criminal Code is difficult to apply because of the unclear or excessively narrow wording of the provisions. A greater 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. After all those accused or suspected of an offence cannot check themselves. If you then add the closing of ranks, it is easy enough to predict the court prospects of such cases. We can cite one typical case where there was no proper investigation into such a case.

On 4 March 2007 twenty-year old Volodymyr Fedoruk turned to the Vinnytsa Region Clinical Hospital named after Pirogov complaining of pains and with septic pathology. He was examined and advised to undergo an operation the next day. According to the information which the hospital issues Fedoruk turned for medical assistance on 5 March. He was operated upon the same day, but died on 8 March from septic infection. According to the case material, it is clear that as well as many infringements when providing medical care, *an anaesthetic was used which is directly prohibited in treating such cases.*

The Vinnytsa Regional Prosecutor's Office refused on 14 April to initiate a criminal investigation into inadequate fulfilment by medical staff of the hospital of their professional duties. The parents lodged an appeal against this decision with the court. However the case was examined in the absence of the applicants on 10 May and the appeal was rejected. Helped by lawyers from the Vinnytsa Human Rights Group, they then against this court ruling. On 26 July the Court of Appeal sent the case for a new examination.

The Leninsky District Court in Vinnytsa on 20 August revoked the decision of the prosecutor's office about refusing to initiate a criminal investigation and sent the case for a new check. The court noted that the prosecutor's office had carried out an incomplete check that nothing had been resolved regarding contradictory evidence and a forensic medical assessment had not been obtained.

Without virtually any investigative work on 11 November the police again refused to initiate a criminal investigation. This decision was appealed in the court.[7]

Investigations into such cases sometimes drag on for years and are most often conducted in a superficial manner.

The following is a typical example of an investigation being dragged out.

On 10 August 2005 after hospital treatment for 21 days (first in the Uzhhorod Regional Infectious Diseases Clinic, and then in the Uzhhorod Central Clinical Hospital), due to the fault of doctors (this being later confirmed by a commission forensic assessment in Lviv), Zoryana Mykhailivna Petranych died at the age of 24.

The Uzhhorod Prosecutor's Office on 19 September 2005 launched a criminal investigation under Article 40 § 1 of the Criminal Code over inadequate fulfilment by medical personnel of their professional duties. On 2 November the case was passed to the Transcarpathian Regional Prosecutor's Office which has since then been running the investigation. In August 2007 the investigation unit of the regional prosecutor's office sent an application to conduct another forensic assessment to establishment the cause of death.[8]

Separate attention should be paid to the constant rise in infant mortality.

[7] The case is supported by the UHHRU Strategic Litigation Fund for Healthcare Cases, run with the financial support of the International Renaissance Foundation. More information on this case is available in Ukrainian at: http://www.33channel.vinnitsa.com/2007/m07-07-17.php, http://www.33channel.vinnitsa.com/2007/m07-08-02.php, http://www.fmob.vn.ua/memorial/vavan.php?page=1

[8] The case is supported by the UHHRU Strategic Litigation Fund for Healthcare Cases, run with the financial support of the International Renaissance Foundation

Infant deaths (up till the age of 1) broken down by cause of death[9]

	2007		2006	
	infants	Percentage of the subtotal	infants	Percentage of the subtotal
Total number of deaths	**5188**	**100,0**	**4433**	**100,0**
from the following causes:				
Some infectious and parasitic diseases	189	3,6	215	4,8
Among them, tuberculosis	2	0,0	1	0,0
viral diseases				
HIV	19	0,4	23	0,5
Tumours	51	1,0	45	1,0
Blood and Vascular diseases, and particular problems with the immune system	49	0,9	43	1,0
Endocrinal diseases and digestive disorders				
and problems with metabolism	48	0,9	59	1,3
Nervous system disorders	170	3,3	123	2,8
Vascular disorders	61	1,2	59	1,3
Respiratory disorders	174	3,4	180	4,1
Including influenza and pneumonia	116	2,2	123	2,8
Digestive system disorders	32	0,6	25	0,6
Specific conditions arising at the prenatal stagei	2503	48,2	1917	43,2
Including heart or vascular disorders in the prenatal stage	1221	23,5	963	21,7
Specific prenatal infections	447	8,6	396	8,9
Haemoglobin linked disorders in the foetus or new	493	9,5	305	6,9
Congenital development disorder or deficiency and				
Chromosome anomalies	1327	25,6	1218	27,5
Including congenital disorders of the				
nervous system	125	2,4	120	2,7
– *Congenital vascular problems*	527	10,2	518	11,7
– *Congenital problems of the digestive system*	103	2,0	81	1,8
Other illnesses	8	0,2	6	0,1
Unspecified or unknown causes of death	253	4,9	193	4,4
External causes of death	323	6,2	350	7,9
The results of an assault aimed at killing or inflicting injury	21	0,4	28	0,6

There is no effective programme at the present time for overcoming this problem..

We can cite the following case where a new-born baby died as the result of inadequate fulfilment by medical personnel of their professional duties. There were, in our view, clear infringements of the standards and requirements during childbirth, and failure to provide information about the state of the patient which led to grave consequences.

On 9 November 2006 at 4 a.m. A. Mykovoz was taken to the Kharkiv City Maternity Unit No. 6 due to the beginning of labour. Five hours later an examination was carried out which showed that the foetus was entwined in the umbilical cord. A caesarean birth was recommended, however the doctors assured the woman that all would be alright in any case.

The birth took place at 8 a.m. the next morning. However they were unable to get the newly-born baby to breathe independently. He was placed in a box for artificial lung ventilation and 6 hours later

[9] The demographic situation in Ukraine in 2007. Express Bulletin. State Committee of Statistics. http://www.ukrstat.gov.ua

was transferred to the city prenatal centre. From then on he remained in a very serious state in the regional intensive care unit for new-born babies. He died on 4 February 2007.

The parents were unable until autumn 2007 to receive and study the conclusions of the department of commission assessments of the Kharkiv Regional Forensic Medical Assessment Bureau from the autopsy and forensic examination. The prosecutor's office has refused to initiate a criminal investigation. Relatives have filed a civil claim against the hospital.[10]

2. PROHIBITION ON TAKING LIFE EXCEPT IN CASES STIPULATED BY LAW (NEGATIVE DUTY))

2.1. THE DEATH PENALTY

On 16 March 2007 Ukraine ratified the Second Optional Protocol to the International Convention on Civil and Political Rights pertaining to the abolition of the death penalty. Thus, after the Constitutional Court judgment finding the death penalty to be unconstitutional and the ratification of this Protocol, as well earlier as the supplementary Protocols No. 6 and 13 to the European Convention on Human Rights, Ukraine has ratified all international agreements prohibiting the death penalty under any circumstances.

2.2. PERMITTED USE OF FORCE RESULTING IN DEATH

In accordance with international standards, 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..[11]

There are, however, often no proper investigations into the justification for use of force by law enforcement officers.

On 16 November 2007 in the city of Drohobych in the Lviv region, a police officer used his gun killing 19-year-old Vadim Shestakov on the spot and fairly seriously injuring another young man

That evening young people had been celebrating the Day of the Student in a cafü. After two police officers came into the cafü, the young people began dispersing. They grabbed one of the young men and began searching him near the police car. Shestakov and his friend tried to help this young man run away from the policeman. According to witnesses, one of them went up to that police officer and shoved him with both hands in the chest, and the other hit him twice in the face, and he fell on his back. A witness says that «when the police officer felt, the lads ran off ... The police officer got up immediately, stood up fully, and shots immediately rang out».

Vadim Shestakov did not stand out physically. He weighed 47 kilograms and was 1.55 metres tall. The other young man is 1.6 metres and weighs 55 kilograms. As confirmed by the witness, the weapon was used when the police officer was no longer in any danger. The young men were not suspected of any crime. There was no warning that a gun would be fired before the fatal shots.

According to available information there has been no significant progress in the investigation into this case.

3. 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

[10] The case is supported by the UHHRU Strategic Litigation Fund for Healthcare Cases, run with the financial support of the International Renaissance Foundation

[11] See the Judgment of the European Court of Human Rights in the *Case of Egri v. Turkey* (1998)

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 reducing 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).

II. PROTECTION FROM TORTURE AND OTHER FORMS OF ILL-TREATMENT[1]

In 2007 there were several important international events which give a general idea of Ukraine's implementation of its commitments with regard to protection from torture and ill-treatment.

From 7-8 May 2007 the Committee against Torture (CAT) reviewed Ukraine's Fifth Periodic Report under Article 19 of the Convention against Torture. Alternative reports were submitted by the Kharkiv Human Rights Protection Group, Amnesty International and Human Rights Watch. The Committee published its Conclusions and Recommendations on 18 May 2007.

On 20 June 2007, with the Ukrainian Government's consent, the Report of the European Committee for the for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Ukraine from 9-21 October 2005 was published.

In 2007 the European Court of Human Rights issued three judgments relating to torture and ill-treatment in Ukraine: *Kucheruk v. Ukraine* from 6 September 2007[2], *Yakovenko v. Ukraine* from 24 October 2007[3] and *Kozinets v. Ukraine* from 6 December 2007/[4].

The conclusions of the two Committees as well as the European Court judgments contain a reasonably detailed analysis of how Ukraine is fulfilling its international commitments with regard to protection from torture and ill-treatment. This enables us to not provide an overall view of the situation, but to concentrate on particular issues which were not covered or not in sufficient detail in the reports of these international bodies.

1. TORTURE AND ILL-TREATMENT IN STRUCTURES OF THE MINISTRY OF INTERNAL AFFAIRS

During 2007 human rights organizations continued to receive numerous reports about the use of torture and unwarranted force by police officers. We can cite just two examples which highlight the problem.

On 12 December Yury Zabolotny came into conflict with the driver of another car on the road in the Vinnytsa region. On the same day four people in civilian clothes detained him in Vinnytsa and brought him in chains to a police building where he was brutally beaten and where they threatened to kill him. According to Zabolotny, the Deputy Head of the Vinnytsa Region section of the Department for Fighting Organized Crime took an active part in this. They demanded that he sign a document confessing to having attacked the driver of the other car. In the evening he was put in a temporary holding facility (ITT). The next day he was admitted to the neurosurgical department of the city hospital with concussion.

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[1] By Arkady Bushchenko, lawyer and legal expert for the Kharkiv Human Rights Protection Group

[2] Judgment in English at http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId= 823015&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

[3] http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=824944&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649,

[4] http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId= 826669&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

On 8 January 2008 the Vinnytsa Regional Prosecutor refused to initiate a criminal investigation. The same day Zabolotny was sentenced by a court to 3 days custodial arrest for persistently refusing to comply with the lawful demands of a police officer. It should be noted that from 12 December 2007 to 8 January 2008 police officers could not question Zabolony and carry out a medical examination since he «was under treatment in the Vinnysa City Hospital No. 2, and at the present time is under administrative arrest».

On 16 November 2007 in the city of Drohobych a police officer used his gun killing 19-year-old Vadim Shestakov on the spot and fairly seriously injuring another young man.

That evening young people had been celebrating the Day of the Student in a cafй. After two police officers came into the cafй, the young people began dispersing. They grabbed one of the young men and began searching him near the police car. Shestakov and his friend tried to help this young man run away from the policeman. According to witnesses, one of them went up to that police officer and shoved him with both hands in the chest, and the other hit him twice in the face, and he fell on his back. A witness says that «when the police officer felt, the lads ran off ... The police officer got up immediately, stood up fully, and shots immediately rang out».

Vadim Shestakov did not stand out physically. He weighed 47 kilograms and was 1.55 metres tall. The other young man is 1.6 metres and weighs 55 kilograms. As confirmed by the witness, the weapon was used when the police officer was no longer in any danger. The young men were not suspected of any crime. There was no warning that a gun would be fired before the fatal shots.

According to available information there has been no significant progress in the investigation into this case.

2. CHARGES AND CONVICTIONS FOR TORTURE

Official statistics still do not separately indicate crimes under Article 127 of the Criminal Code. According to a Ministry of Internal Affairs (MIA) report in 2007 888 crimes linked with exceeding authority were investigated. It is not clear whether these figures include crimes under Article 127 since of the crimes under Article 365 of the Criminal Code («Exceeding authority») actions are included that contain features of torture in the understanding of Article 1 of the Convention against Torture.

According to press reports[5], in Simferopol at the beginning of 2008 a district inspector was convicted, who on 4 March 2007 caused the death through torture of a suspect. However his actions were not classified as torture and he was convicted under Articles 365 «Exceeding authority» and 121 («Premeditated grave bodily injuries»).

In Khmelnytsky police officer was convicted ??????????

In September 2007 the Kharkiv Regional Prosecutor initiated a criminal investigation over the inflicting of medium-severity bodily injuries to Oleksandr Skrypnyk. Soon one of the police officers was charged under Article 122 of the Criminal Code and the case is presently under judicial examination. Up till now the court has not allowed the lawyer representing the interests of the underage Skrypnyk to take part in the case. It is not therefore possible to read the case material and find out why, for example, the police officer is not charged with a crime in his official capacity. According to our information, in some incredible fashion he ceased to be a police officer literally a second before he inflicted bodily injuries on Skrypnyk.

3. TORTURE AND ILL-TREATMENT IN PENAL INSTITUTIONS

Mass-scale beatings by special units in penal colonies

During 2007 information continued to emerge about cases of mass beatings of prisoners in penal colonies by special units of the State Department for the Execution of Sentences [the Department].

[5] http://www.unian.net/ukr/news/news-236129.html

The Department's special unit was created in 2000 through a secret departmental order. Only a new order No. 167 from 10 October 2005 which replaced previous orders was made public. According to this order, the special anti-terrorist unit is to be used for searches of prisoners and penal institutions and Pre-trial Detention Centres.

Amendments were also made to the Internal Regulations which allow for these armed anti-terrorist units to carry out such searches on a regular basis. According to the Department's figures, in 2006 the special unit [spetsnaz] was deployed in penal institutions 43 times. We do not have figures to suggest that in 2007 the anti-terrorist and swift response units were not used, or that they were used less often than in 2006.

As a rule so called «swift response groups» are also involved in such an anti-terrorist unit, these being made up of employees of the local penal colony and others nearby. These groups also wear masks or motorcycle helmets and are equipped with special gear. In total a combined anti-terrorist unit and swift response groups contain from 15 to 100, and sometime more, «fighters».

News reached the public about the shocking beatings on 22 January 2007 in the Izyaslav Colony No. 31, on 7 June 2007 in Buchansk Colony No. 55, on 10 November 2007 in the Slovyanoserbska Colony No. 60 and several other cases.

The Kharkiv Human Rights Protection Group has received the most reliable testimony over the mass beating on 22 January of 41 prisoners at the Izyaslav colony No.31 and the beating of the same prisoners in the Khmelnytsky and Rivne Pre-trial Detention Centres. The events developed as follows:

On 14 January 2007, virtually all prisoners at the Izyaslav Penal Colony No 31 began a peaceful protest action – a hunger strike – putting forward certain demands regarding the conditions and brutal treatment by the administration.

On the same day, Mr. Iltyai, Deputy Head of the Department for the Execution of Sentences arrived with several of his people and promised the prisoners that he would take measures to improve the situation. Mr. Iltyai departed, leaving Major Kislov to rectify the situation. The hunger strike was ended that day.

On 16 January the prisoners, angered by the lies about the events in the Izyaslav colony being spread by the administration and representatives of the Department via the mass media, as well as by the fact that the administration, together with the Department representatives, were engaged in concealing the traces of violations in the colony, restarted their hunger strike. They demanded that the media be allowed on the territory of the colony and that the Human Rights Ombudsperson and the Prosecutor General be informed about the events. After a visit on 17 January 2007 from a representative of the Ombudsperson Mr. Kudruk to the colony and his promises to deal with the matter, the prisoners again suspended their hunger strike.

In the morning of 22 January an anti-terrorist unit and swift response groups were brought into the colony. As always, the faces of the unit members were covered by masks and protective helmets, and they were armed with rubber batons, shields and other special equipment.

According to the prisoners' statements, the beatings occurred in several areas. Around ten prisoners from the heightened security unit were called to the room for educational work where around 50 men from the unit beat them. Other prisoners were beaten in the staff headquarters of the colony. The beatings of prisoners from different sections were continued as they were transferred from one section to another. All of the prisoners say that in the shower rooms at the pass between the living and work zones they continued to be beaten, being driven past a line of spetsznaz officers.

After several hours of beating and humiliation approximately 40 prisoners, beaten, with broken limbs and other injuries, were divided up into two groups and transferred by convoy to the Rivne and Khmelnytsky Pre-trial Detention Centres. All of the prisoners who were thus removed were barefooted and in light clothing. They were transported in chains which were pressed so tight that the blood couldn't circulate. During the journey the prisoners were not given enough water.

The prisoners say that the humiliation and beating continued after they arrived at the Pre-trial Detention Centres and continued for several days. They mention visits apparently by representatives of the prosecutor's office who spoke with the prisoners in the presence of administration personnel.

Virtually in front of the people from the prosecutor's office, the administration staff threatened the prisoners with new beatings if they complained.

Understanding from the behaviour of the prosecutor's office people that the latter had no intention of protecting them from the unlawful behaviour of the administration, most of the prisoners refused to speak to them or denied any beatings. A lot of the prisoners signed documents stating that they had no grievances against the administration. One of the prisoners was so intimidated that he denied having any physical injuries, despite the fact that there were medical documents confirming them.

On 24 December 2007 the Ministry of Justice revoked the State registration of Order No. 167. However there continue to be reports of the deployment of these units in penal colonies. According to information received, on 31 January 2008 a group of around 25 spetsnaz officers in masks and full fighting gear were brought into Penal Colony No. 46 (Rivne region) where they allegedly beat 16 prisoners.

3.1. INDEPENDENT MEDICAL CARE

The Judgments of the European Court of Human Rights on the cases of Kucheruk and Yakovenko concerned ill-treatment of prisoners who needed and did not received urgent medical care. Similar problems over independent medical care continued in 2007. it is not only Department personnel who bear responsibility for ill-treatment of prisoners with special needs, but also the courts which firstly act unwarrantedly slowly, and secondly maintain dubious standards in deciding on prisoners' release. There is also a discriminatory approach as regards release from custody differentiating between convicted prisoners and people held in custody pending a court verdict. This approach can be clearly seen in the provisions of the Joint Order of the State Department for the Execution of Sentences and the Ministry of Health No. 3/6 from 18 January 2000 which envisages the release from serving their sentence of prisoners in the case of certain types of illness, with this not being extended to people remanded in custody.

Viktor Polishchuk, born on 4 October 1978, was sentenced to 8 years imprisonment. He was held from 19 November 2005 in the Horodyshchinsk Colony No. 96 (Rivne region). At the beginning of 2007 he received a leg injury which due to insufficient medical care turned gangrenous. On 30 March 2007 Polishchuk was transferred to the medical unit of the Lviv Pre-trial Detention Centre where his condition significantly worsened. On 9 November 2007 the leg was amputated. On 21 November 2007 a medical commission found cancer of the left testicle with metastases, as well as other illnesses.

A representative of the Department applied to the court for Polishchuk's release on the basis of the above-mentioned Joint Order. However on 29 November 2007 the Halytsky District Court in Lviv turned down the application stating, among other things, that «the disease does not prevent him from serving his sentence since it is possible for a certain amount of time to hold the person in a place of confinement».

It was only on 5 February 2008 that the Lviv Regional Court of Appeal released Polishchuk. However by that stage his condition was hopeless.

On 6 March 2008 Viktor Polishchuk died.

This means that during the course of a year Viktor Polishchuk could not receive adequate medical care nor be released in order to undergo treatment in a civilian hospital. It is staggering that it took the Court of Appeal more than 2 months to pass a ruling on which a prisoner's life depended.

Serhiy Okhrimenko was arrested on 14 March 2007 on suspicion of having committed a crime. From 23 March 2007 he was held in SIZO [Pre-trial Detention Centre] No. 27 in Kharkiv. On his arrival at the Pre-trial Detention Centre, he complained on a number of grounds about his health. In April under SIZO conditions he was diagnosed as suffering from cancer (hyper-nephroma) of the left kidney with metastases in the lungs, and chronic liver cirrhosis He was only given painkillers and treatment of the symptoms with the use of drugs.

According to available information, the SIZO administration repeatedly applied to the court to change the preventive measure applied due to Okhrimenko's state of health since they acknowl-

edged that in SIZO conditions he could not receive adequate treatment. However the court which considered the charges against him ruled to keep him in custody.

Only an application to the European Court of Human Rights asking for urgent measures of assistance resolved the problem. On 11 December 2007, on the day that the European Court approached the Ukrainian government, Okhrimenko was transferred to the oncological clinic in Kharkiv for the necessary treatment.

On 11 January 2008 Okhrimenko underwent a successful operation resulting in a considerable improvement in his health. At present he is in hospital and his life is in no immediate danger.

4. INVESTIGATIONS INTO ALLEGATIONS OF TORTURE AND ILL-TREATMENT

There were no noticeable changes in the system for investigating allegations of torture. As previously, the prosecutor's office which is responsible for investigating such allegations does not carry out investigations which even remotely meet minimum standards of efficiency.

This is first of all linked with the irreconcilable conflict of interests which is created by the double function of the prosecutor's office during a criminal investigation. The Committee against Torture stated in its Comments from 2007 that: it «is concerned by the failure to initiate and conduct prompt, impartial and effective investigations into complaints of torture and ill-treatment, in particular, due to the problems posed by the dual nature and responsibilities of the General Prosecutor's office, (1) for prosecution and (2) for oversight of the proper conduct of investigations. The Committee notes the conflict of interest between those two responsibilities resulting in a lack of independent oversight of cases where the General Prosecutor's office fails to initiate investigation «(Conclusions and Recommendations of the CAT, 2007)

The lack of a system of effective investigation is also confirmed by two judgments handed down by the European Court of Human Rights which found violations of Article 3 of the European Convention on Human Rights in the cases of *Kucheruk v. Ukraine* and *Kozinets v. Ukraine*.

In both judgments the same systemic shortcomings are noted in investigating allegations of torture and ill-treatment which were deemed by the Court to be clearly not without grounds, that is such that requires swift, comprehensive and unbiased investigation.

The Court noted that investigations take a very long time (more than four years in the case of Kozinets and more than five years in the case of Kucheruk. They were suspended several times and only reinstated after complaints to the court. The timeframe established in law was not observed.

In both cases, the domestic courts in revoking the decisions to terminate the investigations, noted the low quality of the investigation and the fact that no steps had been taken by the prosecutor's office to rectify the failings.

Furthermore, in the case of Kucheruk the prosecutor had entrusted the investigation to the Head of the Kharkiv SIZO, that is, a person directly implicated in the ill treatment of the claimant.

In each case it was stated that the investigation had been confined to a mere superficial establishing of the circumstances which could suit the people implicated in the ill-treatment and therefore were not unbiased. In the case of Kucheruk, the Court established that «The scope of the examination was limited to establishing the fact that the guards used their special equipment in accordance with the relevant regulations. This conclusion was made on the basis of the written statements of the guards involved, taken at face-value, and the outline of the events of 2 and 8 July 2002 from the inmates who shared a cell with the applicant.» (§ 157)

The lack was also noted of even the minimum guarantees of public control over the investigation. For several months the claimants had not even been informed of the decision taken.

It should be recalled that the very first judgments of the European Court of Human Rights regarding Ukraine (*Poltoratsky v. Ukraine* and *Kuznetsov v. Ukraine*, 29 April 2003) commented on the inability and unwillingness of the prosecutor's office to ensure effective investigation into allegations of ill-treatment. Later, in the judgments regarding the cases of *Afanasyev v. Ukraine* (5 April 2005); *Gongadze v. Ukraine* (8 November 2005); and *Serhiy Shevchenko v. Ukraine* (4 April 2006), the lack of effective investigation by the State was again found to be a violation of the Convention.

Shortcomings in the system of investigation into complaints and reports of cases of torture are many times greater when we are talking of possible large-scale violations, including mass beatings and other forms of ill-treatment in places of confinement.

Firstly, according to testimony from all prisoners, the ban on reading correspondence with the prosecutor, the Human Rights Ombudsperson, and the European Court of Human Rights is virtually not being observed. No complaint about the behaviour of the colony administration, particularly allegations of mass beatings, can be sent out through legal channels since such complaints are simply removed by the administration. In sending a complaint out through illegal means the prisoner takes the risk of being punished since on receiving such a complaint the prosecutor's office, instead of investigating its substance, can send the administration a demand to punish the prisoner for sending it illegally. Sending such illegal correspondence to the Ombudsperson entails the same risk since the Ombudsperson's Secretariat always sends these complaints on to the Department or the Prosecutor's Office.

The deployment of the special unit is agreed with the local prosecutor's office. A representative or several representatives of this prosecutor's officer are also presently when the unit is brought in and during its further actions.

If there are complaints from the prisoners over beatings by the officers of this special unit, the investigation is conducted by the staff of this same prosecutor's office. This creates an insurmountable conflict of interests since the prosecutor investigating must establish whether a mass beating of prisoners took place in his presence (or at best, in the presence of his boss or colleague). Clearly, by establishing that such a mass beating took place, the prosecutor will need to bring himself, his boss or colleague to answer for complicity in a mass beating.

The prosecutor's office does not ensure the safety of prisoners who complain or witnesses. What is more, the way in which the investigation is conducted always gives prisoners the impression that the prosecutor's office is acting together with the representatives of the Department and the colony administration. Questioning of the prisoners is either entrusted to Department staff, or takes place in their presence.

As a rule, the investigation is confined to taking signed statements from the prisoners that they have no grievances against the administration.

In addition, prisoners who have suffered from mass beatings are transferred to other institutions. This technique is a very effective way of concealing any traces of the beating. During the transfer the prisoner has no way of communicating with the outside world since visits are not allowed for in legislation and these transfers can last from several weeks to several months.

Furthermore prisoners who have complained about mass beatings are then in constant danger of repression from the Department. According to their testimony, they are frequently and unwarrantedly punished which creates grounds for presenting charges under Article 391 of the Criminal Code.

The investigation conducted into the events of 22 January 2007 in the Izyaslav Colony was characterized by these same features. A decision had already been issued by 7 February to refuse to initiate a criminal investigation. It should be noted that the victims of the mass beating or their relatives have been trying ever since to receive a copy of this decision in order to be appeal to appeal against it in the court.

5. PAYMENT OF COMPENSATION TO THE VICTIMS OF ILL-TREATMENT

In November 2007 the Voroshilovsky District Court in Donetsk awarded 2 million UAH (400 thousand US dollars) icompensation to the family of Svitlana Zaitseva. who was wrongly convicted in 2001 of murder and died of tuberculosis. The claim was submitted on the basis of the Law «On compensation for damages ...» of 1994. It is difficult to say how the fact that the woman contracted tuberculosis through ill-treatment effected the designation of compensation, however it should be noted that compensation in the case of judicial error is different in its legal character from com-

pensation for the unlawful actions of State agents which should be granted independently of the presence of a court error.

It cannot be said that court practice has progressed in determining the grounds and criteria for compensation in the case of torture or other forms of ill-treatment.

Serhiy Aleksakhin tried during 2007 to get compensation from the State for the damage caused him by a police officer O. V. Khodorkovsky. In July 2006 the latter was convicted under Article 101 § 1 of the Criminal Code for causing Aleksakhin grave bodily injuries placing his life in danger and under Article 365 § 3 for exceeding his official powers.

The claimant cited the clear norm in Article 1174 of the Civil Code which envisages that «damages incurred to an individual ... through the unlawful ... actions of a public official or official of a State body shall be compensated by the State ... regardless of whether the official was to blame.» The unlawfulness of the police officer's actions aroused no doubt since the court had convicted him. His status as a State employee was also undeniable. Yet the Kyivsky District Court in Kharkiv refused to allow the claim in full for the following reasons:

«For the liability envisaged in Article 1174 of the Civil Code it is necessary that the public official or functionary inflicted the harm in carrying out his duties with the scope of these being established by the relevant legal acts.

At the same time the third party, O. V. Khodorkovsky, who worked within the structures of the Ministry of Internal Affairs exceeded his official powers in causing damage to the victim, namely the claimant S.V. Aleksakhin for which he was convicted by the court.

That is, the unlawful actions with respect to the claimant committed by the third party went beyond the range of official duties and powers, with this precluding the respondent's liability.»

This decision inevitably forces the conclusion that in the view of the Kyivsky District Court, certain unlawful actions by State officials can be included in the scope of their direct powers. Effectively with such logic from the court it follows that the State bears liability under Article 1174 only where the violation of the law is the direct duty of a public official or functionary of a State body.

It should be noted that on 15 January 2007 this same court ordered the Central Department of the MIA for the Kharkiv region to pay damages inflicted by a police officer. This ruling was however later revoked by a court of appeal.

There is thus no established practice at present regarding compensation for damages caused a victim through ill-treatment by a police officer or other State functionaries.

The use of forced confessions in court proceedings

The courts continue to use as evidence confessions to a crime obtained through the use of torture although both the Constitution and the Criminal Procedure Code prohibit the use of confessions gained «with violations of criminal procedure law».

One of the most glaring examples of verdicts indicating the practice of using forced confessions obtained through torture and ill-treatment was the case of Ivan Nechyporuk and Oleksandr Motsny issued on 31 August 2007.

The case involved a whole range of violations of the principles of just court proceedings.

The core of the prosecution's case is several so called «voluntary confessions» obtained from Nechyporuk in May 2004. On ten out of eighteen pages of the verdict devoted to an analysis of the evidence in the case, the focus is specifically on the confessions of the defendants given at the beginning of the investigation after being detained and while being held in the police station. The court considered that «Nechyporuk's guilt is attested to by the confessions written in his own handwriting, his testimony given at the beginning of the pre-trial investigation and the face-to-face confrontation with the defendant Motsny where Nechyporuk described in detail and recounted the circumstances of the crime committed».

Later the court cites two «confessions» from 21 May 2004, one of which was «taken away» by police officer M.M. Borodiy. The court then refers to testimony given by Nechyporuk that same day during interrogation as a witness. On 26 May Nechyporuk already appears with a confession to police officer O.O. Pasichnyk, and soon, on 28 May he brings a confession to the Khmelnytsky City Prosecutor V.I. Shevchuk. Such numerous «voluntary» «appearances» by Nechyporuk to various officials with the irrepressible wish to confess to a crime did not discon-

cert the court, nor was their suspicion aroused by the fact that the detained Nechyporuk was considered a witness and interrogated under threat of liability for refusing to give testimony or giving false testimony.

Nechyporuk was held in the temporary holding facility for around a month although there was no reason not to transfer him to a SIZO. Except one – this is a different department which would not have wanted to answer for causing him bodily injuries and would have definitely recorded them upon his admission. Both defendants from 2004 to 2008 have steadily asserted that brutal torture was used to get confessions out of them.

In 2005 the Khmelnytsky City-District Court acquitted both men finding that it could not consider the confessions to be proof since they had not been obtained voluntarily. The court also revoked the decision to refuse to initiate a criminal investigation into allegations of torture suffered by Nechyporuk and Motsny while being held in the police station.

The acquittal and what is worthy of note, the resolution of the court effectively demanding an investigation into allegations of torture, were revoked by the Ternopil Court of Appeal which the case was transferred to by the Supreme Court in violation of the rules of jurisdiction.

Then the Shepetivsky District Court sent the case back for further investigation since it was not convinced by the confessions given by the accused men. The decision of the district court was changed by the Ternopil Court of Appeal with all the comments about the investigation being excluded except one: that the charges should be changed for more serious ones (Article 115 § 2 of the Criminal Code).

During the further investigation, the prosecutor's office did only this and the case, with the same evidence which had resulted in an acquittal in 2005, landed in the Ternopil Court of Appeal which found the confessions admissible evidence and based their verdict on them. This is despite the fact that the confessions were obtained in circumstances which demanded thorough investigation which that same court had ordered should not be conducted.

6. RECOMMENDATIONS

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

1. Adopt at legislative level a strategy concept 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;

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 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.

It is also necessary to:

– put an end to the practice of deploying special anti-terrorist units and swift response groups in response to peaceful protest actions by prisoners;

– conduct investigations into reports of mass beatings of prisoners at the level of the Prosecutor General;

– 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;

– Ensure in practice uncensored correspondence by prisoners with the prosecutor's office, the Human Rights Ombudsperson and the European Court of Human Rights;

– 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;

– Stop the practice of passing on complaints sent by prisoners to the Human Rights Ombudsperson to the Department for the Execution of Sentences;

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

III. THE RIGHT TO LIBERTY AND SECURITY[1]

Legislation and practice as regards ensuring the right to liberty has basically not changed and therefore the problems and recommendations set out in the reports from 2004-2007 remain current.

In this section we will concentrate on issues which emerged in 2007.

1. LENGTHY REMAND IN CUSTODY PENDING EXTRADITION

In the last reports it was noted that people held in custody pending extradition are not able to initiate a court review of the grounds for their remand in custody, this violating Article 5 § 4 of the European Convention. The violation is all the more significant since there is no form of mandatory periodic review of this issue unlike review of remand in custody during a criminal prosecution.

As a result, people held in custody pending extradition for any length of time, for example, in compliance with temporary measures by the European Court of Human Rights in accordance with Rule 39 of the Court Regulations, do not even have the possibility to appeal to the courts against being their confinement.

Mykola Soldatenko who is awaiting a decision regarding possible extradition to Turkmenistan has been held in custody since 3 January 2006, while Ivan Stankevych and Viktor Kreidych whose extradition is sought by Belarus, have been held since 6 and 18 July 2007 respectively.

Oleg Kuznetsov (following an extradition request from the Russian Federation) has been held in custody since 19 July 2007, and Kateryna Dubovik (sought by Belarus), since 26 August 2007.

Amir Kabulov whose extradition is sought by Kazakhstan has been in custody since 23 August 2004, i.e. more than three years and eight months, a period which must elicit concern.

Over the entire period elapsing since the initial court order to hold them in custody, these people have not had the possibility of initiating a review as to whether their remand in custody is warranted and of applying for another preventive measures to be applied.

In fact the legal system in Ukraine makes it possible to hold a person who is going through extradition procedure in custody indefinitely. The rules of court jurisdiction are built in such a fashion that the court system «sees» people in custody pending extradition once only, when being taken into custody after which the person drops out of view.

2. ARBITRARY DETENTION OF REFUGEES

The shortcomings in the system became glaringly apparent in 2008 when two people held in custody over extradition procedure were granted refugee status.

On 27 August 2007 Kateryna Dubovik was taken into custody by court order from the Holosiyvsky District Court in Kyiv in connection with a request for her extradition from Belarus. On 13 September 2007 this court order was upheld by the Kyiv Court of Appeal.

[1] Prepared by Arkadiy Bushchenko, lawyer and legal expert for KHPG

On 5 March 2008 Ms Dubovik was granted refugee status. Article 3 of the Law «On the status of refugees» prohibits the extradition of a refugee to a country where he or she could be subjected to torture or other cruel, inhumane or degrading treatment or punishment. Since Ms Dubovik was granted asylum specifically on those grounds, her refugee status is an indisputable obstacle to her extradition.

On 7 March the lawyer representing her interests lodged an appeal with the Holosiyvsky District Court in Kyiv where, citing these circumstances, he asked the court to release her from custody.

In a letter from 12 March 2008 Holosiyvsky District Court Judge O.F. Mazuryk answered: «we inform that the Kyiv Court of Appeal, with its ruling on 13.09.2007, already considered the criminal cases in accordance with the appeal lodged by the defenders of the detained woman K.V. Dubovikза against the ruling of the Holosiyvsky District Court in Kyiv from 27 August 2007 which has already come into force and must be enforced.

Thus:

– the lawyer's appeal was not given court examination, and the ruling which effectively denies judicial defence was issued bypassing any procedure;

– the judge cited circumstances which were not the subject of the appeal since the latter did not concern the lawfulness of the ruling from 27 August 2007, but the new situation which had arisen following Ms Dubovik's having been granted refugee status;

– the judge, by not passing a procedural decision, created an insurmountable obstacle against appealing his decision in a higher court.

An analogous situation has arisen with Mr. Kuznetsov who was being held in custody pending extradition and was granted asylum on the same day, 5 March 2008.

Both refugees are presently still in custody.

One can draw several conclusions.

The status of people who are within the extradition procedure is not defined. The strict structure of the court system which traditionally divides cases into criminal and not criminal makes it unable to identify a situation which is not typical for it and cannot determine jurisdiction in such a case, effectively depriving such people of court protection.

Article 5 § 4 of the Convention which guarantees access to the court to determine the justification of any form of deprivation of liberty provides a simple way out of this legal dead end is not implemented by the Ukrainian authorities on a systematic level.

The Ukrainian courts are unable to define the legal nature of the extradition procedure which prevents them from determining the jurisdiction in such cases.

It is interesting that the Russian legal system has moved much further in this respect. The Russian Federation Constitutional Court has stated that in the extradition process the right to liberty must be accompanied by the same guarantees as other types of criminal procedure. It has unequivocally indicated that the use of preventive measures for the purpose of extradition must be regulated not only by Article 466, but also by norms of a general nature contained in Chapter 13 of the RF Criminal Procedure Code.

3. ENSURING THE RIGHT TO LEGAL AID

We should note the efforts of individual judges aimed at ensuring the rights of detainees in areas where pilot offices providing free legal aid are functioning. The example can be cited of the separate judgment of the Bila Tserkva City-District Court in the Kyiv region over the Head of the Bila Tserkva City Police of the MIA Central Department for the Kyiv region [the Bila Tserkva CP] with regard to identified infringements of current legislation. The judgment particularly stresses that a police office may not question a person detained or put questions to him or her before a public defender from the office functioning on the territory of the police department has been called.

SEPARATE JUDGMENT

On 15 February 2008 the Bila Tserkva City–District Court in the Kyiv region
Under presiding judge V.M. Savin
and secretary S.I. Hulchenko
with the participation of Prosecutor R.L. Nechyporenko
lawyer V.E. Kikkas
representative of the Juvenile Affairs Service P. Stepanenko

having in an open court hearing in the city of Bila Tserkva examined the case involving charges against K***, 1991 date of birth, Ukrainian citizen, incomplete secondary education, school student *** in Bila Tserkva, unmarried, originally from and residing in Bila Tserkva, St. +++, with no previous conviction, of committing a crime under Article 15 § 2 and Article 186 § 1 of the Criminal Code

DECIDED

In a court ruling from 15 February 2008 K*** was released from criminal liability under Article 15 § 2 and Article 186 § 1 of the Criminal Code with the application in his cases of compulsory measures of an educational nature with the proceedings against him in the criminal case being terminated.

In the court hearing it was established that K*** had been detained by CP–2 of the Bila Tserkva Police on 18.12.2007 directly after an attempt to commit a crime set down in Article 186 § 1 of the Criminal Code.

After he was detained and brought to the CP–2 building, the Head of the Criminal Police Juvenile Department of the Bila Tserkva PD2, Police Major *** being fully aware that K*** was underage, questioned him and took an explanation, explaining only:

the requirements of Article 63 of the Constitution, not however explaining to either K*** or his mother K*** whom he summoned, after talking with her son, by telephone about the possibility of receiving free legal aid from highly–qualified lawyers.

15 February 2007 saw the official opening in Bila Tserkva of a Public Defence Office, created on the base of the Bila Tserkva civic organization «Public Committee for the Promotion of the Constitutional Right to Legal Aid, in implementation of the Presidential Decree «On a strategy concept for developing a system of free legal aid» from 09.06.2006 № 509/2006.

On 15 February 2007 Agreement No. 1 was concluded on carrying out an experience in organizational forms of providing free legal aid between this civic organization, the Central Department of the Ministry of Internal Affairs in the Kyiv region, and the Bila Tserkva Police on cooperation in providing detained persons with free legal aid. As a supplement to this agreement, an instruction was passed for staff of the Bila Tserkva Police.. On the basis of those documents, an MIA officer shall not question a detained person and will not ask any other questions, and must phone the Public Defence Office to call a public defender. The detained person must definitely be informed of such a possibility.

Head of the Criminal Police Juvenile Department of the Bila Tserkva CP–2, *** did not fulfil this duty.

Nor did the investigator *** who took over the case on 21.12.2007 inform K*** and his mother K*** about this possibility to receive free legal aid.

In the court hearing it was established that K*** is a single mother with four children and a difficult financial position. Despite this, Investigator *** of her own initiative presented the mother of the defendant with lawyer B*** with whom K*** was forced to conclude a fee–paying agreement for providing legal assistance to her son which she informed the court about during the court hearing.

Furthermore, lawyer B*** did not appear at the court hearing on 14.02.2008, and did not provide a lawyer to replace him.

The court of its own initiative informed the Public Defence Office about the need to provide free legal aid and was forced to adjourn examination of the case.

During the examination of the case lawyer V.E. Kikkas provided free legal aid to the defendant and his mother.

Responsible for a criminal case involving a crime by people underage, the investigator into the case *** did not carry out her duty to inform the Juvenile Affairs Service of the Bila Tserkva City Executive Committee about the crime.

It was also established during the court hearing that the pre–trial investigation had been conducted with infringements of Chapter 36 of the Criminal Procedure Code (CPC).

Article 433 of the CPC states that in conducting pre–trial and court examinations into cases involving crimes by juveniles, aside from circumstances set out in Article 64 of the CPC, it is also necessary to ascertain the state of health and of general development of the minor, their living conditions and upbringing; circumstances which adversely influence the upbringing of the minor, through questioning their parents, and other people who can provide such information, as well as demanding the necessary documents and carrying out other investigation activities in this area. The above–mentioned activities are mandatory for the investigator into the case.

Investigator *** did not properly fulfil the requirements of current legislation on these issues and confined herself to questioning the defendant's mother and teacher of foreign literature***/ At the same time it can be seen from the case material that the defendant is living with his adult brother and elder sister. The lad's neighbours were not questioned, nor his form teacher or the school's social pedagogue with regard to his behaviour and upbringing from elementary grades and his overall development.

The investigator also failed to find out about the boy's state of health, restricting herself merely to questioning the Head Doctor in the Bila Tserkva Psycho–as to whether K*** was on their records.

The court also drew attention to the fact that investigator ***did not fulfil the requirements of the agreement made on 01.02.2006 between the Supreme Court, the Prosecutor General, the Ministry of Internal Affairs, the State Department for the Execution of Crimes and the Swiss Agency on Development and Cooperation regarding implementation of the project «Support for the reform of the system of pre–trial detention». This was part of implementation of the provisions of the Presidential Decree No. 39/2006 from 20 January 2006 «On an action plan for implementing Ukraine's duties and commitments following from its membership of the Council of Europe.»

On 02.03.2006 the Deputy Minister of the MIA P.V. Kolyada in his letter addressed to the Head of the Central Department of the MIA for the Kyiv region V.O. Yakovenko pointed out that this agreement was binding upon employees of the investigation unit of the Central Department of the MIA for the Kyiv region and of the investigation subdivisions of the Bila Tserkva city and district police stations.

One of the important elements of this agreement is the conducting of a pre–trial study of the person who committed the crime by the inspectors of the Bila Tserkva Police Penal Inspectorate which enables the court to better understand the offender and choose the most appropriate form of punishment. This approach also makes it possible for inspectors of the Bila Tserkva Police Penal Inspectorate to provide accompaniment for the offender during the pre–trial investigation and court proceedings in order to identify and eliminate the reasons for the crime, reform such people and prevent them from committing new crimes.

Investigator *** did not fulfil her duty to inform the Bila Tserkva Police Penal Inspectorate about the criminal case with regard to K*** which she was dealing with.

Bearing in mind the above–listed violations of the rights of defendant K*** and other infringements of the law during the pre–trial investigation, the court considers it necessary to inform the Head of the Bila Tserkva Police Department of the MIA Central Department for the Kyiv region in order that the appropriate measures be taken to remove such infringements in future.

Governed by Article 23–2 of the CPC, the court:

HAS RESOLVED:

to inform the Head of the Bila Tserkva Police Department of the MIA Central Department for the Kyiv region of the violations of current legislation established in order that appropriate measures be taken.

That the Bila Tserkva City–District Court be informed of the measures taken within the established time period.

Judge (signature)

It would be expedient to extend such practice among judges with this contributing to the real safeguarding of detainees' rights.

4. RECOMMENDATIONS

All last year's recommendations remain in force.

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 No. 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 detention hearings circumstances, which address reasons for arrest without warrant, including the following:

- grounds for the suspicion or charge, in connection with which the prosecution demands that the suspect (accused) be detained;
- 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 detention 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. Exclude from legislation the institution of «detention extension» by a judge, or, at least, introduce necessary amendments to the legislation, in order to prevent the practice of returning a person to a police unit after detention has been extended;

11. 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;

12. Provide people remanded in custody with the right to periodic appeals against the justification for keeping them in custody;

13. 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:

– 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;

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

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

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

15. 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;

16. Shorten the maximum term of detention during pre-trial investigation.

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

18. 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.

19. 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.

20. 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;

IV. THE RIGHT TO A FAIR TRIAL[1]

1. OVERVIEW

The right to a fair trial is guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It is not, however, explicitly secured either in the Ukrainian Constitution or in legislation, with only individual aspects protected by law.

This section assesses specific aspects of the right to a fair trial.

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 standards[2], 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[3] 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.[4] 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. The new members of the Commission immediately created a subcommittee with the task of revising the Strategy Commission passed by the President. These actions in practice prove that the President has renounced his attention to introduce the Strategy Concept he approved despite the fact that it received favourable assessments from international experts from the Council of Europe, scholars, human rights defenders and judges of lower level courts.

The fate of judicial reform is now in the hands of parliament and the President who have, under pressure from the Supreme Court, virtually rejected its introduction.

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[1] Prepared by Volodymyr Yavorsky, UHHRU Executive Director. Since there have been no significant changes, the conclusions reached in the Report Human Rights in Ukraine – 2006 remain entirely relevant

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

[3] See, for example, «Head of the Supreme Court Vasyl Onopenko is concerned that judicial reform in Ukraine could contradict its main objective, improving the justice system and making it meet people's needs, and is asking the President to withdraw the draft Law «On amendments to the Law «On the judicial system of Ukraine» // Information on the Verkhovna Rada website from 22 March 2007
http://www.scourt.gov.ua/clients/vs.nsf/0/F2D409AA21601D74C32572A6004C76A3; See also the Appeal from the Council of Judges of Ukraine to the President from 9 February 2007.

[4] 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.

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 of Ukraine from 1960, despite some updating, does not meet European standards with regard to human rights protection. The economic courts examine disputes applying rules which are not in line with contemporary trends in civil legal proceedings. Despite the adoption of the Code of Administrative Justice of Ukraine, a law has yet to be passed on administrative procedure which would define the standard relations between an individual and the authorities (public officials) adherence to which should be verified by the administrative courts.[5].

Cases involving administrative offences are generally examined with infringements of a number of standards of the right to a fair trial, numerous restrictions on the right to defence and the lack of possibility of appealing a ruling in the appellate courts, etc.

Following the judgment of the European Court of Human Rights in the case of *Gurepka v. Ukraine*, the Supreme Court issued a letter to appellate courts asking that they accept for examination appeals in cases involving administrative offences. The issue of such a letter runs counter to norms of legislation however does comply with the relevant norms of the European Convention on Human Rights and serves to protect the right to a fair trial. Another failing of this letter was that now many cases accumulate at cassation review in the Supreme Court, with this having significantly increased the workload of higher courts.

During 2007 there were also a number of conflicts directly linked with the judiciary which clearly demonstrated the lack of independence of the judiciary and judges. One has in mind the conflict over the Constitutional Court, over the Pechersky District Court in Kyiv, over the issue of appointment of judges to administrative positions, the blocking of work and politicization of the High Council of Justice, and others.

As of February 2008 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.[6] Around 5,604 are on the staff of these courts.

During 2007 local and appellate courts examined approximately 8 614 517 cases and files, this being around 17.83 % more than in 2006 and over 40 % more than in 2005. At the same time, around 74,883 cases remained to be examined (against approximately 24,326 in 2006).[7]

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.

In 2007 a number of serving judges of the higher courts became members of a consultative and advisory board under the auspices of the President and began taking part in legislative activities which are not part of the scope for members of the judicial branch of power. The following became members of the National Commission for the Strengthening of Democracy and the Rule of Law:

– Andriy Vasylyovych Hnatenko – Chairperson of the Civil Proceedings Chamber of the Supreme Court;

– Viktor Vasylyovych Kryvenko – Chairperson of the Administrative Proceedings Chamber of the Supreme Court;

– Mykola Ivanovych Melnyk – in charge of the service of the Speaker of the Verkhovna Rada;

– Oleksandr Mykhailovych Pasenyuk – Chairperson of the Higher Administrative Court;

[5] Item 3, Section 1 of the Strategy Concept for improving the justice system to ensure fair trial in Ukraine in accordance with European standards // Adopted by Presidential Decree from 10 May 2006 № 361/2006.

[6] A meeting has been held of the Board of the State Judicial Administration of Ukraine // The State Judicial Administration http://www.court.gov.ua/news/page.php?court_id=0&archive=1&&year=2008&month=2&news_id=2068.

[7] According to official figures from the State Judicial Administration posted on their website: http://www.court.gov.ua.

– Petro Filipovych Pylypchuk – Head of the Council of Judges, First Deputy Chairperson of the Supreme Court;

– Ivan Bohdanovych Shytsky – Chairperson of the Economic Proceedings Chamber of the Supreme Court..

Just on 25 April the Head of the Supreme Court V. Onopenko had asked the President to be removed from the National Security and Defence Council [NSDC][8] Article 107 of the Constitution states that the NSDC is the coordinating body to the President and co-ordinates and controls the activity of bodies of executive power in the sphere of national security and defence. In view of this, membership on this body by the Head of the Supreme Court also aroused serious arguments against the independence of the judiciary. On 3 May the President removed Onopenko from the NSDC.[9]

On 23 November 2007, after a long meeting in the Security Service [SBU] attended by representatives of the law enforcement agencies, controlling bodies and judiciary, the President issued a Decree on creating an Inter-departmental Working Group on Combating Smuggling and IInfringements of Customs Rules. As the Supreme Court itself reports «in accordance with this Decree representatives of the Supreme Court of Ukraine were invited to join the Inter-Departmental Working Group. Given that the courts are the final stage in combating smuggling and infringements of customs rules, the Supreme Court over the last three months has *within the scope of its competence yet again taken a range of measures aimed at protecting the national interests of the country in the customs sphere...*

The Supreme Court informed the President about the measures taken and their results. Information on these issues was sent to the Co-Chairs of the Inter-Departmental Working Group on Combating Smuggling and Infringements of Customs Rules, the Prosecutor General O.I. Medvedko and the Acting Head of the Ukrainian Security Service V.O. Nalyvaichenko. The relevant letter to the State Customs Service was prepared which drew attention to the need to eliminate shortcomings in the work of the customs bodies.»[10]

Such interest from the Supreme Court in State interests and the constant way it informs various authorities elicit well-founded doubts as to the independence of the courts in examining, for example, cases involving smuggling. In such cases the prosecutor's office defends the State's interests, individuals defend their own rights and interests and the court must decide on the basis of the evidence presented who is right, and not appear as an additional defender of the State's interests.

The State Judicial Administration of Ukraine [SJAU], which is a central authority, in May 2007 began monitoring court suits against the actions of the Cabinet of Ministers and Prime Minister Viktor Yanukovych. The Head of the SJAU Ivan Balaklytsky informed that the relevant instructions had come from the Ministry of Justice and the First Deputy Minister of the Cabinet of Ministers Olena Lukash.[11]

On 17 May 2007, the Verkhovna Rada, exceeding their constitutional powers, passed a Resolution «On an attempt to manipulate the Pechersky District Court in Kyiv and influence the activities of the Central Election Commission [CEC]». This not only gave a negative assessment of a ruling from the Pechersky District Court handed down on 11 May 2007 which allowed a suit lodged by the electoral bloc of political parties «Bloc of Yulia Tymoshenko» against the CEC, but also proposed a mechanism for dealing with the judges who had taken part in considering the case. The Verkhovna Rada proposed, and effectively bound the Prosecutor General, the High Council of Justice to carry out a check into the circumstances around the passing by the Pechersky District Court of its ruling from 11 May 2007, although these bodies do not have such powers and this was direct interest in the

[8] On 25 April 2007 the Head of the Supreme Court Vasyl Onopenko turned to the President Viktor Yushchenko asking to be removed from the National Security and Defence Council of Ukraine // News from the website of the Supreme Court from 25 April http://www.scourt.gov.ua

[9] Presidential Decree № 372/2007 from 3 May 2007 «On amendments to Presidential Decree from 11 September 2006 No 749», http://www.rainbow.gov.ua/documents/119.html.

[10] The courts in defence of the economic interests of the State // News from the website of the Supreme Court from 13 February 2008, http://www.scourt.gov.ua/clients/vs.nsf/0/23CF46DE84EB9E5EC22573EE0033C05C.

[11] Judges forced to write «denunciations» for the Cabinet of Ministers // UHHRU website http://helsinki.org.ua. index.php?id=1179476924.

justice system. The Resolution also ordered the Verkhovna Rada Committee on the Justice System, the chair of which was also a member of the High Council of Justice, to prepare and submit when documents from the High Council of Justice arrive on the results of the check drafts of the relevant decisions[12] (this refers to documents for dismissing judges).

The acting head of the Dnipropetrovsk Regional State Administration Viktor Bondar during an extended session of the Board of the Dnipropetrovsk Regional Prosecutor's Office expressed his readiness to initiate and together with the management of the Regional Prosecutor's Office to create a register of judges who hamper the examination of important court cases. «I am ready to initiate such a conversation with representatives of the higher body of justice, he stressed, and insist that these judges are punished. A few of these cases and we will put an end to this unhealthy practice.»[13]

These and many other examples vividly demonstrate the problem of independence of judges. It is clear that the latter find themselves under pressure when resolving issues of public importance, especially if other public bodies have an interest in a certain resolution of the issue.

The selection procedure for judges is non-transparent which can set the ground for abuse and dependence of the judges on the public officials involved in this procedure.

In 2007 the State Judicial Administration processed 481 files on appointing first-time judges. Of these 331 were from the territorial departments of the State Judicial Administration; 70 from the Higher Economic Court; 80 from the Higher Administrative Court. The SJAU's work resulted in 126 submissions being made in accordance with established procedure to the Supreme Court and higher specialist courts on appointing 482 judges.[14] 803 posts for judge remained vacant as of 1 January 2008.

Parliament did not work through virtually all of 2007. Due to this many courts reached a crisis situation with the term of office of serving judges having expired. After the first five years in office, a judge cannot work as a judge without being appointed judge for life by parliament. Last year 447 submissions to appoint lifelong judges accumulated in parliament. As a result of this in some district courts there was only one serving judge, in 30 – two judges.[15]

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, are leading to their becoming 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 two 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.

The bestowal of State awards by the President and Cabinet of Ministers on particular judges is also of concern since this can elicit doubts as to their independence from the executive branch of power. For example, to mark the Day of Court Lawyers the President awarded the Order «For services», Class III, to judges of the Supreme Court Mykola Patryuk and Ihor Samsin, while Tamara Prysyazhnyuk was awarded the Order of Princess Olha, Class III. Cabinet of Ministers Certificates of Honour for a significant contribution to protecting human rights and civil liberties, and impeccable work in the judiciary were awarded to Supreme Court judges Vera Vereshchak, Volodymyr

[12] Statement from the Board of the All-Ukrainian Independent Judges' Association on infringements of the principles of judges' independence in Ukraine

[13] Acting head of the Dnipropetrovsk Regional State Administration Viktor Bondar is planning to use his power to put pressure on judges // UHHRU website, http://helsinki.org.ua.index.php?id=1189699851.

[14] A meeting has been held of the Board of the State Judicial Administration of Ukraine // The State Judicial Administration, http://www.court.gov.ua/news/page.php?court_id=0&archive=1&&year=2008&month=2&news_id=2068.

[15] Head of the Supreme Court speaks of a real threat for the justice system and asks parliament to remove it // News from the website of the Supreme Court from 14 March 2008 http://www.scourt.gov.ua/clients/vs.nsf/0/9C7FFFA1B9A20445C225740C00370F33.

Konovalov, Valentin Kosaryev, Kostyantin Kravchenko, Natalya Panevych, Mykola Patryuk, Oleksy Synyavsky, Oleksandr Fedchenko, Fedir Chernohuz and Stanislav Shchotka.

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 for this reason that throughout the year there was such a fierce battle between the President, parliament and the Council of Judges for the right to appoint the chairpersons of courts.

It is not uncommon for judges in handing down judgment to experience pressure both from the authorities, and from the interested parties.

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.

During 2007 there was a considerable rise in the number of criminal investigations and disciplinary proceedings initiated against judges. This can be attributed to the desire to fight corruption, however it should also be viewed as a form of pressure on judges since the procedure for such cases is not clearly defined.

At the beginning of January 2008 the Supreme Court submitted for consideration by the Verkhovna Rada an application by the Prosecutor General for consent to the arrest of a judge of the Prymorsky District Court in Odessa. The application was made in connection with a criminal investigation carried out by the Prosecutor General against the judge over indications of the crimes set down in Article 375 § 2 (the handing down by a judge of a knowing wrongful ruling); Article 364 § 2 (abuse of power or official position); Article 366 § 2 (producing fake documents in ones official capacity); Article 190 § 2 (fraud) and Articles 27 § 5 and 190 § 4 (abetting fraud) of the Criminal Code. The application states that the grounds for asking for permission to arrest the judge are the latter's failure to appear before the pre-trial investigation unit for questioning as a person accused, her obstruction of the pre-trial investigation unit in establishing the truth in a criminal matter, ignoring the requirements of the investigation unit making it impossible for the latter to conclude the investigation into the given case. These indicate the need to remand her in custody as a preventive measure.[16]

The Supreme Court upheld the verdict of the Zaporizhya Regional Court of Appeal which sentenced Judge of the Dniprovsky District Court in Dniprodzerzhynsk (Dnipropetrovsk region) I.I. Zaitseva on charges of bribery to 3 years imprisonment with confiscation of her property and a ban on holding any position in the law enforcement bodies or courts for three years.

The Supreme Court allowed a cassation appeal from the prosecutor's office against the sentence passed by the Luhansk Regional Court of Appeal against a judge of one of the district courts of the city of Horlivka in the Donetsk region, charged with abuse of power, embezzlement of State funds allocated to play mine employees of a sum of 266 thousand UAH by handing down wrongful judgments. The case was sent for a new examination.[17]

On 5 April the Verkhovna Rada passed a resolution dismissing Judge of the Mukhachevo City-District Court of the Transcarpathian region Volodymyr Monych. He had become prominent earlier by passing a judgment on a suit brought by Ihor Kril, deputy from the Nasha Ukraina [Our Ukraine] faction prohibiting the then Speaker of the Verkhovna Rada Oleksandr Moroz from signing and publishing the Law on the Cabinet of Ministers.[18]

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[16] The Supreme Court has supported an application to parliament for permission to arrest a judge of the Prymorsky District Court in Odessa. // News from the website of the Supreme Court from 30 January 2008 http://www.scourt.gov.ua

[17] Information «On the level of lawfulness in the country in 2007 (in accordance with Article 2 of the Law «On the prosecutor's office») // The Prosecutor General of Ukraine. Official website 10.03.2008, http://www.gp.gov.ua/ua/vlada.html?_m=publications&_t=rec&id=12985.

[18] Verkhovna Rada gets even with judge who went against Moroz // http://www.helsinki.org.ua/en/index.php?id=1175856640.

On 15 August, the Prosecutor General, together with the police, reported that charges had been laid of taking a bribe of 2,500 US dollars against the Chairperson of one of the district courts in the Donetsk region. It was also reported that his property had been frozen.[19] On 22 October the case was passed to the Supreme Court in order to determine jurisdiction.[20] Overall the prosecutor's office informed of criminal files being submitted to the court in respect of three chairpersons of courts – the Artemivsk, Khartsyzky and Shakhtarsky city-district courts in the Donetsk region.

On 26 November 26 the Prosecutor General informed that the Odessa Regional Prosecutor's Office had initiated a criminal investigation against the chairperson of the Baltsky District Court over indications of the crime set down in Articles 364 § 2 and 366 § 2 of the Criminal Code. Unidentified individuals seeking to obtain property not belonging to them by means of deception had approached the Baltsky District Court with a falsified law suit apparently from the director of one of the private enterprises in Odessa against a limited liability company claiming debts of over 3 million UAH. The judge, despite the fact that all parties in the case were legal entities and therefore, pursuant to the regulations of Article 1 of the Civil Procedure Code, the dispute should have been examined in an economic court, abusing his official position and acting in the interests of the enterprise, passed a ruling ordering the limited liability company to pay the enterprise the amount of debt demanded in the claim. The Odessa Regional Court of Appeal revoked this ruling and terminated the proceedings in the case. The pre-trial investigation with regard to the criminal charges is being conducted by the Odessa Regional Prosecutor's Office.[21]

The press service of the Transcarpathian Regional Prosecutor's Office on 18 January 2008 informed that a criminal investigation had been initiated over a knowingly wrongful sentence handed down by a judge of the Irshavsky District Court (Article 375 § 1 of the Criminal Code). According to the report from the Assistant Prosecutor of the Irshavsky District, who was one of the parties to the examination of the criminal case, the judge flagrantly violating the confidentiality of judges' council, issued a knowingly wrongful acquittal outside the consulting chambers with respect to Ms. P. In the Assistant Prosecutor's view, the judge had unlawfully acquitted the woman on only one of the crimes she was charged with – receiving a bribe, and did not touch on whether she was guilty of the other crimes. Furthermore, in breach of the Criminal Procedure Code, he had declared the verdict in the courtroom but did not provide the defendant with a copy within the stipulated thirty-day period.[22] This case suggests, on the one hand, possible unlawful actions by the judge, but on the other, how vulnerable a judge can be when one of the parties, after the court examination, can initiate a criminal investigation against him or her. Unfortunately there is no information about the later developments in this case, however there is also nothing to show that the judge has been removed or convicted.

In January 2008 the Zhytomyr Regional Prosecutor's Office initiated a criminal investigation against a judge which it alleges handed down an unlawful sentence. According to the Deputy Prosecutor Volodymyr Kobernyuk, on the results of a joint check carried out by the Prosecutor's Office and the SBU Department for the Zhytomyr region, the criminal investigation was launched against a judge of one of the district courts in the region under Articles 364 and 366 of the Criminal Code (abuse of official position and faking documents in ones official capacity). He added that the judge in abusing his official position had acted in breach of the requirements of current legislation. He had added to an official document, namely a verdict, information which he knew to be false. Mr. Kobernyuk said that as a result of the judge's actions, the defendant had been found guilty of unlawfully selling narcotics as a repeat offence and ordered to pay a fine of one

[19] Chairperson of one of the courts in the Donetsk region charged with bribe-taking // http://helsinki.org.ua.index.php?id=1187784743.

[20] Chairperson of a local court faces criminal charges // Official website of the Prosecutor General's Office http://www.gpu.gov.ua/ua/news.html?_m=publications&_t=rec&id=10985&fp=131.

[21] Odessa Regional Prosecutor's Office had initiated a criminal investigation against the chairperson of the Baltsky District Court // Official website of the Prosecutor General's Office, http://www.gpu.gov.ua/ua/news.html?_m=publications&_t=rec&id=11705&fp=91.

[22] Transcarpathian Regional Prosecutor's Office has initiated a criminal investigation against a district court judge for allegedly issuing a knowingly wrongful sentence // http://helsinki.org.ua.index.php?id=1200670681.

thousand UAH, whereas for this crime, the article of the Criminal Code stipulates deprivation of liberty for a period of from 5 to 10 years.[23] There is no information about the further course of the investigation into this case. However it is staggering how easily, without a court conviction and in breach of the presumption of innocence, representatives of the prosecutor's office and the SBU have circulated information about a crime apparently committed by the judge. We are talking here, moreover, about a case in which they were a party to the process since they were presenting the criminal charges.

The flawed procedure for initiating criminal proceedings against judges thus makes it possible for the prosecution to use this to exert pressure.

According to prosecutor's office figures, during 2007 5 criminal investigations were completed into charges against judges of city and district courts of taking bribes, passing knowingly wrongful court rulings and other official crimes. 19 other cases are with the investigation units of the prosecutor's office.

Whereas in 2006 the Prosecutor General initiated submissions to the Higher Council of Justice to have 4 judges dismissed for infringements of the law during judicial examinations, in 2007 such submissions were made with regard to 41 judges.[24]

Administrative pressure is much more often brought to bear on judges via disciplinary proceedings, as well as proceedings over violating their judge's oath. The latter generally provides wide scope for manipulating the wide-ranging content and inexact text of the oath.

For example, the Supreme Court accused the Higher Council of Justice of being overtly partisan, recalling cases when judgments concerning some judges had not been passed for months, while in others the judgments were passed immediately without even hearing opinions about the judge.

One can also note the activity of the qualifying commissions of judges involved in bringing disciplinary proceedings against judges. There is a clear imbalance in that members of the public may not initiate disciplinary proceedings. Such proceedings are initiated solely on the application of representatives of the authorities: the Ministry of Justice, National Deputies, chairpersons of councils of judges of the regions (effectively, chairpersons of the courts), chairpersons of the Supreme and Higher, specialist courts, the Human Rights Ombudsperson. The procedure for considering the question of disciplinary proceedings is also not legally defined.

Information on disciplinary proceedings brought against judges by qualifying commissions of general court judges 2003-2007[25]

Year	Disciplinary proceedings initiated	Disciplinary charges brought	Reprimands issued	Qualification status of the judge reduced	Decision taken to recommend that the Higher Council of Justice dismiss the judge
2003	178	58	43	8	7
2004	284	129	99	10	20
2005	241	114	80	6	28
2006	232	112	82	8	22
6 міс. 2007	202	46	38	8	15

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

[23] Zhytomyr judge may pay for issuing an unlawful verdict // http://helsinki.org.ua.index.php?id=1201084773.
[24] Information «On the level of lawfulness in the country in 2007 (in accordance with Article 2 of the Law «On the prosecutor's office») // The Prosecutor General of Ukraine. Official website 10.03.2008http://www.gp.gov.ua/ua/vlada.html?_m=publications&_t=rec&id=12985.
[25] Generalized information from the qualifying commissions of general court judges on disciplinary proceedings against judges // Information Bulletin of the Higher Qualifying Commission of Judges of Ukraine. Unofficial Theoretical and Practical Publication, № 2 (3), 2007, pp. 2-3.

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 following Resolution No. 3 from the Plenum of the Supreme Court on 13 June 2007 «On the independence of the judiciary» can be considered a reaction to the systematic interference in the work of the courts:

«*In practice the legislative body, and other executive structures and their officials ignore the constitutional principle of division of power into legislative, executive and judicial. There are attempts to interfere in organizing the work of the courts, resolving specific court cases, obstruction to the courts' exercising of justice on legally designated principles; pressure on judges through threats, blackmail or other forms of unlawful influence; including through the passing of unlawful normative legal acts and legal acts of individual force; illegal use of powers; as well as the unlawful allocation of the relevant powers to some state structures which increases the dependence on them of courts and judges.*

Over recent times cases of pressure on judges and interference in the work of the courts have taken on a systemic and overt character, including during judicial examination of cases, creating a corps of judges, appointing judges to administrative posts, and determining issues of judges' responsibility. There are flagrant infringements of the legally established procedure for holding judges liable as regards establishing the grounds for liability, time periods for holding them accountable, ensuring the possibility for judges to use all legally established means for their defence while issues of liability are being determined. In the activities of those responsible for deciding on judges' liability one sometimes see a biased approach and attempts to punish judges for their professional activities. The checks carried out by such people go beyond the limits of their jurisdiction and obstruct the fulfilment by judges of their professional duties (this is seen, for example, in unlawful removal of court cases, demands to provide confidential information from the consulting chambers)»

The extraordinary congress of judges of Ukraine also spoke of the rising pressure on the judiciary.[26]

A surveyof judges, prosecutors, bar lawyers and representatives of civic organizations[27] showed the following most dangerous factors for the independence of judges (in order of importance):

1) Individual judges handing down dubious rulings;
2) Insufficient financing of courts and financing being achieved on an individual basis;
3) Unsatisfactory material and technical provisions for the courts;
4) Judges being dragged into the political struggle;
5) Unlawful use by officials of legislative or executive bodies of their power linked with appointing, electing and dismissing judges; bringing them to justice and appointing judges to administrative posts;
6) The low salaries of judges;
7) The lack of practical means for holding to answer people who are attempting to unlawfully influence judges.

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

[26] See the press release of the Supreme Court Press Service of 6 December 2007 // News from the website of the Supreme Court from 6 December 2007, http://www.scourt.gov.ua

[27] Monitoring of judges' independence in Ukraine // General Editor A. Alexeeva, K. 2007. The study was carried out by the Centre for Judges' Studies and the All-Ukrainian Independent Judges' Association in 2007. 1,024 judges were surveyed, together with 356 prosecutors; 311 bar lawyers; and 186 representatives of civic organizations from 8 regions of Ukraine: the Luhansk, Cherkasy, Sumy, Lviv, Ivano-Frankivsk, and Zaporizhya regions, the Crimea and Kyiv). Available at www.judges.org.ua.

Furthermore, at the present time, the principle of division of power is being violated in the case of the judiciary. Courts administer justice and must be independent of any other branch of power or particular individuals, yet at the same time they are dependent on the executive with respect to financial, material, technological and social issues. This is confirmed by the status of the State Judicial Administration which is a central executive body.

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.

Inadequate funding on maintaining court bodies in 2006 amounting to a sum of around 108 million UAH, effectively led to the suspension of the work of some courts and to debts on loads amounting to over 30 million UAH at the beginning of 2007.[28]

In 2007 funding requirements for the judiciary according to budget programmes were only 51 percent met. Despite an overall increase in spending against 2006 of 21 percent (from 1.311.2 million UAH to 1.586.5 million UAH), the problems with proper funding of the work of courts and judges remains unresolved. To a large extent the new system of administrative courts absorbed the increase.

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.

For several months the monthly maintenance payments were not made to retired judges. According to the Supreme Court this was due to the Cabinet of Ministers' reluctance to allocate money for payments in contravention of the law on the status of judges.[29]

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.

According to the SJAU out of the approximately 786 premises belonging to the courts, only 55 meet the standards approved by the Council of Judges (160 square metres per judge, allowing for their office, courtroom, staff members, etc).

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.

To implement the State Programme for providing courts with suitable buildings from 2006-2010, which was approved by Cabinet of Ministers Resolution No. 918 from 4 July 2006, only 30 million UAH was envisaged for 2007, a mere 6 % of the amount needed. 11 million UAH was allocated for purchasing housing for judges, although 860 judges are not provided with adequate housing, and 478 do not have it at all.

Almost all courts have at least one outlet for the Internet and use emails in their work. As of 1 January 2008 the general figures for judges of general jurisdiction courts being supplied with computers had increased to 65 percent of those needed, while in economic courts, the figure had risen to 80 percent. Therefore one of the priority tasks of the SJAU is to equip courts with computer technology, local networks, access to the Internet for local courts and newly-created local and appellate administrative courts.

It is no less important to ensure that the Single State Register of Court Rulings is filled. Each month around 33,000 texts of court rulings are input into the Register, with the number of rulings at the end of 2007 reaching 1 239 378.[30]

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[28] Decision VIII of the extraordinary congress of judges of Ukraine // On the state of financial, material and technical provisions for the work of general jurisdiction courts» from 7 December 2007 // News from the website of the Supreme Court from 20 December 2007 http://www.scourt.gov.ua

[29] Appeal from retired Supreme Court judges to the First Deputy Prime Minister and Minister of Finance, M.Y. Azarov // News from the website of the Supreme Court from 3 August 2007 http://www.scourt.gov.ua

[30] A meeting has been held of the Board of the State Judicial Administration of Ukraine // The State Judicial Administration, http://www.court.gov.ua/news/page.php.

On the other hand, the Accounting Chamber, having audited the use of public funds for organizational needs of courts and judges, once again pointed to inefficient use of funds, the ill-thought-out nature of State programmes and the failure to fully implement them.[31] The Accounting Chamber particularly paid attention to the fact that the activities of military courts are hardly justified under the present situation. As a result of amendments to legislation there has been a significant reduction in the workload of military courts, and the cost of examination of cases given general expenditure has become 72 times higher. There has been an increase in the average cost of examining one case in a military court which came to 7.2 thousand UAH which is dozens of times higher than the average cost of such examinations by general courts. Thus, the auditors conclude, that the spending on keeping and financing the system of military courts was not justified by the results of their work.[32]

4. ACCESS TO JUSTICE

Free access to justice is a constitutional right and the foundation of just legal proceedings. The principle of free access to justice entails the duty of the courts to not refuse to examine cases within their jurisdiction in order to defend a person's violated rights, liberties or interests; convenient location of courts and a sufficient number of courts and judges in the country.

As already noted, there is 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.

Following 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.

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.

Information about procedure for approaching the courts is not sufficiently available and at times is difficult to understand. The texts of court rulings are largely inaccessible to people who were not involved in the case and yet whose interests are directly affected. Lower level court rulings are virtually not published. Due to the lack of courtrooms, judges often examine cases in their offices; there are infringements of the principle of open court hearings and the technical equipment for recording the proceedings is not available everywhere.

There is a significant problem for people living in isolated rural areas to gain access to the courts. Results of a study showed that the overwhelming majority of district [raion[33]] centres in Ukraine are not geographical centres of the districts. This leads to unequal opportunities for rural

[31] The system to provide for the work of the courts needs improvement // News from the Press Service of the Accounting Chamber from 21 August 2007
http://www.ac-rada.gov.ua/achamber/control/uk/publish/article/main?art_id=932903&cat_id=411.

[32] The work of the military courts needs improvement // News from the Press Service of the Accounting Chamber from 6 November 2007 http://www.ac-rada.gov.ua/achamber/control/uk/publish/article/main?art_id=838477&cat_id=411.

[33] To avoid an abundance of unfamiliar terms, we do not use the Ukrainian terms in this case, but translate oblast as region (other sources sometimes use the word province) and raion as district. There are 24 oblasts in Ukraine, as

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

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. At the present time there is no standard government policy for ensuring that individuals receive free 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 with the European Court of Human Rights regarding such procedures in many cases as criminal procedural in their essence and 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 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 legally stipulated size of the payment to lawyers appointed to provide legal aid in criminal cases amounts to 15 UAH for a full working day. This kind of payment for ones work, together with the complicated procedure for confirming the lawyer's participation in this category of cases, do not encourage lawyers' systematic and proactive participation, nor ensure a proper level for the legal aid provided at the State's expense

Sociological research into access to legal aid in criminal cases carried out in the Kharkiv region in 2007 by the Kharkiv Institute for Social Research showed that only 7.9 % of the respondents (prisoners) had had the opportunity to use the services of a lawyer from the moment of detention up till the first interrogation and it turned out that 41.4 % of those surveyed had only received such a possibility during the court examination. According to the same study, 41.2 % of respondents from among the public, 35.9 % of prisoners and 19 % of investigators were in varying degrees agreed that free legal aid was not available. It should also be noted that more than half of those surveyed consider that some forms of free legal aid do not exist.[34]

It is also interesting and indicative to look at the results of a content analysis of criminal cases to which bar lawyers were assigned.

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well as the Autonomous Republic of the Crimea and two cities with special status – Kyiv and Sevastopol. A raion is part of an oblast. Where there is any likelihood of confusion, the Ukrainian word is given in brackets (translator),

[34] Monitoring of the system of free legal aid in the Kharkiv region: results of a sociological study. D. Kobzin, Y. Belousov, A. Chernousov, O. Serdyuk, A. Bushchenko, Kharkiv Institute for Social Research – Kyiv, 2007, p. 32. Survey among the public and prisoners in the Kharkiv region. The fieldwork among members of the public was carried out in May – June 2007, and the survey of prisoners – in August 2007. The error margin does not exceed 3.2 %. The research was carried out with the support of the International Renaissance Foundation.

Comparison of the real participation of bar lawyers at various stages of the investigation (pre-trial and court) with the possibilities provided to defenders by current legislation[35]

№	Stage	Ideal type	Practice
1.	**Initiating of a criminal investigation (CI)**	The lawyer is entitled to be present when a copy of the protocol is handed over regarding the initiating of a CI, to read it and appeal against it as per established procedure	The lawyer is not present when a copy of the protocol is handed over regarding the initiating of a CI and seldom appeals against it in court or to the prosecutor's office.
2.	**Detention, drawing up a detention protocol**	The lawyer is entitled to be present from the first moments of detention, when the protocol on detention is being drawn up, and to see his / her client before the first interrogation (taking of an explanation)	The lawyer is not present during the actual detention or the drawing up of a detention protocol and there are real problems with access of a lawyer to the first interrogation (taking of an explanation)
3.	**Choice of preventive measure**	The lawyer is entitled to be present during the selection of a preventive measure, especially remand in custody, or to guarantee that the interests of his/her client will be considered, as well as to see the material used to justify the remand of the suspect or choice of preventive measure	The lawyer is not present during the court consideration of choice of preventive measure, especially remand in custody
3.1.	**Appeal against preventive measure**	The lawyer has the right to appeal against the preventive measure in accordance with established procedure	In studying criminal investigations, not one case was found where the lawyer had appealed against the choice of preventive measure
4.	**Carrying out investigative action**	The lawyer is entitled to be present during interrogations of the suspect or accused, and during other investigation action carried out with their participation, or at their application or on the application of the defender him or herself, and in the carrying out of other investigative work with the permission of the detective, investigator or prosecutor. The lawyer also has the right to gather information about facts which could be used as evidence in the case, including demanding and receiving documents or their copies from individuals or legal entities, become familiar at enterprises, institutions, organizations, civic associations with documents, aside from those which are protected by the law as secret; received written opinions from specialists on issues which demand special knowledge; question individuals	Lawyers very rarely take part in investigative work with the exception of cases where this participation is mandatory. However the method of content analysis does not make it possible to state that even in those cases lawyers were really present during this or that investigative measure
5.	**Presenting of charges**	See carrying out investigative activities.	From this stage on lawyers more and more often take part in the case. However in our opinion this is already too late since the charges have already been formulated and all evidence practically gathered
6.	**Drawing up the prosecution conclusion**	The lawyer is entitled to be present during the reading of the prosecution conclusion.	The drawing up and reading of the prosecution conclusion is more and more covered by lawyer «care»

[35] Ibid, pp. 87-90. The table is made up from the results of a content analysis of criminal cases conducted from July to October 2007 in 3 district courts in Kharkiv and in the Kharkiv Regional Court of Appeal. 605 criminal cases were analyzed, being chosen at random for the years 2002-2007 inclusive, and different categories. The number of cases considered during one year in each of the selected courts ranged from 980-1300 with a tendency towards increase in recent years. On average in each district court 184 cases were studied, and 50 in the Kharkiv Regional Court of Appeal.

7.	**Familiarizing oneself with the case material**	The lawyer has the right to make notes, have face-to-face meetings with the accused, explain to the accused the content of the charge, consider with the accused the question of making applications, presenting evidence, asking for somebody's removal from the case, appealing against the actions and decisions of the investigator and prosecutor.	The most common stage from which the participation of a lawyer, either according to an agreement, or ex-officio, begins.
8.	**Preliminary court examination**	The lawyer is entitled to be present during the preliminary examination and to submit an application according to legally established procedure.	At this stage the judge already considers the issue of drawing a defender into the case, and therefore the so-called signed statement appears that the defendant has admitted guilt, that the essence and scale of the charges are understood and that he or she will defend himself or herself alone
9.	**Court hearings into the case (court investigation, court debates and the final word of the defendant**	The lawyer has the right to put questions during court hearings to the defendants, victims, witnesses, expert, specialist, claimant and respondent, take part in the study of other evidence, present evidence, make applications, call for people to be removed, express their opinion during the court hearing regarding the applications of other participants in the court examination; appeal against the actions and decisions of the person running the detective inquiry, the investigator, prosecutor and court; appear in court debates; read the protocol of the court hearing and submit any comments	At this stage participation of the lawyer boils down at best to agreeing / not agreeing with the conclusions of the state prosecutor and applications like «I would ask the court when determining punishment to take into account the defendant's person, the combination of circumstances which mitigate his / her guilty, and also the fact that the crime was not serious and committed for the first time». This in our view is the work of the judge (court)
10.	**Appeals against the court verdict**	The lawyer has the right according to legally established procedure and time frames to submit appeals	Only 1 % of the cases were appealed by lawyers, both those assigned and those according to contracts, which is an extremely low figure. Furthermore, the most motivated appeals are drawn up by people who have not been charged with criminal liability for the first time.. One cannot of course exclude covert outside assistance, however it remains a fact and the court at appeal level takes into account the arguments of a convicted person
11.	**Appeal consideration**	The lawyer has the right to know about submissions by the prosecutor, appeals, submit objections, take part in court hearings during the appeal examination	Among the cases appealed at all, only lawyers working by contract take part, and then only in 25 % of the cases
12.	**Cassation appeal**	The lawyer has the right according to legally established procedure and time frames to submit cassation appeals in the part concerning the interests of the person convicted	Only in 9 cases out of 600 was a cassation appeal submitted, and not one of these was in a case. There was no work by the lawyers on them at all

From 2005 the International Renaissance Foundation in cooperation with the Legal Initiative of the Open Society Institute with the financial support of the «Viktor Pinchuk Fund – Social Initiative», have been carrying out a joint charitable programme on free legal aid aimed at creating a state system of high-quality legal aid meeting the needs of society.

On 24 January 2006 an Order issued by the Minister of Justice created a Council for reforming free legal aid.

On 9 June 2006 Presidential Decree № 509/2006 approved a Strategy Plan for creating a free legal aid system. Measures were taken at the same time on implementing the Strategy Plan were included in the Action Plan for fulfilling Ukraine's duties and commitments arising out of its mem-

bership of the Council of Europe, approved by Presidential Decree № 39/2006. However due to inconsistent policy of the Ministry of justice, the draft law on legal aid has not been prepared.

In implementation of the President's Decrees it was decided to create three pilot projects for providing legal aid which envisaged the creation of pilot legal aid offices. The first such office was created in Kharkiv in September 2006, then in February 2007 in Bila Tserkva (Kyiv region), and in November in Khmelnytsky.

These offices provide free legal aid to any person detained in a police station at any time of the day or night.

The model drawn up within the framework of these projects is for fully equipped and staffed in order to provide «secondary legal aid» Public Defence Offices [PDO]. The full-time team of professional bar lawyers works exclusively within the Project. They provide high-quality legal assistance aimed at helping those facing criminal charges and who cannot themselves afford lawyers' fees. The PDO lawyer begins representing the interests of the detained person (takes on the case) as soon as possible, before the first official interrogation and continues to represent the person throughout all the stages of the pre-trial investigation and court examination, including the appeal.

Each PDO has five bar lawyers, one lawyer and an assistant. Each of the Offices has concluded a formal agreement with the Central Department of the Ministry of Internal Affairs for the relevant region specifying the specific principles of cooperation between the Office and the police. The agreement is to ensure the following additional guarantees of detainees' rights:

- access to a lawyer from the pilot project before the detainee is interrogated by a police officer;
- the possibility of rejecting the services of a lawyer only in the presence of a lawyer;
- reports to the project's lawyers of all cases where people have been detained.

The agreement also stipulates procedure for the experiment and for the process of involving the bar lawyer in defence of the detained person.

As was anticipated, the police have been very reluctant to accept these changes and reforms. The level of opposition varies in different cities. In Bila Tserkva the police would seem to have accepted the new rules and be fulfilling the provisions of the agreement, while in Kharkiv they are still unyielding in their opposition to the changes.

The level of cooperation with courts in different cities is different. The judges of Bila Tserkva, following the position of the Chairperson of the court, are actively supporting the project. They strictly observe the provisions of the agreement and demand the same from the police, as well as accepting PDO lawyers as an integral part of the institutional structure of the system of criminal justice. On the other hand, in Kharkiv one has the impression that the courts ignore the PDO as a structure, and work with PDO lawyers as individual lawyers defending the rights of their own clients.

Overall, however, the results of the assessment suggest that the projects can be considered successful. Law enforcement officers' awareness that lawyers can appeal against a detention without sufficient evidence has led to an on average 3-5 times reduction in the number of detentions in police stations taking part in the projects. Lawyers of the Offices are also successfully working to achieve the use by courts of preventive measures alternative to remand in custody, such as release on bail or personal guarantee, thus also changing practice in the use of preventive measures. PDO experience demonstrates that where there is an active position from the lawyer, the courts are ever more inclined to not opt for remand in custody. Only in 28 % of the criminal cases which PDO lawyers were working on in Bila Tserkva did the courts choose remand in custody as preventive measures, with this figure in Kharkiv being 30 %. Overall the quality of representation of people on lower incomes in criminal cases has improved considerably.

We should note the efforts of individual judges aimed at ensuring the rights of detainees in areas where pilot offices providing free legal aid are functioning. The example can be cited of the separate judgment of the Bila Tserkva City-District Court in the Kyiv region over the Head of the Bila Tserkva City Police of the MIA Central Department for the Kyiv region [the Bila Tserkva CP] with regard to identified infringements of current legislation. The judgment particularly stresses that a police office may not question a person detained or put questions to him or her before a public defender from the office functioning on the territory of the police department has been called.

SEPARATE JUDGMENT

On 15 February 2008 the Bila Tserkva City–District Court in the Kyiv region
Under presiding judge V.M. Savin
and secretary S.I. Hulchenko
with the participation of Prosecutor R.L. Nechyporenko
lawyer V.E. Kikkas
representative of the Juvenile Affairs Service P. Stepanenko

having in an open court hearing in the city of Bila Tserkva examined the case involving charges against K***, 1991 date of birth, Ukrainian citizen, incomplete secondary education, school student *** in Bila Tserkva, unmarried, originally from and residing in Bila Tserkva, St. +++, with no previous conviction, of committing a crime under Article 15 § 2 and Article 186 § 1 of the Criminal Code

DECIDED

In a court ruling from 15 February 2008 K*** was released from criminal liability under Article 15 § 2 and Article 186 § 1 of the Criminal Code with the application in his cases of compulsory measures of an educational nature with the proceedings against him in the criminal case being terminated.

In the court hearing it was established that K*** had been detained by CP–2 of the Bila Tserkva Police on 18.12.2007 directly after an attempt to commit a crime set down in Article 186 § 1 of the Criminal Code.

After he was detained and brought to the CP–2 building, the Head of the Criminal Police Juvenile Department of the Bila Tserkva PD2, Police Major *** being fully aware that K*** was underage, questioned him and took an explanation, explaining only:

the requirements of Article 63 of the Constitution, not however explaining to either K*** or his mother K*** whom he summoned, after talking with her son, by telephone about the possibility of receiving free legal aid from highly–qualified lawyers.

15 February 2007 saw the official opening in Bila Tserkva of a Public Defence Office, created on the base of the Bila Tserkva civic organization «Public Committee for the Promotion of the Constitutional Right to Legal Aid, in implementation of the Presidential Decree «On a strategy concept for developing a system of free legal aid» from 09.06.2006 № 509/2006.

On 15 February 2007 Agreement No. 1 was concluded on carrying out an experience in organizational forms of providing free legal aid between this civic organization, the Central Department of the Ministry of Internal Affairs in the Kyiv region, and the Bila Tserkva Police on cooperation in providing detained persons with free legal aid. As a supplement to this agreement, an instruction was passed for staff of the Bila Tserkva Police.. On the basis of those documents, an MIA officer shall not question a detained person and will not ask any other questions, and must phone the Public Defence Office to call a public defender. The detained person must definitely be informed of such a possibility.

Head of the Criminal Police Juvenile Department of the Bila Tserkva CP–2, *** did not fulfil this duty.

Nor did the investigator *** who took over the case on 21.12.2007 inform K*** and his mother K*** about this possibility to receive free legal aid.

In the court hearing it was established that K*** is a single mother with four children and a difficult financial position. Despite this, Investigator *** of her own initiative presented the mother of the defendant with lawyer B*** with whom K*** was forced to conclude a fee–paying agreement for providing legal assistance to her son which she informed the court about during the court hearing.

Furthermore, lawyer B*** did not appear at the court hearing on 14.02.2008, and did not provide a lawyer to replace him.

The court of its own initiative informed the Public Defence Office about the need to provide free legal aid and was forced to adjourn examination of the case.

During the examination of the case lawyer V.E. Kikkas provided free legal aid to the defendant and his mother.

Responsible for a criminal case involving a crime by people underage, the investigator into the case *** did not carry out her duty to inform the Juvenile Affairs Service of the Bila Tserkva City Executive Committee about the crime.

It was also established during the court hearing that the pre–trial investigation had been conducted with infringements of Chapter 36 of the Criminal Procedure Code (CPC).

Article 433 of the CPC states that in conducting pre–trial and court examinations into cases involving crimes by juveniles, aside from circumstances set out in Article 64 of the CPC, it is also necessary to ascertain the state of health and of general development of the minor, their living conditions and upbringing; circumstances which adversely influence the upbringing of the minor, through questioning their parents, and other people who can provide such information, as well as demanding the necessary documents and carrying out other investigation activities in this area. The above–mentioned activities are mandatory for the investigator into the case.

Investigator *** did not properly fulfil the requirements of current legislation on these issues and confined herself to questioning the defendant's mother and teacher of foreign literature***/ At the same time it can be seen from the case material that the defendant is living with his adult brother and elder sister. The lad's neighbours were not questioned, nor his form teacher or the school's social pedagogue with regard to his behaviour and upbringing from elementary grades and his overall development.

The investigator also failed to find out about the boy's state of health, restricting herself merely to questioning the Head Doctor in the Bila Tserkva Psycho–as to whether K*** was on their records.

The court also drew attention to the fact that investigator ***did not fulfil the requirements of the agreement made on 01.02.2006 between the Supreme Court, the Prosecutor General, the Ministry of Internal Affairs, the State Department for the Execution of Crimes and the Swiss Agency on Development and Cooperation regarding implementation of the project «Support for the reform of the system of pre–trial detention». This was part of implementation of the provisions of the Presidential Decree No. 39/2006 from 20 January 2006 «On an action plan for implementing Ukraine's duties and commitments following from its membership of the Council of Europe.»

On 02.03.2006 the Deputy Minister of the MIA P.V. Kolyada in his letter addressed to the Head of the Central Department of the MIA for the Kyiv region V.O. Yakovenko pointed out that this agreement was binding upon employees of the investigation unit of the Central Department of the MIA for the Kyiv region and of the investigation subdivisions of the Bila Tserkva city and district police stations.

One of the important elements of this agreement is the conducting of a pre–trial study of the person who committed the crime by the inspectors of the Bila Tserkva Police Penal Inspectorate which enables the court to better understand the offender and choose the most appropriate form of punishment. This approach also makes it possible for inspectors of the Bila Tserkva Police Penal Inspectorate to provide accompaniment for the offender during the pre–trial investigation and court proceedings in order to identify and eliminate the reasons for the crime, reform such people and prevent them from committing new crimes.

Investigator *** did not fulfil her duty to inform the Bila Tserkva Police Penal Inspectorate about the criminal case with regard to K*** which she was dealing with.

Bearing in mind the above–listed violations of the rights of defendant K*** and other infringements of the law during the pre–trial investigation, the court considers it necessary to inform the Head of the Bila Tserkva Police Department of the MIA Central Department for the Kyiv region in order that the appropriate measures be taken to remove such infringements in future.

Governed by Article 23–2 of the CPC, the court:

HAS RESOLVED:

to inform the Head of the Bila Tserkva Police Department of the MIA Central Department for the Kyiv region of the violations of current legislation established in order that appropriate measures be taken.

That the Bila Tserkva City–District Court be informed of the measures taken within the established time period.

Judge (signature)

It would be expedient to extend such practice among judges with this contributing to the real safeguarding of detainees' rights.

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.

According to SJAU figures, there has been a certain speeding up in the consideration of criminal cases against a clear increase in the time taking for examination of administrative and civil cases. It should be added that Ukrainian legislation establishes time limits only for scheduling the review of particular cases and does not take into account the whole amount of time for considering the case, including other levels. State statistics therefore fail to show the main problem seen in reasonable time limits being exceeded because of the case being sent from one court to another. It is also important that these figures show an increase in unconsidered cases at the end of the year which demonstrates a negative trend over recent years when thousands of cases from previous years accumulate in the courts.

Efficiency of consideration of cases by local general jurisdiction courts[36]

№ з/п	Type of figures	2006	2007	Rate of change in %
Criminal cases				
1	**The number of cases where proceedings have been completed, in total**	188788	186244	-1,35
2	Cases scheduled for examination with infringements of the time limits set down in Article 241 of the CPC	2032	1425	-29,87
	Percentage of the number of cases where proceedings have been completed	1,08	0,77	X
3	Cases scheduled for examination with infringements of the time limits set down in Article 256 of the CPC	4976	3867	-22,29
	Percentage of the number of cases where proceedings have been completed	2,64	2,08	X

[36] Statistics of the State Judicial Administration for 2007, available on the official website http://www.court.gov.ua.

4	**The number of unconsidered cases at the end of the reporting period**	41147	40348	-1,94
	Percentage of the number of cases where proceedings were underway	17,90	17,81	X
5	Including cases where consideration is over 6 months late (not counting cases where proceedings were terminated)	5451	5363	-1,61
	Percentage of the number of cases not considered cases not counting cases where proceedings were terminated	18,83	18,60	X
Administrative cases				
6	The number of cases where proceedings have been completed, in total	106625	126035	18,20
7	Including with infringements of the terms for examination set down by the Code of Administrative Justice	13248	14439	8,99
	Percentage of the number of cases where proceedings have been completed	12,42	11,46	X
8	**The number of unconsidered cases at the end of the reporting period**	18915	19970	5,58
	Percentage of the number of cases where proceedings were underway	15,07	13,68	X
9	The remainder of unconsidered cases (not including cases where proceedings have been terminated)	17462	18557	6,27
	Percentage of the number of cases where proceedings were underway	13,91	12,71	X
10	Cases over 2 months late (not including cases where proceedings have been terminated)	5250	5299	0,93
	Percentage of the number of cases not considered not counting cases where proceedings were terminated	30,07	28,56	X
Civil cases based on law suits, separate proceedings				
11	**The number of cases where proceedings have been completed, in total**	1143519	1240758	8,50
12	Proceedings in cases concluded over the time limits established by the Civil Procedure Code	122040	123484	1,18
	Percentage of the number of cases where proceedings have been completed	10,67	9,95	X
13	**The number of unconsidered cases at the end of the reporting period**	197518	207892	5,25
	Percentage of the number of cases where proceedings were underway	14,73	14,35	X
14	*Percentage of the number of cases excluding cases where proceedings were terminated)*	174245	183805	5,49
	Percentage of the number of cases where proceedings were underway	12,99	12,69	X

15	Cases over 3 months late (not including cases where proceedings have been terminated)	43458	40846	-6,01
	Percentage of the number of cases not considered, excluding cases where proceedings were terminated	24,94	22,22	X

Unfortunately there is no information about unconsidered cases by the Supreme Court. Over the last few years more than 40 thousand cases have accumulated in this court. Last year parliament gave permission on a once-off basis for these cases to be temporarily divided between appeal courts for cassation review. Clearly we will not speak about the quality of such reviews however it was possible to thus release the load on the Supreme Court. Nonetheless the reasons for such a build up of cases were not removed since the court reform did not take place. This year should therefore have shown a rise in unconsidered cases, however there is no information at all about the consideration of cases in the Supreme Court.

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.

According to figures from the State Judicial Administration, through 2006-2007 the load on one judge of a local court rose on average by 15-20 % in almost all courts with the exception of the Chernivtsi, Volyn, Poltava and Rivne regions. There was an almost 30 % increase in the workloads in the Donetsk and Ternopil regions. On average a local court judge receives 155 cases a year. However this figure is considerably higher in many local courts: in the Khmelnytsky City-District Court the figure is 312; in the Sykhivsky District Court in Lviv – 319; and in the Bilyayivsky District Court in the Odessa region as many as 390 cases.

At the same time the workload per judge in a court of appeal is on average 3-4 times lower than that of judges in local courts, although, except in the Zhytomyr and Ternopil regions, the figure has increased by a third over the last two years.]

Military courts were virtually without work since their jurisdiction has been significantly decreased over the last few years and the number of judges has not been reduced, this leading to clear disproportion.

Ukrainian 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 one of the most common reasons for Ukraine losing cases in the European Court of Human Rights.

In July 2007 the European Court found that there had been a violation of the right to a fair trial due to the excessive procrastination in the courts over the case of Oleksandr Dovhikh v. Ukraine. Delay in hearing the case in the Mykolaiv Court cost the State 1,816 thousand Euros.

Since April 2001 up to the present day[37] hearings have been continuing into the criminal case against O.H. Onyshchenko from Dnipropetrovsk who has been in custody all that time. The case has been sent back several times for further investigation: in April 2004, August 2005 and January 2008 the case was sent by the Supreme Court for repeat examination, and all verdicts were revoked. The case is presently being examined by a local court and the accused has made an application to the European Court of Human Rights.[38]

7. 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

[37] As of May 2008.
[38] The case is supported by the UHHRU Strategic Litigations Fund.

to a fair trial especially due to the non-enforcement of rulings from domestic courts within a reasonable period of time. (over 75 cases out of 109 in 2007, i.e. more than 75 %).

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 data from the Ministry of Justice, as of 1 January 2008 the State Bailiffs' Service was due to enforce 7 254 061 writs of execution worth in total 51 792 862 619 UAH. In 2007 Bailiffs completed 4,348,032 documents worth 17,309,884,431UAH, of which 2,358,331 executions writs were actually enforced with 4,157 577 451 UAH retrieved. According to statistical estimates, only about 32 % of execution writs in the country are enforced. Approximately 30 % of other execution proceedings are terminated for various reasons.[39]

According to the SJAU, during 2007 5,901 complaints reached the courts (one should also add 966 cases which arrived in 2006 but were not considered) against the actions or inaction of the State Bailiff or other officials of the State Bailiffs' Service. Of these 1,968 complaints were not examined. Of the 3,868 examined, 1692 were allowed. 555 were examined with infringements of the time limits set down in the Civil Procedure Code, and 1,013 remained without examination. These figures demonstrate to an equal degree the ineffectiveness of court control over implementation of court rulings.

On 8 June 2007 the liquidation commission of the Department of the State Bailiffs' Service ceased its work due to the completion of liquidation of State Bailiffs' Services. all bailiffs' services became structural subdivisions of the relevant Departments of Justice. However this did not significantly increase the number of enforcement rulings.

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».[40] The situation however with to this day remains appalling.

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.[41]

There are also problems in the fact that gaps in legislation create the conditions for escaping liability for non-enforcement of rulings. The law obliges the State Bailiff in cases where there are

[39] See, for example, the overview of main reasons for non-enforcement of court rulings on defending property rights in the section on Property rights where the grounds are given for terminating enforcement proceedings where the debtor is one of several forms of state enterprise.

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

[41] 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/

indicators of a crime in the actions of a person who deliberately obstructs proceedings to send the relevant law enforcement body an application to bring criminal charges against the person. In 2007 over 20 thousand applications from State Bailiffs were sent to prosecutor's offices or to the police to initiate such criminal investigations. Yet only slightly more than 6 thousand criminal investigations were in fact initiated.

When considering applications from State Bailiffs the prosecutor's offices and bodies of the Ministry of Internal Affairs do not always adhere to the requirements of the Criminal Procedure Code, for example, as regards time periods for consideration, and there are numerous cases of unwarranted refusals to implement criminal investigations, of copies of resolutions refusing to launch criminal proceedings being sent late or not at all to the State Bailiffs' Service. Most often in considering such applications, law enforcement agencies refuse to launch criminal investigations for the following reasons: the debtor not being in work and not receiving income; not finding the debtor at their main place of residence; as well as due to partial repayment of alimony or maintenance arrears. Drawn-out review of applications or unwarranted refusal to launch criminal investigations adversely affects timely real enforcement by state bailiffs of court rulings and leads to a sense of impunity in enforcement proceedings.[42]

The prosecutor's office provides these figures regarding their activities in ensuring enforcement of court rulings

Year	Documents of prosecutor's response considered with the use of measures to eliminate the violations	Disciplinary proceedings brought against functionaries	Criminal investigations initiated	Unlawfully detained individuals released at the initiative of the prosecutor's office
2006	12069	9191	287	372
2007	13603	10011	347	399

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

8. 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.)

As noted, considerable problems are presented by the lack of a proper level of legal culture among high level public officials. 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 testify against 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:

[42] Ibid

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[43]

№ з/п	Indicator	2006	2007	Rate of change	
					%
1	**Proceedings completed into cases (not including cases which were not initiated following a complaint from the victim)**	189158	185773	-3385	-1,79
2	**Cases returned by first instance courts for further investigation** (Articles 246, 281 of the CPC) (not including cases which were not initiated following a complaint from the victim)	7581	6858	-723	-9,54
	Percentage of the number of completed proceedings into criminal cases of public prosecution	4,01	3,69	X	X
3	**Cases returned to prosecutor's offices in accordance with Article 249 of the CPC**	2049	1444	-605	-29,53
	Percentage of the number of completed proceedings into criminal cases of public prosecution	1,08	0,78	X	X
4	**Criminal cases withdrawn by the prosecutor's office in accordance with Article 232 of the CPC**	3917	2873	-1044	-26,65
	Percentage of the number of completed proceedings into criminal cases of public prosecution	2,07	1,55	X	X
5	**Total number of criminal cases returned by the courts and withdrawn by prosecutor's offices (not including cases which were not initiated following a complaint from the victim)**	13547	11175	-2372	-17,51
	Percentage of the number of completed proceedings into criminal cases of public prosecution	7,16	6,02	X	X
6	**Number of people with respect of whom judgments or resolutions of local courts on returning cases for further (pre-trial) investigation were revoked at appeal level.**	2131	2029	-102	-4,79
7	**Separate judgments issued regarding infringements of legislation in conducting detective inquiry or pre-trial investigations**	2474	2284	-190	-7,68

[43] 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.

An additional infringement of the presumption of innocence is the application of amnesties with respect to people whose criminal examination is still in process.

9. RECOMMENDATIONS

1) Continue implementing the Strategy Plan 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, within a year pass the Laws on the Judiciary and on the Status of Judges submitted by the President to the Verkhovna Rada in December 2006 and passed by parliament in their first reading.

2) Continue implementation of the Strategy Plan for reforming the system of free legal aid. On its basis the Ministry of Justice should draw up and submit to parliament via the Cabinet of Ministers a draft law on legal aid..

3) Begin implementation of the Strategy for reforming criminal justice, passed by the President, in particular, by reforming criminal procedure law and passing a new Criminal Procedure Code[44].

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) 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

6) 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

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

8) 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.

9) 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.

10) 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.

11) Implement the National Action Plan on ensuring proper enforcement of court rulings approved by Presidential Decree on 27 June 2007 N 587/2006.

12) Increase the efficiency of the State Bailiffs' Service by strengthening legal and social protection of State bailiffs, as well as other guarantees of their independence, and by improving the legislative norms which directly regulate the enforcement of court rulings, #

13) 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 much 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.

14) 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.

[44] 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 being drawn up by a working group of the National Commission for the Strengthening of Democracy and the Rule of Law.

V. THE RIGHT TO PRIVACY[1]

The right to privacy is guaranteed by the Constitution of Ukraine, where 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 defends 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 directed at infringing the right to privacy.

Although the situation in this area saw some positive moves (for example, abolishing the inclusion of names on railway tickets), the general trend is towards an increase in interference by the State, in particular, where communications and information privacy are concerned.

On the other hand, Ukraine is not removed from the global assault on privacy in the context of the fight against terrorism and the implementation of new procedure for keeping tabs on individuals (biometric data, the introduction of electronic passports with biometric data, etc). However, whereas in other democratic countries there are legal mechanisms to protect against abuse in this area, in Ukraine such mechanisms either do not exist or are not very effective. Therefore movement in this field on the whole is one-sided with ever more restrictions on the right to privacy being introduced, without the implementation of effective mechanisms of protection.

We should add that Ukraine has not even begun implementing the general measures linked with enforcing the Judgment of the European Court of Human Rights in the case of *Volokh v. Ukraine*, although the judgment quite clearly indicated the lack of compliance of Ukrainian legislation with the requirements of the European Convention on Human Rights.

1. COMMUNICATIONS PRIVACY

Legislation does not set down clear grounds for interception of information from communication channels (phone tapping, mobile tapping, Internet tapping or e-mail tracking), or the specific period of time during which such information is intercepted, or the circumstances in which the information should be destroyed and how it can be used. Safeguards ensuring lawfulness of such interception of communication channels are clearly inadequate. As a result of this, no one can

[1] By Ruslan Topolevsky and Volodymyr Yavorsky, UHHRU.

monitor the number of permits and the necessity for listening in, and the individuals, in relation to whom such measures have been applied, are not aware of this fact and can, therefore, neither challenge such actions in court nor otherwise defend their right to privacy.[2]

On a number of occasions during 2007 public figures asserted that their conversations had been tapped, for example, Yury Lutsenko[3], members of the Central Election Commission from the coalition[4], and others.

On 7 February the Deputy Prosecutor General V. Pshonka initiated a criminal investigation into a breach of privacy during a conversation between the then Speaker of the Verkhovna Rada, Oleksandr Moroz and the British Ambassador. This followed the publication of a transcript of the conversation on the Internet in January 2007. The prosecutor's office in Kyiv was instructed to carry out the criminal investigation[5] The Security Service [SBU] was accused of carrying out the wiretapping, but categorically denied any involvement[6]

On 23 February 2007 the then Minister of Internal Affairs Vasyl Tsushko reported that during a check to establish what special packs they had for wiretapping, including mobiles, and for finding out where the owner of the mobile was at any point in time, it emerged that the Ministry of Internal Affairs (MIA) had only bought 9 such packs with State funding, but 17 had been handed to the SBU. According to Mr. Tsushko, «*That suggests that some other sources of financing may have been used to buy special technology. The possibility follows also that there was unsanctioned purchase and use of such devices, including with the aim of serving he interests of particular political forces or commercial structures. We are carrying out an internal investigation into this* «[7]

Soon after, according to the Deputy Minister of Internal Affairs and Head of Crime Police, Mykola Kupyansky, during an inventory in one of the MIA operations units, another unregistered system for intercepting mobile communications was found although in accordance with a Presidential Decree such systems had to be passed to the SBU.[8]

Later, in September 2007, Acting Head of the SBU, V. Nalyvaichenko spoke of three cases where illegal outfits were discovered making use of equipment which can be purchased abroad and engaging in wiretapping. In one of the cases, 60 thousand conversations had been tapped. The conversations had involved heads of regional state administrations, heads of regional police departments and those connected with resolving issues concerning land relations. Mr. Nalyvaichenko believes that there are another three or four special wiretapping packs in regions of Ukraine, and several in Kyiv.[9]

On 17 September 2007 the Chernihiv Women's Human Rights Centre addressed an appeal to the Prosecutor General regarding the fact that there are a number of orders used in the State Department for the Execution of Sentences with provisions which violate the rights and interests of prisoners, including the right to privacy.[10]

They draw attention to the fact that the Internal Regulations[11] allow for the removal of letters written in secret code or script, or using other agreed symbols, as well as those containing informa-

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[2] «Human Rights in Ukraine – 2004, Human Rights Organizations' Report» – Kharkiv: Folio, 2005. The report is available at www.helsinki.org.ua and www.khpg.org.ua

[3] Lutsenko feels that he's being watched // UNIAN information agency http://www.unian.net/ukr/news/news-189083.html.

[4] SBU carried out surveillance not of members of the Central Election Commission, but of the situation in general // UNIAN information agency http://www.unian.net/ukr/news/news-199679.html.

[5] Deputy Prosecutor General Viktor Pshonka has initiated a criminal investigation into violation of privacy of telephone conversations committed against a public figures // Report from the Prosecutor General's office on 5 February 2007 http://www.gpu.gov.ua/ua/news.html?_m=publications&_t=rec&id=87158&fp=331.

[6] SBU carries out searches of its departments // UNIAN information agency: www.unian.net

[7] http://www.rada.gov.ua/zakon/skl5/3session/STENOGR/23020703_12.htm

[8] MIA finds yet another unregistered wiretapping pack // UNIAN information agency http://www.unian.net/ukr/news/news-186260.html

[9] Valentin Nalyvaichenko «SBU isn't a coin able to please everybody» // «Glavred» Internet publication http://www.glavred.info/archive/2007/09/03/101748-6.html

[10] V. Badira Norm-creating activities of the State Department for the Execution of Sentences – under public control // http://www.khpg.org/index.php?id=1201530418

[11] Item 43 of the Order of the State Department for the Execution of Sentences № 275 from 25.12.2003 (with subsequent amendments and additions) which approves the Internal Regulations of penal institutions.

tion which should not be divulged, and that they had not been sent to the addressee, or passed to the prisoner, but removed and destroyed. Valentina Badira from the Chernihiv Women's Human Rights Centre believes that this restricts prisoners' right to correspondence.

The Centre's appeal also draws attention to the failure to comply with legislation of the new procedure for checking correspondence[12], infringing the norms which prohibit the reading of letters directed to the Human Rights Ombudsperson, the European Court of Human Rights or other international organizations which Ukraine is a member of, as well as to the prosecutor's office.[13]

This letter was later sent by the prosecutor's office to the Department for the Execution of Sentences which sent a reply asserting that the above-mentioned provisions did contravene either current legislation or the European Convention for the Protection of Human Rights and Fundamental Freedoms.

In December 2007 the Chernihiv Women's Human Rights Centre also approached the Ministry of Justice asking that they consider whether the above-mentioned normative legal acts of the Department for the Execution of Sentences comply with Ukrainian legislation and international standards. In January 2008 the Ministry of Justice replied saying that work was finishing on introducing amendments to Orders No. 275 and No. 13[14]

In December 2007 the Chernihiv Regional Prosecutor initiated a criminal investigation against a local council deputy suspected of organizing wiretapping. According to a report from the Prosecutor Anatoly Vasylevsky, during the course of the investigation criminal investigations had been launched in August 2007 over instances involving the unlawful use of special technical devices for illicitly receiving information and breach of telephone privacy. On 11 December a criminal investigation was initiated against a person believed to be involved in organizing those crimes.[15]

On 26 September 2007 the Cabinet of Ministers adopted Resolution No. 1160 «On approving the Procedure for obtaining a court order to carry out measures which temporarily restrict human rights and the use of the information obtained».[16]

This Procedure sets out how a court order is obtained for carrying out operations which temporarily restrict human rights, for example, a warrant to illicitly gain access to a person's home or other property, to use technical devices to obtain information, intercept communication channels, monitor letters, telephone conversations, telegraph and other correspondence, as well as the use of information obtained during these operations.

However, neither Cabinet of Ministers Resolution № 1169, nor the Law «On investigative operations» contains a list of such measures temporarily restricting human rights.

The adoption of such a Resolution effectively legalizes poorly monitored secret surveillance, providing the law enforcement agencies with unlimited access to personal information.

By European standards an application for access to private information must be sufficiently justified. It outlines the circumstances and explains why it is only in this way that the necessary information can be obtained. At the same time, after the termination of a criminal investigation, or when it has been passed to the courts, a person is informed that he or she was under surveillance. This makes it possible to lodge a complaint against the actions of the law enforcement agencies with the courts. Furthermore, there must be independent control over this activity (usually from the Ombudsperson). None of this is available in Ukraine. It should be noted that restriction of rights is possible only on the basis of the law. However it is precisely via subordinate legislation that the possibilities are effectively extended for law enforcement agencies to restrict human rights.

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[12] Item 2.4 of Order of the State Department for the Execution of Sentences № 13 from 25.01.2006, which approves instructions on checking correspondence.

[13] Besides legislative norms, this is also Order of the State Department for the Execution of Sentences № 275 from 25.12.2003.

[14] V. Badira Norm-creating activities of the State Department for the Execution of Sentences – under public control // http://www.khpg.org/index.php?id=1201530418

[15] Criminal investigation launched against deputy for wiretapping // о справу проти депутата за прослуховування телефонів// UNIAN information agency: http://www.unian.net/ukr/news/news-227205.html, «Black grave // Dzerkalo tyzhnya [the Weekly Mirror] № 41 (670) 3 — 10 November 2007, http://www.dt.ua/1000/1050/61009.

[16] Website of the Verkhovna Rada of Ukraine http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=1169-2007-%EF

For example, an application with the signature of the head of an investigations unit is submitted for consideration to the head of the court of appeal of the region, of the cities of Kyiv or Simferopol, of the Crimean Autonomous Republic or their authorized deputy according to where the case is located. The head of the investigations unit or his deputy gives notification as to whether a court warrant has been issued or turned down to the prosecutor's office which supervises adherence to the law by the bodies carrying out the investigative operation.

The Procedure approved by the Cabinet of Ministers thus fails to comply with Article 97 of the Criminal Procedure Code («the enforcement of individual investigative operations stipulated in Ukraine's legislative acts is undertaken with a court warrant in accordance with an application agreed with the prosecutor's office from the head of the relevant investigations unit or his deputy»). It makes it possible to receive a court order without prior agreement with the prosecutor's office supervising observance of legislation of the given investigations unit.

In this situation some lawyers recommend applying «presumption of unlawfulness» in the actions of the lawyers of investigations units and immediately appealing against their actions to the prosecutor's office responsible for prosecutor supervision over those units.[17]

In October 2007 the Ukrainian Internet Association called on the President to suspend the force of the Cabinet of Ministers Resolution from 26 September «On approving the Procedure for obtaining a court order to carry out measures which temporarily restrict human rights and the use of the information obtained». It sent the appropriate letters outlining the unlawfulness of this Cabinet of Ministers Resolution and need to revoke it to the Ministry of Justice, the State Committee of Ukraine for Business Enterprise, the Prosecutor General, the Supreme Court, the Cabinet of Ministers, the Human Rights Ombudsperson, as well as an open letter to the President.

Later the Human Rights Ombudsperson Nina Karpachova sent a letter to the then Prime Minister Viktor Yanukovych asking that Cabinet of Ministers Resolution № 1169 from 26 September be revoked. .In her view the Resolution was in contravention both of Ukrainian legislation, and of Article 8 of the European Convention for the Protection of Human Rights. She believed that if in the above-mentioned legislative acts the Government perceives certain gaps on issues which the above Procedure touches on, then these shortcomings can only be removed by tabling the appropriate legislative suggestions in the Verkhovna Rada.[18]

However the Ministry of Justice rejected these objections with an extensive commentary on the reservations expressed about the Resolution. It also asserted that the Cabinet of Ministers «have not only unified the procedure for investigations units of different authorities receiving warrants, but having removed the stamp restricting access from official acts, have taken a significant step towards improving openness and transparency in the activities of the law enforcement agencies. This will give the public the opportunity to carry out more effective democratic control over the work of investigations which will in turn promote their greater efficiency and implementation of the functions with which they have been entrusted»[19] At the beginning of 2008 this Resolution remained in force.

No exact figures are known for the scale of wiretapping in Ukraine since official statistics are not provided by State bodies. This is because in 2005 such information in generalized form was, at the initiative of the SBU, added to the register of information constituting a State secret (generalized data on investigative operations

It became known earlier that in 2002 courts had issued more than 40 thousand warrants. It was also officially confirmed that in 2003 the Appeal Court of the smallest region in Ukraine, the Chernivtsi region, had issued 823 warrants for the interception of information from communications

[17] New court order procedure for carrying out measures which temporarily restrict human rights // Firm of Bar Lawyers D&U Partners, http://www.du-partners.com/ua/actual_matters/view/14/

[18] Nina Karpachova «The Cabinet of Ministers Resolution which makes it possible to intrude into people's private life, is in contravention of not only the Ukrainian Constitution, but also the Convention of the Council of Europe. Message from the Press Service of the Human Rights Ombudsperson i: http://www.ombudsman.kiev.ua/pres/releases/rel_07_11_09.htm

[19] Commentary from the Ministry of Justice regarding the Cabinet of Ministers Resolution from 26 September «On approving the Procedure for obtaining a court order to carry out measures which temporarily restrict human rights and the use of the information obtained» http://www.minjust.gov.ua/0/11296

channels.[20] According to information from the Prosecutor General's Office, the number of such warrants by September 2005 was in excess of 11 thousand, with the results of the wiretapping having been used in only 40 cases.[21].

In September 2007 the Acting Head of the SBU V. Nalyvailenko stated that in a week the courts give (obviously the SBU – author) three – four warrants for wiretapping, for example, in connection with suspected involvement in terrorist activities, illegal arms trafficking and narcotics..[22] The total number during the year would thus come to around 200 warrants.

By submitting information requests as part of the project «Monitoring adherence to Article 8 of the European Convention on Human Rights in Ukraine», undertaken by the civic network «OPORA» with the support of the International Renaissance Foundation, it was ascertained, for example, that during three quarters of 2007, the Court of Appeal of the Transcarpathian Region, which is one of the least populated in the country issued 323 warrants to intercept information from communications channels.

200 applications were submitted by police bodies in the Crimea during 2007 for warrants to intercept information from communications channels. During the first three quarters of 2007 344 applications were made in the Kharkiv region. Moreover as well as the Ministry of Internal Affairs, warrants are also received by the SBU, the tax police and other law enforcement bodies. It is also clear that the number of applications only approximately indicates the actual number of warrants issued.

If we thus take the data for one region and extrapolate it to the scale of the whole country, we can assume with justification that the approximate number of warrants for interception of information from communications channels come to around 12 thousand permits a year. We would stress that the error factor must be considered since there are no exact figures for all regions. However the figures seem likely since the date correlates with that of the Prosecutor General for 2005.

That is, it would seem that since 2002 the number of court warrants has become more than three times smaller, however over the last three years the number has remained stable – around 12 thousand per year. This figure is considerably higher than in countries of Western and Central Europe.

There can be no doubt that data on the depersonalized number of court warrants throughout the country for interception of information from communications channels, just as for the number of cases of interception of correspondence and searches carried out, should be available to the public whereas the authorities sometimes unlawfully (since information concerning observance of human rights should be open) view this as confidential information which is in the possession of the State and has the stamp «For official use only», etc, and may not therefore be shown to members of the public.

In 2006-2007 three sets for monitoring cellular communication networks were removed, as well as around 50 devices for tapping premises, including the offices of political parties, of heads of the local authorities and on structures of information activity. More than 40 people faced administrative charges. Eight criminal investigations were initiated in the regions for unlawful use of such equipment.[23]

The SBU in order to combat cyber-terrorism is carrying out measures on monitoring the use of the Internet and regulating its Ukrainian segment. Despite the lack of legal definition of the powers of the SBU in this sphere, it is continuing to introduce the technical possibilities for exercising this surveillance over use of the Internet.

According to Order No. 122 of the State Committee on Communications from 17 June 2002, only Internet providers which have installed a state system of monitoring (analogous to the Russia

[20] Yevhen Zakharov: «Investigative activities and privacy of means of communication», available in English at: www.khpg.org.ua.

[21] Prava Ludyny [Human Rights], No. 28, 1-15 October 2005

[22] Valentin Nalyvaichenko «SBU isn't a coin able to please everybody» // «Glavred» Internet publication http://www.glavred.info/archive/2007/09/03/101748-6.html

[23] Deputy Head of the SBU «There is no talk of total wiretapping in the Cabinet of Ministers Resolution» // The newspaper «Dzerkalo tyzhnya», № 42 (671) 11 — 18 November 2007, http://www.dt.ua/1000/1550/61106/

SORM – «System of ensuring investigative activity») and have received the appropriate certificate from the SBU may provide access to global information networks to institutions and organizations which receive, process, circulate and store information which is the property of the state. The Ministry of Justice of Ukraine, in response to a letter from the Internet Association of Ukraine regarding the legality of Order No. 122 of the State Committee on Communications stated that it was legal, however later, on 23 November 2005, this time answering the same question posed by the UHHRU, it declared it unlawful

Despite this, all the activities based on this Order are still being carried out. No equipment has been dismantled and the list of providers is effectively still in force.

UHHRU approached the Security Service, asking on what grounds the Internet was continuing to be monitored when Order No. 122 had been revoked. The reply from the SBU stated that such activities were on the basis of the Law on investigative operations. However, given the functioning of a monitoring system, doubts arise as to whether constant monitoring is really carried out solely within the boundaries of investigative operations launched. The point is that the specific nature of the monitoring demands constant surveillance of traffic, and not selective surveillance, largely of a specific person.

3. INFORMATION PRIVACY AND PERSONAL DATA PROTECTION

Ukraine has still not ratified the Council of Europe's Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, No. 108, although the Action Plan Ukraine – EU for 2005 stipulates the ratification of Convention No. 108 and the Additional Protocol to it, with the necessary amendments introduced at the same time to domestic legislation.

In March 2006 the Verkhovna Rada passed in full the draft law «On Personal Data Protection»[24]. However the President used his power of veto. The law was 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 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.

Meanwhile, without a normative base for personal data protection, discussion of draft laws has been continuing in parallel to the actual creation of a Single State Automated Register of Individuals (SSARI), as well as other state registers containing personal data. Parliament has in past years repeatedly rejected draft laws on creating such a Register

In response to this and despite the lack of any legal grounds, on 30 April 2004 the then President issued Decree No. 500 «On the Creation of a Single State Register of Individuals» which sanctioned the creation and running of a Single Register The Decree empowered the Ministry of Internal Affairs to create and maintain this single register on the basis of a Single State Automated Passport System (hereafter – SSAPS), based on a concept approved by a Cabinet of Ministers Resolution back in 1997

In order to carry out the work on creating SSAPS, the Ministry of Internal Affairs appointed the private company «Corporation «SSAPS». This meant that personal data which Ukrainian citizens passed to a government agency were then passed on to a private structure. Later the MIA management also empowered this private structure with the issue of passport forms, the State Automobile Inspection [traffic police] database, and so forth

The main point of SSAPS is to create a single automated database about members of the public whereby all information about any Ukrainian citizen gathered by any government body or State institution will be held under one number. Such a system will inevitably lead to violations of privacy. Precisely for that reason, the Hungarian Constitutional Court back in 1991 declared an analogous

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

system unconstitutional. There is no such system in any developed democratic country. Yet parliament has begun creating it. Effectively, as can be seen from the above, the system is being created in practice, without any proper legal grounding.

However parliament did not begin its legalization by legislative means. On 23 February 2007 the Verkhovna Rada issued Resolution № 719-V which introduced amendments to the Verkhovna Rada Resolution «On approving the provisions on the passport of a Ukrainian citizen and birth certificate» № 2503-XII from 26.06.1992., which approved the Provisions on a passport for Ukrainians to travel abroad.[25] This foresees that additional information (in particular, biometric) about the holder of a passport for travel abroad, the contact of which is determined by current legislation, may be reflected by a cordless electronic carrier built into the document.

In connection with this President Yushchenko signed Decree № 399/2007 from 12.05.2007 «On declaring void some decrees of the President of Ukraine», which cancelled his previous decrees on this subject, namely:

Presidential Decree «On the passport of a Ukrainian citizen for travelling abroad» № 491 from 28.10.1993;

Presidential Decree «On measures for creating a State Information System for a register of individuals and their documentation» (aside from Article 1 as regards the Description of the internal left side of the cover of a child's travel document) № 1218 from 14.12.1996.

Previously issued passports for travel abroad, as well as passports organized with the use of the previous types of passport forms, are valid until they expire.

On 26 June 2007 Cabinet of Ministers [CVU] Resolution № 858 from 26.06.07 «On approving a technical description and form for the passport of a Ukrainian citizen for travelling abroad and amendments to some CMU acts» envisaged the processing in centralized manner of passports only of the new type. The current CVU Resolution № 450 from 2 April 2002 «On approving the Procedure for centralized processing, preparation and issue of a passport of a Ukrainian citizen for travelling abroad» was cancelled. This had stipulated that «centralized processing of passports for foreign travel in the regions shall be introduced as centres are created for the State information system for a register of individuals and their documentation».

Two weeks before this (!), on 11 June 2007 MIA Order № 194 was issued. With this Order, the Acting Minister of Internal Affairs M. Korniyenko made Deputy Minister V. Fatkhutdinov responsible for implementing a general contract between the MIA and the SSAPS consortium for preparing new passports for foreign travel.

The issue of passports for foreign travel was thus artificially blocked, and an artificial demand created led to mass infringements of people's rights especially given that this all occurred during the summer vacation period. Some 60 thousand people were waiting for passports

It seems to us that the objective in creating such a situation was to discredit the State enterprise «Resources – document» which carried out accelerated issue of passports, its subsequent liquidation and the full takeover of its work on issuing passports by the private concern «SSAPS».

In November 2007 the Internet newspaper «Business» published a journalist investigation into these events.[26] Later, during the night from 7-8 December 2008, the author, journalist Maxim Birovash was attacked. He says that the assailants stole internal correspondence of the Ministry of Internal Affairs, protocols of meetings of the commission on passport provision, and other documents which he was due on 10 December to present during a court hearing in connection with a civil suit brought by the Chair of the Consultative Council of the concern SSAPS, Yury Sidorenko.[27]

UHHRU believes that one of the main lobbyists for passing these normative legal acts was Vasyl Hrytsak. It was for this that he was awarded the UHHRU anti-prize «Thistle of the Year» for worst human rights offender.[28]

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[25] Official Herald of Ukraine № 16 2007, http://www.gdo.kiev.ua/files/db.php?god=2007&st=585.

[26] «Beyond the passport» – «Business», № 43 (770), 22.11.2007: http://www.business.ua/i770/a23851/; «SSAPS» and collapse» – «Business», № 40 (767), 01.11.2007: http://www.business.ua/i767/a23798/; «So who is lying then, General Hrytsak?» – «Business», № 46 (773), 12.11.2007: http://www.business.ua/i773/a23919/

[27] When assailants sell police protocols (in English) http://www.khpg.org.ua/en/index.php?id=1197931105

[28] UHHRU website: http://helsinki.org.ua/index.php?id=1196616829

At the beginning of 2007 parliament passed the Law «On the State register of voters» which came into force on 1 October 2007. It should be noted that this law is an extremely positive move from the point of view of safeguarding the right to privacy, although it does not contain procedure for independent control over the use of this register.

The law envisages the creation of a single State register of voters which will 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. The register will contain the following: 1) last name, first name and patronymic (with an indication to any changes made to these names); 2) date of birth; 3) place of birth; 4) place of residence; 5) date of nationalization; 6) information as to whether the person is mentally fit.

The single register will be made up from the national electoral list, formed by merging regional and local electoral lists. The lists will be placed in an electronic system and input into one automated database which will be supported by the Central Election Commission.

On 6 July 2007 the Ministry of Employment and Social Policy issued an Order «On using temporary procedure for taking into account and using information regarding people crossing the border during the period for receiving State and social payments». Although officially the purpose for the check was to avoid people working abroad from receiving social benefits, some observers considered this to be an attempt at obstructing labour migrants from taking part in the elections.

On 11 September 2007 the Ministry of Employment and Social Policy put out Order № 473 On some measures for carrying out an experiment on exchanging information in order to prevent the unlawful divulgence of information obtained when information is passed between the Ministry of Employment and the Administration of the State Border Guard Service regarding people who during the period for receiving State and social payments were crossing the State border or were outside the country.

The Minister instructed the Director of the State Employment Centre, the Minister of Employment and Social Policy for the Autonomous Republic of the Crimea, heads of regional departments of labour and social protection within the State administrations of the regions, Kyiv and Sevastopol, to take under their personal control issues regarding maintenance of confidentiality when using information about the above-mentioned category of people, and prohibited disseminating it and passing it to third parties.

On 25 September 2007 the Central Election Commission passed a resolution on explaining the application of the Law «On the elections of National Deputies of Ukraine», with regard to specification by precinct electoral commissions [PEC] of the electoral lists on the basis of information received by district [okruzhni] electoral commissions from the State Border Guard Service. For example, district electoral commissions which received information from the Border Guard Service were to pass this on, printed on paper, to the PEC. A meeting of the PEC had to make a decision for each individual who had gone abroad and not returned within three days of the elections. On 26 September the Central Election Commission revoked this resolution.

On 28 September a resolution came into effect issued by the Kyiv District [okruzhny] Administrative Court over a civil suit brought by the bloc of political parties «Our Ukraine – People's Self-Defence» calling for the actions of the Ministry of Internal Affairs to be declared unlawful. The resolution states that the MIA acted unlawfully in gathering, retaining, using and disseminating personalized information about individuals of a confidential nature, namely, regarding their actions in crossing Ukraine's border. It also says that the MIA «without legitimate grounds approached the management of the State Border Guard Service Administration for personalized information about the movement abroad of Ukrainian citizens, this demonstrating unlawful action carried out by the MIA».[29]

Such behaviour from the authorities violates the fundamental principle for treatment of personal information. For example, legislation prohibits the use of such information for any other purpose than that for which it was obtained. Such behaviour therefore presents a serious threat

[29] On the unlawful gathering by the Ministry of Internal Affairs of confidential information about an individual – statement from the Bloc's lawyers // Press Service of the Bloc «Our Ukraine – People's Self-Defence» http://www.razom.org.ua/ua/news/18964/

to privacy and in a democratic country is only possible on the basis of a court order in each individual case.

In autumn 2007 a single computerized database was created in the Lviv region for orphans, children deprived of parental care and children from families in crisis. The all-Ukrainian database is designed to simplify adoption procedure. Almost 5 thousand children living in Lviv and the region have thus far been added to the register. Half of them are in need of care or adoption. The new database contains full information and a photograph of each child. The creation of such a database in the absence of the relevant law on personal information poses a threat to the right to privacy of these children.

Information about individual business people is gathered at present in the Single State Register of Legal Entities and Individuals – Entrepreneurs [the Register] created in accordance with the Law «On state registration of legal entities and individuals – entrepreneurs». This was created and is run by the State Committee on Regulatory Policy and Entrepreneurship which acts as its manager and administrator. State registrars carry out State registration and input information into the Register according to the place of residence of the individuals – entrepreneurs.

With regard to the above, we believe it necessary to insist on adherence to the following international standards on an individual identification number: different numbers must be kept separate in different databases; it is not acceptable to create a SINGLE number for gathering all information about an individual; numbers must be used SOLELY for the purposes for which they were created, and their use must be stipulated in a Law on Personal Data Protection. There should also be an independent State structure which should monitor the collection, storage and use of personal data (this function is usually entrusted to the Ombudsperson).

At the present time the main electronic classifier on the basis of which personal data is gathered and processed is the identification code which is issued by the State Tax Administration. The sphere of its use is constantly being expanded and far exceeds the aim 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, etc.

Therefore in reality we have a situation where the administrative practice of State executive bodies is knowingly violating the Law of Ukraine 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 and so forth.

According to SBU information from 29 March 2007 the unlawful activities were thwarted of a group which had been selling and disseminating information on restricted access held in State electronic information resources – registers and databases. There is particular demand for the databases of the tax bodies, the State Customs Service and the MIA State Automobile Inspection [traffic police]. During 2006 28 attempts to sell databases of State institutions and organizations containing confidential information held by the State were thwarted.[30]

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.

In autumn 2007, as part of the campaign against those not paying for communal services, the newspaper «Irpin Herald» printed a huge list of the people with the largest arrears, together with their home addresses.[31] This was an unprecedented intrusion into the private life of the people mentioned in the publication.

[30] On protection of State electronic information resources // SBU Press Centre report: http://ssu.gov.ua/sbu/control/uk/publish/article?art_id=58025&cat_id=39574.
[31] IRPENIADA: Deputy of the Regional Council doesn't pay for communal services // http://maidan.org.ua/static/news/2007/1190874901.html.

In March 2002 the Kyiv Prosecutor's office initiated a criminal investigation against Dmytro Chobit over intrusion into the private life of Viktor Medvedchuk. In July 2002 Viktor Medvedchuk lodged a civil suit with the Pechersky District Court in Kyiv in defence of his honour and dignity, as well as demanding moral and material compensation for losses inflicted by the author and publishers of the book «Narcissus». On 7 April 2004 the court allowed Medvedchuk's suit, finding Chobit guilty of intrusion into the personal life of the Head of the President's Administration. Dmytro Chobit appealed against this ruling, first in the Kyiv Court of Appeal, and later in the Supreme Court. At the end of 2007 a Supreme Court panel of judges rejected the demands in Medvedchuk's suit stating that «political figures inevitably expose themselves to meticulous coverage of their words and deeds and must be aware of this.» The Supreme Court thus differentiated between the right to inviolability of the personal life of private and public individuals. Since the claimant could not prove that the information had been disseminated with malicious intent, and political figures are open for discussion, in this case the Supreme Court upheld Dmytro Chobit, applying the standards of the European Court of Human Rights: the judiciary may not restrict the right to discuss information of public importance.

4. TERRITORIAL PRIVACY

During 2007 39,384 applications were submitted to the courts by law enforcement agencies to carry out searches of people's homes or other property. 171 of these were returned without examination. 37,736 were allowed, meaning that the courts turned down 1,477 applications for search warrants, or around 4 % of such applications.

The courts also examined 22,772 applications from law enforcement agencies on removing things, including documents containing State or banking secrets from.people's homes or other property. The courts met 21,579 applications, thus rejecting 1,193 (or approximately 5.2 % of those submitted.)

In addition, the courts considered 9,193 applications from law enforcement agencies to inspect homes or other property. 8,914 applications were allowed, with 279 (around 3 %) being rejected.[32]

A problem remains with the procedure for carrying out searches or removals, not in homes but other property of a person since these actions may be carried out without a court warrant which does not comply with international standards.

5. OTHER ASPECTS OF PRIVACY AND RESPECT FOR FAMILY LIFE

One of the problems concerning the right to privacy is the positioning of video surveillance cameras in public places. Quite often people have no idea that they are under video surveillance. For example, in autumn 2007 the Lviv City Council, together with the management of the Central Department of the MIA Department for the Lviv region decided to establish video surveillance cameras in 29 schools in Lviv and 19 such cameras on Market Square and in the building of the City Council. Due to the lack of legislative regulation for such gathering of information, there is a risk that the right to privacy will be violated.

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.[33]

In cases involving adoption, Ukrainian legislation still fails to take the interests of the adopted child within the context of the right to private life into consideration. Confidentiality of adoption is guaranteed by the fact that the adoptive parents may register themselves as the child's biological

[32] Data of the State Judicial Administration. Report of first instance courts on examination of cases within criminal proceedings.

[33] 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.

parents (Article 229 of the Family Code), change the information about the place of birth within 6 months of the child's birth (Article 230 of the Family Code), while disclosure about a case of adoption is subject to criminal liability. (Article 168 of the Criminal Code of Ukraine). However the right of a child to know his or her biological parents (Article 7 of the UN Convention on the Rights of the Child) and the right to preserve his or her identity (Article 8 of the UN Convention on the Rights of the Child) are entirely forgotten. Even more, the law contains provisions for keeping the adoption secret from the child him or herself. (paragraph 2 of Article 226 of the Family Court).[34]

There are also problems with compulsory medical examinations. 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.

On 30 November 2007 the Ministry of Health published Letter № 4.25-58/3095 on the admission of children who have not received vaccinations to preschool institutions. It states that «*in Ukraine measures on prophylactic vaccinations have been introduced at State level. According to Article 12 of the Law «On the protection of the population against infectious diseases», prophylactic vaccinations against diphtheria, whooping cough, measles, polio, tetanus, tuberculosis are compulsory and included in the vaccination schedule. Pursuant to Article 15 of the said Law admission of children to educational, preschool, sanatorium and other children's institutions shall be carried out on presentation of the relevant documents from a healthcare institution issued on the basis of a medical examination of the children, if there are no medical reasons precluding admission, as well as if prophylactic vaccinations have been carried out in accordance with the vaccinations schedule. Children who have not received prophylactic vaccinations in accordance with the vaccinations schedule are not permitted to attend institutions for children. Pursuant to Article 41 of this Law, individuals responsible for infringing legislation on the protection of the population against infectious diseases bear liability in accordance with Ukraine's laws*» [35]

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.[36] During the year this issue was covered by the press on a number of occasions.[37]

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[34] The right to respect for personal and family life: civil and legal aspects in Ukrainian legislation and court practice (in Ukrainian). Y. Petrova. The European Convention on Human Rights: Main provision and practical application, the Ukrainian context/ edited by O.L. Zhukovska. – Kyiv: «BIPOL», 2004, p. 403

[35] «Everything about bookkeeping» – № 119 –24 December 2007

[36] In arguing the legal position for the possibility of rejecting vaccinations, reference is made to norms of the following laws:

«On the fundamental principles of health care legislation in Ukraine»: Article 42: «Risky methods of prophylactic care ... are declared admissible if they ... are applied with the consent of the patient who has been information of their possible harmful consequences»; Article 43 «In the case of a patient who has not reached the age of 15, medical intervention is carried out at the consent of his or her legal representatives».

«On the protection of the population against infectious diseases»: Article 12 «Prophylactic vaccination of mentally fit adults are carried out with their consent ... In the case of persons who have not reached the age of 15 .... vaccinations are carried out with the consent of their parents.

«On the protection of the population against infectious diseases», Article 15 «Children who have not received prophylactic vaccinations in accordance with the vaccinations schedule are not permitted to attend institutions for children».

The Constitution of Ukraine, Article 8 «The Constitution of Ukraine has the highest legal force. Laws and other normative legal acts are adopted on the basis of the Constitution of Ukraine and shall conform to it.

The norms of the Constitution of Ukraine are norms of direct effect. Appeals to the court in defence of the constitutional rights and freedoms of the individual and citizen directly on the grounds of the Constitution of Ukraine are guaranteed.»; Article 53 «Everyone has the right to education».

«On the protection of childhood». Article 19 «Each child has the right to education»;

«On preschool education» Article 6 «The principles of preschool education are accessibility for each citizen of educational services provided by the system of pre-school education;

Judgment of the Constitutional Court of Ukraine from 04.03.2004 № 5-judgment/2004: «access to education as the constitutional guarantee of the fulfilment of the right to education on the basis of equality, means that nobody can have their right to education rejected.

[37] In the Odessa region parents reject vaccination of their children // UNIAN. – http://health.unian.net/ukr/detail/186389; Anti-vaccination campaign spreading around Ukraine UNIAN. – http://health.unian.net/ukr/de-

During 2007 the courts received 2,555 applications for compulsory hospital examinations for those accused of a crime (according to Article 205 of the Criminal Procedure Code.). 2,478 were granted, with 77 applications (around 3 %) turned down.[38]

During 2006-2007, UHHRU received numerous complaints from prisoners about not being able to marry or get divorced while serving their sentence. In order to do either of these things, legislation stipulates that a person must personally appear at the State Register Office according to his or her place of residence. This is obviously impossible for prisoners especially if it has to be done according to their old address and not where they are serving their sentence. The personnel of the Register Office refuse to come to a penal institution, while the penal administration refuses to transport the prisoner to the Register Office. This situation presents a violation of the right to marriage and family life.

UHHRU appealed to the Ministry of Justice to resolve this problem on the basis of normative acts regulating the work of Register Offices. The Ministry of Justice entirely agreed and acknowledged that there was a problem. On 21 November 2007 an Order of the Ministry of Internal Affairs and the Ministry of Justice issued Order № 1154/5 «On amendments to the Rules of registration of acts of civil state in Ukraine» which effectively regulated the situation and resolved the problem.[39]

6. RECOMMENDATIONS

1) Ratify the Convention of the Council of Europe No. 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 protection of personal information;

– 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.

– 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.

3) Revoke Verkhovna Rada Resolution from 23 February 2007 № 719-V on amendments to Verkhovna Rada Resolution «On approving the provisions on the passport of a Ukrainian citizen and birth certificate» № 2503-XII from 26.06.1992 and 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»

4) Revoke Cabinet of Ministers Resolution № 11698 from 26 September 2007 «On approving the Procedure for obtaining a court order to carry out measures which temporarily restrict human rights and the use of the information obtained».

5) Pass a law «On interception of telecommunications» which will allow for independent monitoring of the activities of the Security Service of Ukraine in intercepting communications, publishing an annual report with depersonalized information regarding the interception of information

tail/187231; «After vaccination – to resuscitation?» ï // http://20minut.ua/news/77072; Vaccinations – for and against // http://www.gazeta.rv.ua/?n=11695; Twp views on vaccinations» // Ukraine and the world. – № 13 (413). – 26.03.2007. – http://www.uwtoday.com.ua/articlea.asp?NID=3738&JId=203&LID=1; Lesya Shcherbenko Children without vaccinations are not admitted to kindergartens. // http://gpu.ua/index.php?&id=211842

[38] Data of the State Judicial Administration. Report of first instance courts on examination of cases within criminal proceedings.

[39] Report from the Ministry of Justice http://www.minjust.gov.ua/0/11568.

from communications channels in the course of investigative operations. Remove generalised data on investigative operations from the «List of Items of information which constitute state secrets».

6) Introduce amendments to legislation clearly stipulating procedure for interception of communications (wiretapping of landlines and mobile telephones, surveillance of electronic mail, control over checks on information on the Internet) with the following:

– Procedure for court warrants for such activities and the time limits they are valid for;

– 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.

7) 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

8) 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 searches;

9) 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;

10) 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);

11) Abolish the licensing of IP-telephone systems

12) 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);

13) Change Order No. 13 of the State Department of Ukraine for the Execution of Sentences from 25 January 2006 «On approving instructions for checking the correspondence of people held in penal institutions and pre-trial detention centres», removing the requirement to place the full address of the penal institution on the envelope of outgoing mail, and bring its provisions into line with the requirement of privacy of correspondence to the Ombudsperson, prosecutor's office and international organizations which Ukraine is a member of.

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.

VI. FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION[1]

1. OVERVIEW

There was little significant change with freedom of conscience and religion during 2007. 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 2004-2006 can confidently still be used.[2]

The most significant event during the year was the Judgment against Ukraine from the European Court of Human Rights in the case of *Svyato-Mykhaylivska Parafiya v. Ukraine* from 14 September 2007[3]. In its examination of this case, the Court used previous years' Human Rights in Ukraine reports; pointed to 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.

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

According to international standards, the right to believe is by its very nature not subject to any restrictions. This inner freedom of thought is inalienable, and the State has no right to interfere under any circumstances. In practical terms this means the absence of direct (physical force, punishment, etc) or indirect forms of compulsion which go against the personal position of the individual where he or she is confronted with the choice of whether or not to betray his or her own convictions under certain external compulsion.

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;

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[1] Prepared by Volodymyr Yavorsky, UHHRU Executive Director.

[2] See «Human Rights in Ukraine – 2004», «Human Rights in Ukraine – 2005» [Kharkiv: Folio] and «Human Rights in Ukraine – 2006» [Kharkiv, Publishing House «Prava Ludyny»]. Available in both Ukrainian and English at: www.helsinki.org.ua. and www.khpg.org.ua

[3]

– 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.

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

However given the intention declared by the authorities to abolish military conscription and introduce a contract system, this problem may disappear.

There is also potential for problems over the right to reject an identification number on the grounds of religious conviction. During the year, law suits continued en masse against the tax bodies refusing to put notes in people's passports entitling a person to not use an identification number. The tax bodies in their turn argued with logic that they have no right to put notes in people's passports by themselves and that this is within the jurisdiction of the Ministry of Internal Affairs. There were a particularly large number of suits from people who had rejected identification numbers previously allocated. In all these cases, the tax bodies lost and were ordered by the courts to add the relevant note to the passports.

3. FREEDOM TO PRACTISE ONES RELIGION OR BELIEFS

3.1. THE 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 worship, 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.

Clearly such restrictions limit religious freedom since the right to organize religious services, to study and teach ones religion or convictions, to propagate ones beliefs and a great deal more, directly express a person's right to religious freedom and should not depend on the legal status of the organization. It should be stressed that for some religious groups, it is vital to be able to exist without official recognition since the lack of any contact with the State authorities is a part of their faith.

We would also note that in accordance with 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 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. It is also not permitted to register the Church as a legal entity. It is registered 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 foreseeability[4] In this judgment, the Court also pointed out the first and fourth of the problems we have outlined here.

The following provides a recent case involving infringement of freedom of worship.

A panel of judges of the Higher Administrative Court on 27 June 2007 upheld the rulings of the appellate and local courts refusing to register the articles of association of the religious community «Parafiya of Andriy Pervozvany [the First Called] of the Ukrainian Soborna [Assembly] Orthodox Church. In passing its decision on refusing registration, the court established that the articles of association of the religious community set down its canonical and organizational subordination to the Kyiv Eparchy of the Ukrainian (Soborna) Orthodox Church. However according to information from the State Committee on Religious Affairs, a Resolution from 31.01.03 No. 1/3 had refused to register the articles of association of the Ukrainian)Soborna) Orthodox Church. The court thus established that the religious community had set down canonical and organizational subordination to a non-existent religious organization, this being an infringement of Article 8 § 2 and Article 9 § 1 of the Law on Freedom of Conscience and Religious Organizations. On the one hand this ruling is in accordance with the letter of the law, on the other hand, however, it is direct interference by the State in the determining of the internal structure of its religious organization which is in violation of international standards. This religious organization has already unsuccessfully tried to receive legal entity status over many years and has been turned down under various pretexts.

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

Pursuant to Article 9 of the European Convention on the Protection of 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 principle.

[4] 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.

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, 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 uncovered crimes linked with vandalism. We would mention in particular the conviction of Odessa vandals.

On 18 February, using a stencil, vandals daubed swastikas on 302 gravestones at the Third Jewish Cemetery in Odessa. The anti-Semites also targeted the memorial plaque marking the home of the doctor, publicist and civic figure Leon Pinsker in the centre of the city and the Memorial to the Victims of Nazis, leaving the words «Welcome to the Holocaust». On 12 March three men were detained on suspicion of committing the crime: two 25-year-old unemployed men from Odessa and a 20-year-old student of one of the Odessa technical colleges. They claim that «they simply wanted to see the public's reaction.» On 10 August the Malynivsky District Court in Odessa found all three guilty of desecrating the graves, however excluded the article on inciting inter-ethnic enmity. Two of the men were sentenced to two years imprisonment, while the third received the same term, but with a suspended sentence (with a deferment of execution of the sentence for a year). The men were also ordered to pay the cost of carrying out the expert assessment – 15,169 UAH.

On 24 December 2007 the leaders and authorized representatives of the Member Churches of the Council of Evangelical Protestant Churches of Ukraine sent a letter to President Yushchenko asking him to take under his personal control the investigation into the criminal behaviour of police officers, and ensure the right of believers of the Evangelical Protestant Churches to freedom of faith, life and health, honour and dignity, inviolability and security. The joint appeal was said to have been prompted by the fact that cases of officials' abuse of their authority and flagrant violations of the rights of believers of Evangelical Protestant Churches by police officers had taken on the appearance of a certain trend. The appeal specifically mentions an «attack» on 1 August 2007 by armed officers of the crime police and a special force «Berkut» unit during a religious service on the House of Worship of the Church of Christians of the Evangelical Faith «Living Water» in Yevpatoriya. Also cited is a case where a threat to kill was made using armed weapons by police officers on 8 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.[5]

This problem is exacerbated at the local level where discrimination and intolerance can be clearly seen in the decisions of the bodies of local self-government. The Ukrainian Association for Religious Freedom on 27 January issued an open appeal to the President, the Speaker of the Verkhovna Rada and the Prime Minister regarding «ever more frequent calls, in particular from certain bodies of local self-government, to ban the activities of this or that religious organization, as well as cases where the activities of religious organizations were unlawfully prohibited or restricted.»[6].

Another problem lies in the lack of legislative and administrative measures from the authorities to reduce intolerant and inaccurate publications in the mass media regarding religious minorities and combating efforts to incite religious enmity.

In December Ukrainian Association for Religious Freedom issued an appeal to the media regarding frequent occasions of exceeding biased coverage of religious life in the Ukrainian media..[7]

3.2.1. The organization and holding of religious peaceful gatherings

The Law on Freedom of Religion and Religious Organizations runs counter to Article 39 of the Ukrainian Constitution in imposing a permission-based procedure for holding religious peace-

[5] Council of Evangelical Protestant Churches appeals to the President // UHHRU website: http://helsinki.org.ua/en/index.php?id=1198756658

[6] Religious panorama, № 2, 2007. pp. 43-45.

[7] Religious panorama. № 12, 2007. pp. 33-34. This also prompted another appeal from this organization, published on 29 January 2007 (cf. Religious panorama, № 2, 2007. pp. 43-45).

ful 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.

3.2.2. 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 (a fine) for foreign nationals, and for religious organizations – a warning, then in future possible forced closure.

This situation became more difficult during 2007. 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.

4. THE STATE AND RELIGIOUS ORGANIZATIONS

4.1. THE PRINCIPLE OF INVIOLABILITY AND NEUTRALITY

The constitutional principle of separation is based on the principle of pluralism of though and entails the impossibility of merging the State and religion.[8]

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.

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 strategic dimension. Positive decisions on these issues, with view exceptions, are received only by the dominant religious organizations.

The Head of the Synod of Independent Evangelical Churches of Ukraine Anatoly Kalyuzhny stated that in Kyiv their religious organizations are not allocated land, with this being given solely to parishes of the Ukrainian Orthodox Church under the Moscow Patriarchate.[9] There are virtually no known cases where land was allocated to non-Christian religious organizations.

[8] 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.
[9] Religious panorama, № 10, 2007, pp. 24-25.

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 (UOC MP) or under the Kyiv Patriarchate (UOC KP), are dominant in different areas.

We can also mention systematic efforts by the President towards creating a single Local Ukrainian Orthodox Church. Although these efforts were more organizational, and their influence political, many representatives of religious organizations believed them to be direct interference in internal Church matters.

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.

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. This involved a split in a religious community, and the authorities took it upon themselves to determine which of the believers belonged to the community, i.e. who were members and who were not. They consequently deprived the other group of believers of their right to make changes to their articles of association. The European Court stated:

«*...The State cannot oblige a legitimately existing private-law association (which a religious organization is – author) to admit members or exclude existing members. Interference of this sort would run counter to the freedom of religious associations to regulate their conduct and to administer their affairs freely» [Item 146 of the Court Judgment)*.

In the same case, making use of the unclear definition in legislation of the term «religious community» and despite the clear definition of membership of this community in the articles of association, a Ukrainian court found that members of the community were all those who visit the Church and not only those who are members in accordance with the articles of association. In this way it undoubtedly interfered in the internal affairs of the organization and adopted the side of one of the parties in conflict.

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

For example, an Instruction from the Head of the Poltava Regional State Administration on 2 June 2005 approved a new version of the articles of association of the Sviato-Mykhailivska religious community of the Ukrainian Orthodox Church under the Kyiv Patriarchate in Poltava, and also passed amendments on changing the head of the Parafiya Council. The other side appealed against this decision. In the court hearing it transpired that the State Administration had known about the schism in the community, however, with such information and without a sufficient number of documents regarding the authority of those who had applied for registration, the authority involved carried out the registration, thus taking the side of one of the parties to the dispute. It was for this reason that on 17 September 2007, the Kharkiv Court of Appeal allowed the claim brought and revoked the State Administration's decision. However two years of the community's activities had been virtually paralyzed as a consequence of the unlawful activities of the authorities.

In another similar case, a panel of judges of the Higher Administrative Court passed a judgment on 4 July 2007 upholding the conclusion of the courts of first instance and appeal on the need to declare invalid the instruction issued by the Head of the Rivne Regional State Administration No. 498 from 20 October 2005. «On registration of amendments and additions to the articles of association of a religious community» and revoke it. This instruction registered amendments and additions to the Articles of Association of the religious community of the Ukrainian Orthodox Church under the Moscow Patriarchate – the Sviato-Voskresenska Parafiya in the city Ostroha, which involved the transfer of a part of this religious community to the jurisdiction of the Kyiv Patriarchate. In so doing, the respondent had not only effectively registered a new religious community of the Kyiv Patriarchate of this parafiya, but had liquidated a religious community (the Sviato-Voskresenska Parafiya of the Ukrainian Orthodox Church under the Moscow Patriarchate) which had existed since 1991 and which had the rights of a legal entity in accordance with the law. This was a violation of Article 5 § 5 of the Law on Freedom of Conscience and Religious Organizations. Moreover the courts had established that the decision of this religious community from 17 October 2005 to transfer to the Kyiv

Patriarchate had not been unanimous. Some of the believers had remained in support of the previous religious jurisdiction (affiliation) and had not agreed with the decision of the other believers. Once again it took two years to reinstate the rights infringed by the authorities.

There are still problems with the return of places of worship nationalized by the Soviet regime. This property is gradually being privatized which makes its return more complicated. Despite this, parliament on 11 May rejected a draft law calling a moratorium of the privatization of property linked with religious worship in State or municipal possession.[10] On the other hand, the authors of the draft law went ahead of events and demanded in that law that a norm be established on the compulsory return of such property. With this they obviously ruined the idea of at least establishing a moratorium of the privatization of this property.

Later a Presidential Decree from 1 November[11] effectively established this moratorium which stopped the privatization of many structures by bodies of local self-government and the local authorities.

The situation at present is thus foreign and there are no ways visible at the present time for resolving the problems.[12]

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.

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.

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.

From 1 September 2006 in the first grades of 106 schools in Kyiv, with the consent of parents, an experiment was introduced on teaching a course on «Christian Ethics in Ukrainian culture». The course is introduced as a variant element of the programme «Christian Ethics» and the first-grade students are taught by teachers who have undergone training in the Kyiv Teacher Training University named after Boris Hrinchenko. The students are given a «working notebook» and the teachers have received not only a methodological handbook, but also a CD with musical accompaniment which they have been using with success in their classes. From 1 September 2007 around 4 thousand students (approximately 20 % of the total number in the city) began attending such courses.[13]

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[10] Verkhovna Rada rejects draft law regarding a moratorium privatization of property designated for religious purposes which is in the possession of the State or municipal authorities // UHHR website http://helsinki.org.ua.index.php?id=1178888780.

[11] Presidential Decree No. 042/2007 from 01.11.2007. «On protecting sacred monuments of culture in Ukraine».

[12] Cf. Issues of legal backup for the process of returning former Church property in Ukraine // Religious Information Service of Ukraine www.risu.org.ua.

[13] Kyiv Press Inform // http://kyiv.osp-ua.info/index.php?newsid=12232, as well as the official website of the Kyiv City State Administration: http://www.kmv.gov.ua/divinfo.asp?Id=96899.

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 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 2004[14]

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.

[14] Freedom of Religious and Worship in Ukraine within the context of compliance with European standards (in Ukrainian) / 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 INFORMATION[1]

Long-overdue amendments to legislation to improve access to information did not materialize in 2007. One of the reasons was the political crisis which impeded parliament's normal legislative work. At the same time, all the problems with access to information discussed in previous year's reports emerged in full measure in 2007. As in previous years, human rights organizations systematically requested necessary information and very often received refusals, fob-offs, or quite simply heard nothing at all.

Responses were sometimes not provided because the information requested was classified as on restricted access on the basis of subordinate normative legal acts with reference to Articles 30 and 37 of the Law «On information».

With regard to secret information, the type of information should be included in the List of Items of Information constituting State Secrets. However there is no such list for information in the possession of the State which is stamped «For official use only» [DSK]. If there are lists of such information, they are not always made public. One thus has 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.

For this reason in 2007 the civic organization «Maidan» Alliance decided to look into which central authorities have lists of information stamped «For official use only». For example, at the end of 2007 and beginning of 2008 they sent information requests to the authorities as given on the official website of the Cabinet of Ministers[2] (he Verkhovna Rada, the President's Secretariat, as well as the Kyiv City State Administration. The respondents were asked: «Is there a list of items of confidential information in the possession of the State which is stamped «For official use only», or is there any other list of items of information (documents, etc) which are not to be provided or made public in response to information requests from individuals (including from journalists)?» In the event that such a list existed, the respondents were asked to provide a copy of the relevant act, or a written list of such items of information,

The information requests were drawn up in accordance with the Law «On information» and sent recorded delivery with notification to the sender. .Of the 79 respondents, 34 provided the lists requested or clearly stated that there no such lists (thus answering the question asked); The Ministry of Education and Science provided a partial response (as regards supplements to the relevant list which, unlike that, do not have the stamp «For official use only». General answers were given by the Ministry of Defence, the State Security Service and the Department of State Protection which could, in our view, be justified by the specific nature of their work. The following 7 of those sent the information request simply ignored it:

- The Ministry of Culture and Tourism;
- The Ministry of Health (considering the established tradition of this Ministry to not comply with information legislation, in May 2008 a suit was filed with the District Administrative Court in Kyiv seeking to have its inaction declared unlawful);

[1] Prepared by Yevhen Zakharov, KHPG Co-Chair; Oksana Nesterenko, KHPG Expert on Information Law, Lecture at the Department of Constitutional Law of the Yaroslav Mudry National Law Academy; and Oleksandr Severyn, Legal Adviser to the «Maidan» website.

[2] Government website www.kmu.gov.ua

- The State Department on Issues of Citizenship;
- The Ministry of Foreign Affairs;
- The Ministry for the Coal Industry;
- The State Committee for Veterans' Matters;
- The State Food Department.

Written refusals giving various arguments were provided by 34 respondents.

It is typical that none of the respondents observed Article 33 of the Law «On information» which makes it obligatory to send the person requesting the information written notification within 10 days of whether the information request will be met. It is worth noting that over the three years that the «Maidan» Alliance has been conducting this monitoring of access to information in only one case out of the hundreds of requests sent has the law been observed in this respect, that being by the High Council of Justice.

The responses established that 44 central authorities have such instructions:

- The State Television and Radio Broadcasting Committee – Order No. 10 from 4 April 2006;
- The Ministry of Education and Science – Ministry Order No. 5dsk from 14 February 2002 «On the organization of work with documents stamped «For official use only» approved a branch list of confidential information in the State's possession»;
- The Ministry of Internal Affairs – Order No. 207 from 6 March 2003;
- The Prosecutor General's Office – Order of the Prosecutor General No. 18 from 18 March 2005, approved «List of documents created through the work of prosecutor's offices which contain confidential information»'
- The Ministry of Justice – Order of the Ministry of Justice from 21 Marc 2008, No. 515;
- The Ministry for Youth and Sport – Order No. 3374 from 6 October 2007;
- The Ministry of Defence – «List of confidential information of the Armed Forces of Ukraine»;
- The State Department on Nationality and Religion – «The relevant list has been drawn up»;
- The Ministry for Emergences – Order No. 369 from 16 June 2006 approved a List of confidential information of the Ministry for Emergences;
- The State Department for the Execution of Sentences – Order No. 248 from 19 December 2006 «On approving instructions for procedure regarding the register, storage and use of documents which contain confidential information»;
- The State Committee on Issues of Regulatory Policy and Enterprise – List of items of information in the possession of the State which contain confidential information and are stamped «For official use only» by the State Committee (Order No. 98);
- The State Security Service [SBU] – Order of the Head of the SBU from 5 November 1998, No.245/DSK;
- The Ministry of Employment and Social Policy – Order No. 268 from 19 July 2006;
- The Administration of the State Border Guard Service – Order from 23 April 2006;
- The Ministry of the Economy – Order No. 185 from 31 May 2006;
- The State Treasury – Order from 15 May 2007;
- The State Committee on Land Resources – Order from 15 May 2006 No. 166;
- The Ministry for Housing and Communal Services – Order from 3 August 2006 No. 273;
- The State Committee on the State Material Reserve – Order No. 55 from 13 February 2007;
- The Ministry of Transport and Communications – the Ministry has drawn up a List of Items of Information containing confidential information in the possession of the State and stamped «For official use only». This is annually reviewed and approved by the Minister;
- The State Property Fund – List of Items of Information containing confidential information in the possession of the State and stamped «For official use only» (approved by the Head of the Fund V. Semenyuk on 14 November 2005);
- The Central Control and Audit Department – Order of the Head of the Department No. 405 from 1 December 2005;

♦ The State Committee for Financial Monitoring – Order from 17 December 2007 No. 227;

♦ The Ministry of Fuel and Energy – Order from 15 August 2006 No. 288;

♦ The Ministry for Industrial Policy – Order from 21 August 2007 No. 492;

♦ The Ministry of Regional Development and Construction – Order from 3 August 2006 № 273

♦ The Pension Fund – Order from5 December 2007 № 223;

♦ The Antimonopoly Committee of Ukraine – Order of the Head of the Committee from 4 May 2006 № 55;

♦ The State Duty Service of Ukraine – Order from.30 January 2004 № 60;

♦ The State Commission on Regulation of the Market of Financial Services – Order of the Head of the Commission from 10 August 2004 № 141.

♦ The State Service for Export Control – Protocol No. 10 of a meeting of the Export Committee of the State Service from 23 March 2006;

♦ The National Commission for Regulation of the Electricity Industry – Order No. 24 from 5 April 2006;

♦ The Department for State Protection – Order of the Head of the Department from 22 December 2005 No. 444;

♦ The State Aviation Administration – Order from 24 May 2007 No. 275;

♦ The Ukrainian State Centre for Radio Frequencies – Order from 25 September 2007 No. 325;

♦ The State Committee for the Forestry Industry – Order from 25 May 2006 No. 119;

♦ The High Council of Justice – Instruction approved by the Head of the Council on 30 December 2005 № 86/0/1-05.

♦ The State Department for Maritime and River Transport – Order from 31 July 2006 № 132.

♦ The State Department for Roads – Protocol of the Expert Commission No. 1 from 27 March 2007;

♦ The State Archive Committee – Order No. 105 «On approving a List of documents and files with the stamp «For official use only» of State archival institutions» from 10 August 2006.

We would note that some of the central authorities still do not have a List of confidential information and replied that lists were in process of being drawn up. This was, for example, the response of the Ministry of Finance and the State Department on Communications and Informatatization.

It is impossible not to be disturbed by the refusal to provide lists from 12 out of the 44 State bodies, namely: the Prosecutor General's Office; the Ministry for Emergences; Ministry of Finance; Ministry of Fuel and Energy; the Central Department of the Civil Service; the National Space Agency; the State Protection Service; the State Department on Intellectual Property; the State Service for Special Communications and Protection of Information; the State Aviation Administration; the Ukrainian State Centre for Radio Frequencies and the State Committee for the Forestry Industry. They gave the following reasons:

1) the documents have the stamp «For official use only»;

2) the issue needs to be agreed with the SBU (State Aviation Administration);

3) the person seeking the information does not have sufficient legal grounds to receive these lists;

4) the person asking has not explained why s/he needs the information State Department for Maritime and River Transport).

Thus, as pointed out earlier, we cannot find out what we do not have the right to know. This is in direct contravention not only of Article 34 of the Constitution (since all restrictions on the right of access to information must be established only by law), and of Article 57 which states that laws and other normative legal acts that determine the rights and duties of citizens, but that are not brought to the notice of the population by the procedure established by law, are not in force, and the instructions in question here directly concern the right of access to information. Furthermore, as has been stressed many times, the failure to provide information on the basis of Article 37 of the Law «On information» is in breach of the Constitution. According to Article 8 § 2 and 3, the

Constitution of Ukraine has the highest legal force. Laws and other normative legal acts are adopted on the basis of the Constitution of Ukraine and shall conform to it. The norms of the Constitution of Ukraine are norms of direct effect. The Transitional Provisions of the Constitution state that laws and other normative acts, adopted prior to this Constitution entering into force, are in force in the part that does not contradict the Constitution of Ukraine. Thus Article 37 § 8 of the Law «On information» does not comply with the Ukrainian Constitution, and it is the constitutional precepts which should apply. The phrases «do not have legitimate grounds» or «explain what you need this information for» are entirely incomprehensible since if this information is on open access, then it should be provided to the person seeking it without any additional conditions. It should be noted that the Prosecutor General's Office did provide a list of documents stamped «For official use only» in response to a request from another organization – the Kharkiv Human Rights Protection Group[3] This Order replace Order № 89 from 28.12.2002 «On organization of work with documents in the possession of the State stamped «For official use only». However neither the old, nor the new, orders have been made public, they have not been printed and are not on the website of the Prosecutor General's Office. They were not in any computer legal systems (Order No. 18 was input into the system of League – Law at the request of KHPG which provided the text of the Order). This is no wonder, since according to Presidential Decree No. 493 from 21 May 1998 the Prosecutor General's Office, as before, does not register its normative acts in the Ministry of Justice which means that many of its normative legal acts are simply not known. This is in spite of the fact that those normative acts of the prosecutor's office which it has been possible to receive and make public clearly have a direct relation to human rights and fundamental freedoms. At the same time, it should be noted that after criticism from human rights organizations the website now contains considerably more normative legal acts of the prosecutor's office.

Our analysis of the lists of information stamped «For official use only» provided in response to information requests, and deemed by central authorities to be confidential suggests that some of the information which these bodies are placing on restricted access if of public importance which should not under any circumstances be subject to such restrictions. For example, the State Department on Nationality and Religion designates the following information as being 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»:

1. on the results of checks of the State Committee on the State Material Reserve by controlling bodies;

2. on the results of tenders to sell material assets of the State reserve;

3. on particular issues regarding cooperation between Ukraine and the European Union (directives for negotiations, other documents on position);

4. on the economic situation in CIS countries and the possible development and consequences for Ukraine (information with elements of analysis);

5. on negotiations regarding access to the commodities and services market within the framework of Ukraine's joining of the World Trade Organization;

6. on consideration of Ukraine's application to join the WTO (reports of working groups on the results of meetings);

7. on problematical issues regarding the negotiation process on Ukraine's joining the WTO'

8. on access to the commodities and services market (bilateral protocols).

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

1. 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;

[3] Order № 18 from 18 March 2005 can be found on the KHPG website at: http://www.khpg.org/index.php?id=1214326358

2. books recording the number of lands (text and graphic parts);

3. 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., find 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.

Such an analysis of the information which central authorities classified as information for official use only shows that the criteria for limiting access are incomprehensible.

In 2007 environmental groups learned of the existence of several normative acts from the Ministry for Environmental Protection[4] , according to which large sections of environmental information can be designated as confidential, namely:

- information on dealing with environmental issues with trans-border rivers;
- regulation of environmental issues concerning biologically active (poisonous, infectious) substances, genetically modified organisms which can be used as biological weapons;
- separate conclusions from State environmental impact assessments;
- information about the technical characteristics of hydro-technical structures;
- information concerning the functioning of the Russian Federation Black Sea Fleet on Ukrainian territory.

In our view, the content of these Orders from the Ministry for Environmental Protection runs counter to the Constitution, the Aarhus Convention, the Laws «On the protection of the natural environment» and «On information» which guarantee each person the right to free access to environmental information. It is typical that these Orders from the Ministry also carry the stamp «For official use only» and are not even registered with the Ministry of Justice. They should be revoked as unlawful.

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».

If one adds to this process of collecting data the nomination «most appalling response», then the laureate in our view would be the State Tax Administration [STA]. There are several reasons. Firstly, the STA did not provide a response claiming that the response had been given in a letter dated 20 November 2007 which in fact contained no answer. Secondly, the STA in this response gave information regarding which normative legal acts are subject to State registration although this information was not that sought. Thirdly and most interesting is the fact that Item 4.b of the Cabinet of Ministers Resolution No. 731 from 28 December 1992 which is cited in the response is not in fact in the said Resolution. The text of this part of Item 4 according to the STA states that «... have an inter-departmental nature, that is, they are mandatory for other ministries, executive bodies, bodies of government and are connected with drawing up the direction of activities of institutions, the process of taking decisions and precede their passing, do not have to be provided in response to information requests.

However in fact this sub-item of Item 4 of the Resolution is as follows: «have an inter-departmental nature, that is, they are mandatory for other ministries, executive bodies, bodies of government and are connected with drawing up the direction of activities of institutions and

[4] For example, Order of the Minister for Protection of the Natural Environment № 470 from 25 November 2004 and its updated version, issued in 2006.

organizations which do not fall within the sphere of management of the body which issued the normative legal act.»

We can see that employees of the STA in this case have not only failed to provide a response, but are also, to put it mildly, making arbitrary interpretations of a Cabinet of Ministers resolution. Or to be entirely honest, are engaged in falsifying normative legal acts.

It should also be noted that in the above-mentioned resolution the issue of classifying information as on limited access is not resolved at all. Furthermore, during other monitoring, the STA refused to provide information citing Regulations on tax information in the State Tax Service, approved by STA Order No. 175 from 2 April 1999 «On approving the Provisions on tax information in the State Tax Service».

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-know 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.

In summing up, we should note that the campaign for receiving the relevant lists from all central authorities must be continued by sending repeat information requests depending on the grounds and content of the first refusal, letters to the Cabinet of Ministers, as well, where necessary, applications to the court. The end result of the project should be the creation of a «List of Items of Information in the possession of the State classified as confidential. Other information on the activities of these bodies which does not go into the List and which is not by law a State secret will de facto be recognized by the State as open and on free public access.

We are convinced that a necessary condition for changes for the better to the situation with access to information is the adoption of a Law «On freedom of information» in the form of an updated version of the Law «On information». It would be possible to mark out the procedural part in a separate law. In general all recommendations for improving access to information made in the previous human rights organizations' reports for 2004-2006, remain in force now.

VIII. FREEDOM OF EXPRESSION[1]

1. OVERVIEW

The situation during 2007 did not change significantly.

After 2004 there was a considerable easing in pressure on the media and journalists from the authorities, however during the last two years pressure has been gradually increasing, especially at the local level.

Nor has independence from the authorities become a guarantee of independence for the media. The lack of separation of editorial policy from the media outlet owners has made media outlets too dependent on the wishes of their owners which are increasingly controlling editorial policy.

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[2]. This problem is particularly acute during elections when, for example, all television cameras of the channels are occupied with commissioned features, while omitting events of public significance which don't appear in the news.

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.

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. 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 not organized themselves sufficiently. Ethical mechanisms virtually don't work, while independent trade unions are, as a rule, small or not well-developed.

During 2007 the Ministry of Justice continued drawing up a draft law «On reform of State and municipal printed media outlets» (registration No. 4003). It was tabled in parliament, however by letter № 21-12-1702 from 1 March 2007 it was withdrawn due to a change in the makeup of the government. The Ministry of Justice applied to the Cabinet of Ministers to extend the term of the reworked draft Law to 1 July 2008 (letter № 21-9/213 from 17 January 2008).

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[1] Prepared by UHHRU Executive Director Volodymyr Yavorsky.

[2] The term clearly comes from the word for jeans and refers to news items, discussion programmes, etc, which have been paid for, and do not therefore meet the requirements of independent journalism. One of the media actions against this is called «We're not for sale». See: http://www.khpg.org.ua/en/index.php?id=1210290762 and follow the links below for more detail both of the phenomenon and how some are fighting it (translator).

The reform of State and municipal media has not thus taken place. Living off subsidies from public funding, these media outlets are most often mouthpieces for the authorities which do not observe the standards of freedom of speech.

In the view of the Institute for Mass Information, Ukraine is gradually improving its situation according to all the «classic» criteria which international human rights structures use to assess the situation with freedom of speech. At the same time a dangerous trend is emerging in the country with the spread of «jeansa» – commissioned texts containing covert advertising. The situation could lead to the loss of the right to the profession since it exists with the tacit consent of the media owners, a large percentage of politicians and the journalists themselves».

«Reporters without frontiers» consider that it is easier for journalists to work now than before, however through polarization of society and the press, it is hard for journalists to take an independent editorial position. They cite as an example the closure of the television programme «Toloka» on UT-1[3] i, the resignation of the Editor of «Gazeta-24»[4] because one of the main shareholders wanted to dictate the political line.[5].

Monitoring showed a rise in tolerance by the local authorities to the media. However there remains a problem with constant intrusion by owners in the work of the media outlets. These were the conclusions from the regional monitoring carried out by the Laboratory for Legislative Initiatives, the Civic Network OPORA and the Committee of Voters of Ukraine carried out with the support of the International Renaissance Foundation.[6].

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.

As of 1 January 2008 the Ministry of Justice had registered or re-registered 2,486 printed media outlets (in 2007 – 1331, in 2006 – 1048) and 35 information agencies (in 2007 – 24, in 2006 – 11).

Territorial offices of the Ministry registered (/re-registered) over two thousand printed publications (during 9 months of 2007 – 1102, 9 months of 2006 – 960).[7]

In order to create a single system for keeping track of printed media outlets in the country and information agencies a State Register of Media Outlets and Information Agencies has been created[8]. The administrator of the Register is the State enterprise «Information Centre» of the Ministry of Justice which is creating and maintaining the programme software for the Register, ensuring the storage and protection o f data kept in the Register and issues authorized extracts from it. Information from the Register is provided either in shortened form or in full in response to written requests either from individuals or legal entities for a fee set by the Ministry. Information from the Register is provided free of charge to the court, prosecutor's office, detective inquiry or criminal investigation

[3] See the report on the work of the Commission investigating the temporary suspension of broadcast of the UTV-1 talk-show «Toloka» http://1tv.com.ua/about/1tvnews/07/04/03/18/05.html.

[4] See also «Vitaly Portnikov will be dismissed from «Gazeta 24» for skiving off if he doesn't withdraw his statement about censorship http://helsinki.org.ua.index.php?id=1196345223; Portnikov leaves «24», Knyazhytsky – from «Tonis» Over censorship http://helsinki.org.ua.index.php?id=1191918482.

[5] «Reporters without frontiers» «It's dangerous to be a journalist these days // Radio Svoboda http://www.radiosvoboda.org.

[6] Project: «Ukraine: a year after the elections: monitoring of the regions». Carried out in the following 10 regions: Volyn, Lviv, Vinnytsa, Odessa, Donetsk, Sumy, Chernihiv, Kharkiv and Kherson. The monitoring looked at the following: the structure of the media market (media ownership, specific features of the information realm the relations between the authorities and the media, the availability of influential Internet publications: http://helsinki.org.ua.index.php?id=1185451112.

[7] Information on the results of the Ministry of Justice's activities in 2007 http://www.minjust.gov.ua/0/zvit_2007.

[8] Adopted by Ministry of Justice Order No. 4125 from 21 June 2007

units in connection with a criminal investigation which they are dealing with, other State authorities and bodies of local self-government.

2.2. TELEVISION AND RADIO BROADCASTING

The National Television and Radio Broadcasting Council of Ukraine carries out compulsory registration of television and radio broadcasting organizations. Even those which only produce audiovisual production without circulating it themselves 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 2007 the State Register held information about 1,523 television and radio companies (hereafter TRC) and providers of information, namely 1426 TRC and providers of programme services, 97 providers of information. Of the 1426, 96 were State-owned, 396 – municipal and 994 – private.[9]

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

The Institute for Mass Information has stated that Ukraine is gradually becoming a country with a relatively low level of serious violations of the principles of freedom of speech. This is reflected first and foremost in the fact that there have not been any killings or suspicious disappearances of journalists for a few years running. No journalist is behind bars for any offence linked with carrying out journalist work.

Information on recorded offences[10]

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

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

Information about victims of crimes among media employees[11]

	Victims of crimes			From which they died		
	2006	2007	Rate of change, %	2006	2007	Rate of change, %
Media employees	92	46	-50.0	1	0	

[9] Report of the National Television and Radio Broadcasting Council for 2007 // National Council's official website http://www.nrada.gov.ua/cgi-bin/go?page=117.

[10] For data from IMI monitoring over many years, see http://imi.org.ua/index.php?option=com_content&task=view&id=172036&Itemid=42. See also the description of violations. Institute for Mass Information Chronicle of Infringements of Freedom of Speech http://imi.org.ua/media/hronique.doc.

[11] According to figures from the Ministry of Internal Affairs posted on their website: http://mvs.gov.ua/mvs/control/main/uk/publish/article/53966;jsessionid=90E9A16E35E13DD262262B3724A663C5

Last year did not bring the desired progress in the Gongadze investigation. The court hearings into the case against the men who carried out the killing – former high-ranking officers of the Ministry of Internal Affairs [VIA] lasted all twelve months. However 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 being in hiding. Other witnesses who could point to those who really ordered the killing were not named in court.

The Supreme Court on 22 June upheld the verdict against the killers of the journalist Ihor Aleksandrov. The ruling from the Luhansk Regional Court of Appeal which sentenced 5 men to periods of imprisonment from 3 to 15 years for their involvement in the killing of the journalist was passed in July 2006. The Prosecutor General soon afterwards applied to the Supreme Court to review the sentences which the prosecutor's office believed too lenient...Compensation awarded to the relatives of the journalist was not paid since the investigators did not take care to record the property of the accused at the right time.[12].

The most brutal attack on a journalist was the assault on 7 December on Maxim Birovash, correspondent for the newspaper «Business». It took place in the lift of his apartment block. When he got into the lift, two men entered it, knocked him to the ground, grabbed his bag and fled. He says that the bag contained internal correspondence of the Ministry of Internal Affairs, protocols of meetings of the commission on passport provision, and other documents forming the basis for a journalist investigation into machinations over issuing passports. The journalist was due to present these documents during a court hearing on 10 December in connection with a civil suit brought by the Chair of the Consultative Council of the private concern SSAPS [Single State Automated Passport System] Yury Sidorenko. In November representatives of the company lodged a defamation suit against Maxim Birovash and «Business» demanding compensation of 46 million UAH. The journalist links the attack to his professional activities given that the assailants took virtually none of his personal things, discarding the bag in the entrance to the block. However a pocket computer and all documents relating to the SSAPS case had disappeared. Maxim Birovash reported the attack to the Darnytsa District Police and within a few hours one of the assailants was detained. They found two telephones on him belonging to the journalist with the memory cards removed. The Darnytsa Police initiated a criminal investigation into the robbery. On 18 February the man detained then was sentenced to five years imprisonment. The databases of Mr. Birovash's investigations were never found since the other assailant has still not been caught.[13].

On 26 August, some young people who introduced themselves as employees of the Odessa branch of BYuT (Bloc of Yulia Tymoshenko) beat up a photographer from the newspaper «Sevodnya» Oleksandr Lesyk. Lesyk noticed that the young people at the end of the rally began loading tents and flags with BYuT symbols into an ambulance. The photographer began photographing this. Young men standing near the ambulance went up to him and asked him to erase the last shots. When he refused, they pushed him to the ground and began beating him. The police found the assailants and on 31 August initiated a criminal investigation for hooliganism (Article 296 § 2 of the Criminal Code). The case as of April 2008 was still being investigated.

In Donetsk on 21 September 5 cars were set on fire, one of them belonging to the Editor of the Internet publication «Ostrov» Serhiy Harmash. He claims that the arson attack on his car was no chance crime and links it to his own journalist activities. He says that the criminals first set fire specifically to his car and then after it had burned completely began setting fire to other cars of the same make. He assumes that they did this deliberately in order to deflect attention from the arson attack on specifically his car. At the first stage of the investigation the police were inclined to think that this was small-time hooliganism without taking into account the version about arson as the result of his journalist activities. The police have not made any conclusions from their investigation public.

[12] Institute for Mass Information Chronicle of Infringements of Freedom of Speech, http://imi.org.ua/media/hronique.doc.
[13] Ibid. See also http://www.khpg.org.ua/en/index.php?id=1197931105&w=Birovash.

Ihor Stsibailo, head of the Media Union in Ternopil, correspondent for the newspaper «Tochka OPORY», was attacked during the early hours of 20 October near the Ternopil Youth Centre «Las Vegas» by two men in civilian clothes, one of whom produced a pass identifying him as a criminal investigation officer Oleh Mohyla. The journalist was then taken to Ternopil Police Station No 2.

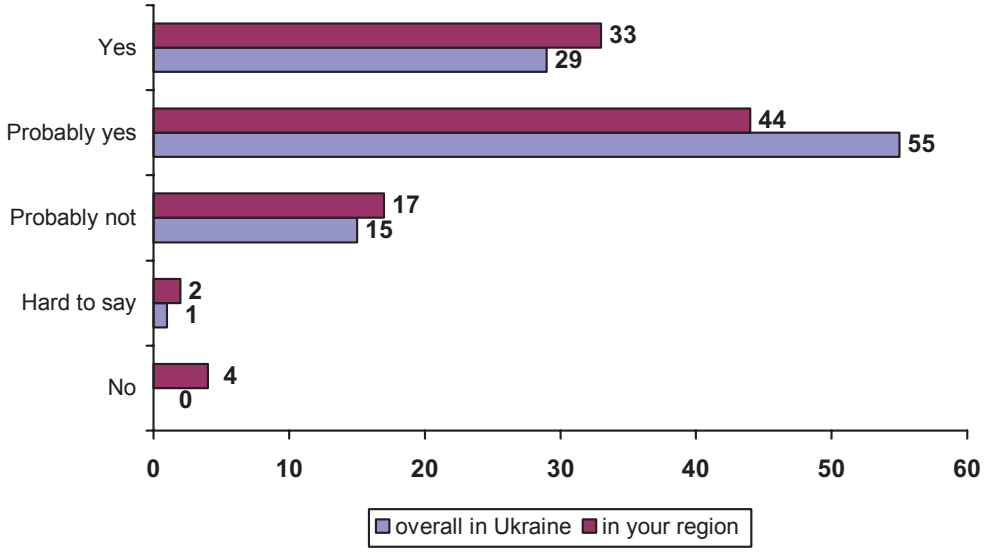
The police officers took away all the journalist's possessions and, without writing up a protocol, placed him in a cell. In the morning when Ihor demanded to be released, he says that Captain Kravchuk opened the door to the cell and said that he had been detained for forging documents. When Ihor began protesting, Kravchuk hit in the chest and told him to sit quietly or he'd get more of the same.

Around 11.30 the police released him, but did not return one mobile phone or 300 UAH. When asked for the remaining items, they denied their existence and asked Ihor to sign that his possessions had been returned. When he refused, he was taken to No. 1 police station where he was released by the head of the station. He made statements to both the City and regional prosecutor's offices. The journalist ended up in the neurological unit of the Ternopil Regional Hospital with a preliminary diagnosis of concussion. There was no response from the prosecutor's office. The journalist has lodged civil suits against them. The first hearing was scheduled for March 2008.

3.2. CENSORSHIP AND OTHER FORMS OF PRESSURE ON THE MEDIA AND JOURNALISTS

A survey of journalists suggests the existence of censorship.[14].

Is there censorship in Ukraine and in your region?



According to the survey, journalists most often encounter the following: demands from the authorities to see their material before it's published; direct instructions to the management of

[14] From November 2006 – February 2007 the Ukrainian Independent Media Trade Union conducted a study as part of the project «Effective control over the work of the local authorities by the local media and Ukrainian journalists», supported by the International Renaissance Foundation. The study involved interviews with media experts and representatives of the local authorities, as well as questionnaires to journalists in three regions – Donetsk, Lviv and Kyiv (the city as well as Kyiv region). 143 questionnaires were obtained (48 in the Lviv region; 47 – Donetsk region, and 48 from Kyiv and Kyiv region). The results were compared with those of a study commissioned by the Kyiv Independent Media Trade Union in November 2004 – January 2005. On that occasion the geographical scope of the survey was considerably greater. In neither case was the selection representative of all journalists working in Ukraine and the results can therefore only be used to gain a picture of the problems experienced and to identify trend, and not to gauge their prevalence in terms of scale or numbers of journalists. // «Censorship in Ukraine exists» http://telekritika.kiev.ua/articles/143/0/9120/nmpu_doslidzhennia/. Some information in English at http://www.khpg.org.ua/en/index.php?id=1176283386&w=censorship

the media outlet from the authorities on the nature of coverage of the events, as well as with the removal by the editor of information which the editorial deems undesirable from the author's text; the editor's refusal to publish material; or direct instructions on how to cover it.

The repeat showing of the television program «Toloka», with opposition leaders Tymoshenko and Kyrylenko on the First National Television channel [UT-1], first broadcast live on 19 March in the evening did not eventuate. Later the producer (and presenter) Viktor Pavlyuk was told that the programme had been cancelled. He is convinced that this was because of the last programme with the leaders of the opposition. The Director of UT-1 Vitaly Dokalenko claimed that the programme had been cancelled due to the lack of professionalism of the presenter. The Kyiv Independent Media Trade Union did not agree, pointing out that the ratings for the last programme had probably been the highest ever. After the broadcast was suspended, Vitaly Dokalenko set up an internal investigation, accusing the presenter of the programme of covert advertising for the opposition. On 23 March during the programme «Freedom of speech», Dokalenko stated that the programme would not appear on 26 March and that it would not be reinstated until the internal investigation was concluded. Later the investigation found that the programme had been removed without justification. It resumed broadcasting two months later but with a new presenter.

In September the National Union of Journalists made a statement about growing pressure from the authorities on the local media and journalists[15].

The Chief Editor of «Gazeta 24» Vitaly Portnikov resigned on 9 October over censorship. The decision was taken after a conversation with the investor of the holding «MediaDim» Volodymyr Kosterin. The latter said that it was necessary fro the company to carry out internal supervision over the work of the editorial board and expressed the wish, in Portnilov's words, to establish political control over the publication. Vitaly Portnikov described all of this in an open letter published in a number of media outlets.

«I will not conceal the fact that I encountered attempts to publish material which is at variance with the concept of the publication from my first days working as one of the main editors and then Chief Editor of «Gazeta 24». However at first I was able to more or less effectively withstand and therefore shield the members of the editorial staff from attempts at political exploitation by the investor and his closest people». Mr. Portnikov explains that the situation radically changed after the parliamentary elections during which the party headed by Volodymyr Kosterin (Ukrainian Green Party) made an «extremely unsuccessful» showing.

On the same day the President of the holding «MediaDim» and head of the board of the channel «Tonis» Mykola KnyazytskyУ confirmed that the accusations against the owner of the holding Volodymyr Kosterin which Vitaly Portnikov had made were fair. And on 13 October Artyom Shevchenko,, news editor on «Tonis» which is part of the «MediaDim» holding, also handed in his resignation.

The Chief Editor of the First Business Television Channel Svitlana Kolyada reported on 9 February that a considerable amount had been deducted from her salary because a feature had been shown from Lviv about how the local authorities had allocated additional funding to pay the communal services of veterans of UPA [the Ukrainian Resistance Army]. The feature was absolutely balanced with different points of view presented (for example, from communists). «I was told that this was because there couldn't be such a feature on our channel for political reasons», Ms Kolyada explained. «Our accountant told me «I don't understand anything but there was an order to deduct money for the feature from Lviv». After this she telephoned the assistant to the investor who confirmed that this had been the investor's decision.

The Kyiv Media Trade Union spoke of pressure on journalists of Radio «Era» who had come out with the initiative to create a branch of the media trade union. For example, straight after its creation, the administration found grievances against its members and one of the activists Mykhailo Hlukhovsky was asked to right a letter of resignation. Later he and other initiators of the trade union were dismissed.

[15] Memorandum of the National Union of Journalists «On the situation in the national information realm» // Internet publication «Telekritika» 4 September 2007 http://telekritika.kiev.ua/articles/143/0/9777/memorandum_nacJonalnoi_spJlki_zhurnalJstJv_ukraini_pro_stanoviще_u_nacJonalnomu_/.

3.3. OBSTRUCTION OF JOURNALISTS' WORK

In 2007 one criminal case reached the court against a person charged under Article 171 of the Criminal Code (obstruction of legitimate professional activities of journalists). It was returned for further (pre-trial) investigation.[16] In general we are aware of only one case where this article was applied however in our view it is rather dubious and contradictory.[17].

3.4. 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 outlets[18]

№			2003	2004	2005	2006	2007
1.	Under examination				753	926	719
2.	Proceedings into the case concluded		627	514	441	605	490
2.1	including	With a ruling issued	308	250	246	356	265
2.1.1		Including where the claim was allowed	187	158	150	193	168
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

According to data from the Association of Media Lawyers, overall from 1998 to 2008 according to an analysis of 738 court rulings, only 25 % 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. The largest number of 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 %[19].

The following are some examples of law suits.

On 27 June 2007 the Kyiv Court of Appeal closed the page on a three-year court case against TV Channel 5. The claim brought by National Deputy Volodymyr Sivkovych was rejected. Previously, on 20 July 2006, the same ruling had been issued by the Pechersky District Court in Kyiv. In autumn 2004 Volodymyr Sivkovych lodged a defamation suit with the Pechersky District Court against Channel 5 and specifically Petro Poroshenko. As a consequence, in the thick of the electoral campaign, 10 days before the first round of voting in the presidential elections, the bank accounts of both Channel 5 and of Petro Poroshenko were frozen. Broadcasting of the only opposition channel at that time began being disconnected in the regions.[20].

[16] Data from the State Judicial Administration for 2007
[17] «The Case of the newspaper «Perrekrestya». Institute for Mass Information http://imi.org.ua/index.php?option=com_content&task=view&id=170363&Itemid=37.
[18] Data from the State Judicial Administration for various years.
[19] «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
[20] Freedom of speech in Ukraine: developing mechanisms and methods for the struggle // UNIAN Information Agency 05.07.2007, http://www.unian.net/.

The Dnipropetrovsk City Department of the Ministry of Internal Affairs on 14 July lodged a suit against the newspaper «Litsa» [«People»] for two articles on law enforcement subjects. The MIA Department demanded protection of honour, dignity and business reputation and compensation of 15,000 UAH. The examination into the case carried on till the end of the year then in February 2008 the MIA withdrew its claim.

On 31 October Delta Bank filed a suit against the information agency «Economic news» demanding compensation for alleged damage to their reputation of 100 thousand UAH. In the claimant's view, the Chief Editor of «Economic news» Taras Zahorodny had done damage to the bank by circulating information at a press conference on 4 July 2007. It had been stated there that in the course of a journalist investigation in June 2007, the conclusion had been drawn that banks had ignored the decision of the National Bank of Ukraine No. 168 which prohibited banks from concealing their real interest rates. The bank's lawyers claimed that the information circulated by Mr. Zahorodny had led to a fall in the rate of loans issued by the bank. The preliminary hearing took place on 5 November 2007, and the examination of the case was adjourned until 2008.

On 4 August the Supreme Court rejected a claim made by the former leader of the Social Democratic Party (United) Viktor Medvedchuk calling for information presented in the book «Narcissus» to be declared false. Previously, on 26 July 2004, the Kyiv Court of Appeal had found the author of the book Dmytro Chobit guilty of intrusion into Medvedchuk's private life. Then the Court of Appeal ordered Chobit to pay Medvedchuk 10 thousand UAH for moral damages, and the publishing house «Prosvita» which had published the book was ordered to pay him 20 thousand UAH.

On 28 December 2007 the City-District Court in Slovyansk (Donetsk region) passed a ruling partially allowing a law suit filed by Valentin Rybachuk; Mayor of Slovyansk, against a television company SAT plus and journalist Natalya Popova, ordering the respondents to retract information made public and pay the Mayor 80 thousand UAH in moral damages. On 18 March 2008 the Donetsk Court of Appeal revoked this ruling and rejected the claim.[21].

On 19 November 2007 the Head of the Consultative Council of the consortium SSAPS [Single State Automated Passport System].filed a claim against «Blitz-Inform» for 46 million UAH. The seriousness of the intensions of the claimant is reflected in the fact that the sum entailed the need to pay state duty of 4,6 million UAH.[22]. The claim was allowed on 23 May 2008. The amount awarded against the newspaper and two journalists was 27 million UAH, this being the largest amount to date in Ukraine. and more than all claims against the media in 2004. Now In order to lodge an appeal, the newspaper and journalists will have to pay state duty of between 1 and 2.5 million UAH, depending on the court ruling.

In 2007 the National Television and Radio Broadcasting Council carried out 270 checks of television and radio companies [TRC] and reviewed the results at sessions of the National Council, these being 186 scheduled checks, and 84 not according to set plans.

As a result of the checks, the National Council issued warnings to 92 TRC and fined one – the TRC «Melitopol». Court applications were made to remove the licences (in accordance with Article 37 of the Law «On Television and Radio Broadcasting») of five TRC.[23].

4. 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.

[21] Natalya Popova («SAT plus») has won her appeal against the Mayor of Slovyansk http://www.telekritika.ua/news/2008-03-18/37202.

[22] http://www.telekritika.ua/daidzhest/2007-11-25/35141. and also (in English) http://www.khpg.org.ua/en/index.php?id=1212763363

[23] National Television and Radio Broadcasting Council Report for 2007 http://www.nrada.gov.ua/cgi-bin/go?page=117

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.[24]

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.

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 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, 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) Accelerate the procedure for ratifying the European Convention on trans-border television, the Additional protocol to the Convention on trans-border television, and also introduce amendments to legislation on the implementation of its regulations, as well as the provisions of the EU Directive 85/552/EU, 97/36/EU «Television without Borders.».

13) 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.

14) 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, as well as removing preliminary control over the distribution of films, etc.

[24] 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/

IX. FREEDOM OF PEACEFUL ASSEMBLY[1]

The situation with observance of the right of peaceful assembly changed in 2007, as compared with the previous year. Monitoring which the «Respublica» Institute has been carrying out for several years showed positive trends during that year. There were considerably less infringements of the right to peaceful assembly than in 2006, and in the first half of 2007 not one case where the police dispersed a rally was observed.

These trends can best be observed if one compares the situation with freedom of assembly in 2007 with, on the one hand, that in 2006, and on the other with the events of the first months of 2008.

This type of comparison makes it very clear that the exercising of freedom of assembly at present is entirely about administrative practice since, aside from Article 39 of the Constitution, there are no other normative legal acts regulating peaceful assembly. Local regulations based on the Decree of the Presidium of the Supreme Soviet of the USSR of 28 July 1988 are in breach of the Constitution and are declared unlawful by courts. Such regulations do, however, exist in some regions and are a source of conflict. The quality of administrative practice in the context of police behaviour depends to a large extent on the management of the Department of Public Safety of the Ministry of Internal Affairs and their understanding of the role of the police in this area.

Overall, according to MIA figures, in 2007 there were 187,852 peaceful gatherings (against 170,700 in 2006, 124,400 in 2005) involving almost 82.5 million people (against 85.3 million in 2006 and 63 million in 2005). One thus sees a clear trend towards increasing numbers of peaceful gatherings.

1. LEGAL REGULATION OF THE RIGHT TO PEACEFUL ASSEMBLY IN UKRAINE

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. This establishes a notification-based system, where the organizations of rallies and demonstrations merely inform the local authorities of their plans. No permit from any State authority or body of local self-government is envisaged. Only the courts may prohibit a rally or in any way restrict the right of assembly.

Several draft special laws on freedom of assembly drawn up by civic organizations, National Deputies and the Cabinet of Ministers[2], did not end up being considered by the Verkhovna Rada in 2007.

An important milestone was the examination by the Babushkinsky District Court in Dnipropetrovsk of a civil suit filed by the local civic organization «Respublica» calling for the rules «Regulations on holding mass events in the city of Dnipropetrovsk» to be quashed. These Regulations[3] were the most draconian of any passed by the local authorities in Ukraine (for example, rallies were permitted only in one place, and in order to hold any kind of gathering, you needed the permission

[1] Prepared by Volodymyr Chemerys, Institute «Respublica»
[2] See the section on Freedom of Peaceful Assembly in Human Rights in Ukraine – 2006.
[3] Ibid, for a more detailed analysis of these Regulations

of eight (!!!) municipal services). As we explained in previous reports, all such «Regulations», passed by the local authorities of many Ukrainian cities are unconstitutional. In Kyiv, Lviv, Sumy and several other cities similar «Regulations» were revoked by the courts, or previously cancelled by the city councils. However, in a number of cities – Kharkiv, Kherson, Zaporizhya and Poltava, they continue to be used as the grounds for courts banning gatherings, and even, in contravention of the Constitution, for bans without a court order, at the decision of the local authorities.

On 30 March 2007 the court revoked the said «Regulations» as unconstitutional[4], and in June the Dnipropetrovsk Regional Court of Appeal upheld this ruling. 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.

On 6 June 2007 the Executive Committee of the Kharkiv City Council passed Decision № 543 approving Temporary Regulations «On the procedure for reviewing issues regarding the organization and holding of gatherings, rallies, processions and demonstrations in the city of Kharkiv». Almost all items of this decision by an executive body of local self-government fail to comply (directly contravene) legal acts of the highest legal force, specifically the Constitution of Ukraine, the European Convention for the Protection of Human Rights and Fundamental Freedoms, Constitutional Court Judgment № 4-rn/2001 from 19 April 2001. For example, Items 4.1, 4.2 and 4.3 of the Regulations specify places in the city which, in the view of officials of the City Executive Committee, are the only ones in the city where demonstrations, procession and rallies can be held.

A positive change to be mentioned is that during 2007 neither the authorities nor bodies of local self-government even once referred to legislation dating back to Soviet days on freedom of assembly, for example, to the 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», as was the case in previous years.[5]

2. EXERCISE OF FREEDOM OF ASSEMBLY IN 2007: CHANGE IN THE ATTITUDE OF THE POLICE TO THE ISSUE

2007 saw virtually no change as regards the attitude of the local authorities to peaceful assembly, particularly to those involving political opposition. The local authorities tried to ban or «suspend» them.

For example, back on 29 December 2006 representatives of the Kyiv City State Administration (KCSA), under the leadership of its Deputy Head Volodymyr Holovach, ignored a ruling from the Shevchenkivsky District Court which on 25 December had turned down an application from the KCSA to ban a peaceful gathering. Purely on the grounds of an act regarding «infringement of the rules for municipal improvements», drawn up on the eve of the event by representatives of the KCSA and the public pavements department of the Shevchenkivsky district, they dismantled the tent erected for gauging public opinion on the social project «12 steps towards the authorities» by activists from the All-Ukrainian Union «Civic Council of Ukraine» on Maidan Nezalezhnosti [Independence Square]. Approximately thirty members of the gathering present when the tent was being dismantled showed resistance to the representatives of the KCSA and the public pavements department. Yet police officers present paid no heed to the demands made by Mr. Holovach and did not take part in dismantling the tent. They did not detain any of the members of the gathering, as called for by the Deputy Head of the KCSA, and also refused to use special devices against them.

Furthermore, on 23 January 2007, following a check of statements from the Chair of the «Civic Council of Ukraine» V. Khaletsky, the investigation officer from the department of the Shevchenkivsky District Police Department passed material to the Shevchenkivsky District Prosecutor's Office. The material concerns infringements by officials of the KCSA during the removal

[4] Human rights activists win important case for freedom of assembly http://helsinki.org.ua/en/index.php?print=1176280368

[5] A more detailed analysis of this Decree can be found in last year's report.

of the tent of Article 364 (abuse of power or official position) and Article 365 (exceeding ones authority or official powers) of the Criminal Code. On 13 February the Prosecutor's office refused to initiate a criminal investigation against officials of the Kyiv authorities however this case was the first recorded case in Ukraine's history where the police did not take measures against participants of a peaceful gathering as demanded by the local authorities, but instead accused the authorities of violating the rights of peaceful assembly. The police pointed out that the representatives of the KCSA had dismantled the tent in contravention of the said ruling of the Shevchenkivsky District Court from 25.12.2006 and without representatives of the State Bailiffs' Service being present.

In December 2006 Vasyl Tsushko was appointed Minister of Internal Affairs. The majority of Deputy Ministers also changed. The Department of Public Safety which deals directly with public order during meetings was headed by Vasyl Fatkutdonov who took a new position on the issue of freedom of assembly.

When, on 27 January 2007, the Mayor of Kyiv (and Head of the KCSA) Leonid Chernovetsky sent the Minister of Internal Affairs a letter demanding that the police bring administrative charges under Article 185-1 of the Code of Administrative Offences against the activists of the «Civic Council of Ukraine», the reply received read: «Police officers had no grounds for drawing up administrative protocols over infringements foreseen in Article 185-1 (Infringement of the procedure for organizing and holding gatherings, rallies, street processions and demonstrations) of the CAO against representatives of the All-Ukrainian Union «Civic Council of Ukraine».

In the change in attitude of the police to freedom of assembly, a by no means small role was played by human rights organizations whose representatives joined the Ministry of Internal Affairs Public Council (the Public Council) for the Observance of Human Rights created in December 2005. During 2007 direct contact was established between human rights defenders and the management of the Ministry of Internal Affairs (MIA). Thanks to this it was possible to swiftly resolve difficult issues on safeguarding the right to peaceful assembly, for example, releasing picketers detained under Article 185-1 of the CAO (detained, in the view of human rights defenders unwarrantedly) in Kyiv (January) and Odessa (October). The MIA management also involved members of the Public Council in official commissions investigating the actions of the police during much publicized events (the actions of the police special unit «Berkut» during the football match «Dynamo» (Kyiv) – «Shakhtar» {Donetsk) on 27 May and the picket over the monument to the Russian Empress Catherine II in Odessa in summer and autumn). The use of force by the police was found by the commission to have been unjustified and disciplinary measures were brought against a number of police officers. A criminal investigation over the actions of the police and football fans during the match is still underway.

The MIA Department for Public Safety in 2007 for the first time drew up «Method guidelines for ensuring law and order during mass events and protest actions». This took into account a lot of the wishes of human rights groups regarding safeguarding the right of peaceful assembly, as well as European practice and judgments of the European Court of Human Rights on freedom of assembly. For example, these «Method guidelines» stipulate that if disruption to public order arises during a rally, the police do not «suspend» (i.e. disperse) it, but localize and put an end to the actual infringement of order without stopping the entire rally. It is also stated that according to Ukrainian legislation and normative acts of the MIA and the Ministry of Justice, police officers are only used by State bailiffs during enforcement of court rulings (including rulings prohibiting rallies) to maintain law and order.

In April 2007 the Shevchenkivsky District Court in Kyiv banned meetings in the centre of the capital over the President's Decree dissolving parliament, both those by the «white and blue», and the «orange» political forces. It banned them at the application of the Kyiv City State Administration because, according to the applicant, there could be run-ins between the various political forces. In our view, by taking this decision, the court infringed the Constitution and ignored the case law of the European Court of Human Rights which, according to Ukrainian legislation is a «source of law». In its turn, the MIA leadership (V. Fatkhutnikov) stated that, despite the court ruling, the police would not obstruct either meeting, and would merely protect public order. All measures planned by the various political camps took place over several weeks on Maidan Nezalezhnosti [In-

dependence Square], European Square and near the building housing the Constitutional Court in the capital. The police did not get in the way of these events and merely placed a cordon between demonstrators representing different political factions. No violations of public order were recorded. Such action by the police can be viewed as safeguarding the rule of law (perhaps for the first time in Ukraine's recent history).

The holding of the annual Freedom March which takes place in many cities in the world on the first Sunday in May, calling for the decriminalization of soft drugs was typical. In 2006 the Kyiv police had blocked the action even despite a court ruling which did not ban the march. This behaviour from the law enforcement agencies aroused sharp criticism from human rights organizations, but was supported by the then Minister of Internal Affairs Yury Lutsenko. .In 2007 the police, taking heed of the view of civic organizations, rather than obstructing participants of the action, as had been the case the previous year, guarded them from their opponents – members of far-right groups and skinheads. Both actions took place – «Freedom March» and the action of its opponents.

There was also a certain test for the police in the holding of gay and lesbian processions. On the evening of 17 May activists of the gay and lesbian movement in Ukraine held a public action on Kyiv's Khreschatyk St aimed at fighting homophobia and promoting tolerance. A spontaneous event turned into a gay and lesbian procession. Those taking part included members of a considerable number of lesbian, gay, bisexual and transgender organization and informal groups: the Kyiv civic organization Gay Alliance; the feminist-lesbian information and educational centre Women's Network; the all-Ukrainian civic organization Gay Forum of Ukraine and others. Along the way no significant incidents occurred if we disregard the verbal exchanges between activists and individual by-passers. The surprise awaited the participants of the procession in Shevchenko Park which procession began reaching close to eight in the evening, in order to take off their gay and lesbian, and anti-homophobia badges, etc, on the square around the monument to Kobzar [the poet Taras Shevchenko) and to review the event.

It transpired that the capital's law enforcement agencies had seriously worried for the safety of the participants of the action and very swiftly deployed considerable numbers of spetsnaz [Special Forces] officers. According to participants in the procession there were no less than a hundred officers. The spetsnaz officers were placed around the perimeter of the park, and also directly by the members of the procession which had already ended. The presence of the spetsnaz was entirely justified since it turned out that members of an ultra-right group were planning to confront the members of the procession. However they were too late. A group of homophobic young people had arrived at the square when the procession ended and people were addressing the participants. Under the watchful eye of the spetsnaz officers, the procession participants left the park.

The head of the operation for safeguarding public order during the action said in an informal conversation with the procession's organizers, that the spetsnaz forces had been brought in to prevent violence and gave advice how to disperse so as to minimize possible risk.[6]

During 2007, according to MIA figures, 169 participants in peaceful gatherings faced administrative measures (against 158 in 2006). There were no cases recorded, as in previous years, of public officials being punished for obstructing peaceful gatherings.

3. THE ROLE OF THE LOCAL AUTHORITIES AND THE COURTS IN VIOLATING FREEDOM OF ASSEMBLY

If one can speak of positive changes in the attitude of the police to freedom of assembly, this cannot be extended to the how the local authorities and bodies of local self-government viewed this right, nor to the attitude of the courts during 2007.

We have already spoken of the attitude demonstrated by officials from the Kyiv City State Administration, however in 2007 the heads of the Kharkiv and Lviv City Councils also violated freedom of assembly.

[6] Spetsnaz forces deployed for a spontaneous gay procession in Kyiv http://korrespondent.net.

At the beginning of March, the Kharkiv City Executive Committee applied to the court to ban a rally of the movement «Narodna samooborona» [«People's Self-Defence»] planned for 18 March on Freedom Square. The reasons given for the application were that the organizers had not informed the authorities in timely fashion (in Ukrainian legislation it is still not stated within what period of time the authorities must be informed of a planned gathering); had not provided a scenario for the action; had not agreed the cleaning up of the area with the communal services, etc (these requirements to organizers of gatherings are not contained at all in any legal act in Ukraine. The Dzerzhinsky District Court in Kharkiv suspended preparation for the rally, as well as advertisements about it in the press, while it considered the case. Then National Deputies from «Nasha Ukraina» [«Our Ukraine] decided to organize in their own name a meeting with voters in the same place. However the Secretary of the Kharkiv City Council, Genady Kernes, during the evening of 15 March, together with employees of the communal services dismantled the stage which the organizers had erected on Freedom Square.

On that same day, 15 March, the court did in fact ban any rallies on 16 March on that Kharkiv square and the «People's Self-Defence» rally was held in a different place.

The District [Okruzhny] Administrative Court for the Kharkiv region turned down the administrative suit brought by the local authorities for a ban against an action on 9 August in Kharkiv to mark International Day of the World's Indigenous People.[7]

In September employees of one of the construction enterprises in Lviv demanded the resignation of a judge of the Lychakivsksy District Court in Lviv who, in their opinion, had violated a judge's oath by issuing in the space of one day several dozen (!!!) rulings freezing the shares owned by members of the work team of the enterprise. On 12 September, on the application of the Lviv City Executive Committee, the Halytsky District Court in Lviv prohibited a picket of the Lychakivsksy District Court. The picketers stopped their protest action after this, believing their goal to have been achieved – the issue of justice in the Lychakivsksy District Court was taken up by the High Council of Justice, and leaflets explaining the actions of the judge involved had by that time been handed out to passers-by and people in public transport.

District [Okruzhny] Administrative Court in Kyiv refused to place restrictions on mass actions on Maidan Nezalezhnosti and in other central squares in Kyiv from 24 to 30 September as applied for by the Kyiv City State Administration.[8]

At the beginning of October the Suvorovsky District Court in Kherson banned a peaceful torch procession to mark the Day of the Ukrainian Armed Forces. The court justified its ruling on the grounds that this would obstruct the movement of ambulances, fire engines, and «will also inevitably lead to the disorganization of the work of the authorities and bodies of local self-government.» The court moreover made reference to flawed decisions from the Kherson City Executive Committee, passed back in March 2006, which was in our view unlawful and unconstitutional.[9]

The Leninsky District Court in Sevastopol on 18 October prohibited the civic organization «Movement against illegal immigration – Sevastopol» from holding a «Russian March» on 4 November through the central streets and avenues of the city. The arguments from the local authorities could not fail to bemuse: the obstruction by the participants of the action of transport could do some degree paralyze the life of the city and cause its residents huge inconvenience.[10]

4. INCIDENTS DURING MASS GATHERINGS

Most criticism last year was over the actions of the police Special Forces unit «Berkut» during the brawl in Kyiv at the Olympic Stadium during the football match «Dynamo» – «Shakhtar» on 27 May.

[7] The Kharkiv City Authorities couldn't ban events to mark International Day of the World's Indigenous Peoples // http://www.helsinki.org.ua/index.php?id=1186657298

[8] Court refuses to restrict political meetings on Maidan // Сайт УГСПЛ, http://www.helsinki.org.ua/index.php?id=1190719233

[9] How a peaceful procession got in the way of mad fire engines // www.khpg.org/index.php?id=1194512550, and in the Kherson newspaper «Vhoru» on 19 October 2007

[10] Sevastopol Court bans «Russian March» on 4 November // UNIAN information agency http:// human-rights.unian.net

Immediately after these events, the Deputy Minister of Internal Affairs Vasyl Fatkhutdinov set up a commission to look into the incident, including both representatives of the MIA and members of the MIA Public Council. The commission came to the conclusion that certain «Dynamo» fans had disrupted public order, however the behaviour of the police officers establishing order had not been appropriate to the situation. As the result of the commission's investigation, disciplinary measures were taken against «Berkut» officers who had used excessive force against football fans. For comparison, the actions of «Berkut» against «Dynamo» fans in June 2005 at the same station during a match between the same teams aroused sharp criticism from human rights groups. Yet the then Minister of Internal Affairs Yury Lutsenko stated that there had been no violations in the behaviour of the police officers and that there were therefore no grounds for setting up a special commission.

On 27 June 2007 people protesting against construction work near No. 14 on Bereznyakivska St. in Kyiv were attacked by around 40 people who arrived in a coach. According to information provided by the Dniprovsky District Police Department, they inflict head, neck and stomach injuries on three of the protesters, residents of neighbouring buildings. After this, the assailants began erecting a fence cordoning off the territory of the future construction site. The protesters called the police and an ambulance, and the police detained seven of the assailants – 18-20-year-old students of the Kyiv National Institute for Physical Education who for a modest sum (the fee for such actions is normally around 150 UAH) agreed to carry out the attack on the protesters. Some of the assailants received administrative penalties. Against thirteen other attackers of the peaceful picket, a criminal investigation over the inflicting of bodily injuries is in process.

On 16 March 2008 police officers from the Pechersky District Police Department applied force to disperse a picket by the civic initiative «Preserve old Kyiv» against construction work on the territory of the Zhovtneva Hospital, which the protesters consider illegal. During the dispersal a journalist from the Kyiv newspaper «Gazeta po-kyivsky» Andriy Manchuk received injuries. The MIA set up a commission however did not include members of the public despite demands to do so by representatives of the initiative «Preserve old Kyiv». As of the end of March 2008 the commission had not completed its investigation. However on 21 March 2008 the Head of the Kyiv Central Department of the MIA Vitaly Yarema stated that activists of the civic initiative, picketing on the territory of the hospital under construction, had been «commissioned» by unnamed individuals. Clearly such statements can influence the conclusions of the commission.

5. THE ODESSA REGION AND THE CRIMEA – PROBLEM REGIONS

Whereas in the first half of 2007 the incidents of 27 May at the Olympic Stadium and on 27 June at Bereznyaky in Kyiv were essentially one-off incidents concerning mass gatherings, beginning from 25 June conflicts began in Odessa conflicts began over the dismantling of a memorial to the participants of the uprising against the Russian monarchy on the Battleship Potemkin in 1905 and the erection in its place of a monument to the Russian Empress Catherine the Second. Catherine has a far from unequivocal reputation since it was she who issued the decrees ordering the destruction of the Zaporizhyan Sich and the inculcation of serfdom in Ukraine. Protests against the monument to Catherine were therefore organized by members of Cossack associations and organizations with a national orientation from many Ukrainian regions (Ivano-Frankivsk, Kharkiv, Khmelnytsky, Poltava and others). Most Odessa residents are indifferent to the honour paid the Russian Empress, however civic groups of Odessa Cossacks who cooperation with the local police on measures to maintain public order, actively supported the erection of the monument.

The protests ended only on 29 October when the monument erected at the decision of the Odessa City Council was unveiled. However during the four months from the time that the monument to the people of the Potemkin was dismantled to the opening of the monument to Catherine there were several run-ins between the Odessa police and Cossacks, drawn in by the police on the one hand, and representatives of Cossack associations from other regions and some Odessa residents (the largest number present, according to police reports, was 500) on the other.

From the point of view of the members of the «Respublica» Institute who took part in the work of the MIA commission which investigated the situation with peaceful assembly in Odessa in 2007, the biggest problem was the fact that the Odessa police involved the local Cossacks (having the formal right to do this in accordance with the Law «On the Police» in the confrontation with the opponents of erecting the monument. The police thus contributed to a situation where conflict between members of the public and the local authorities in Odessa was turned into a conflict between members of the public.

The protests against the erection of the monument to Catherine were joined in July by protests against military exercises of Ukrainian and NATO forces entitled «Sea Breeze – 2007». At the application of the Odessa City Executive Committee, the Prymorsky District Court in Odessa banned «any individuals, legal entities or civic organizations from holding rallies in the centre of the city. It's interesting to note that the entire population of Ukraine which the court prohibited from gathering in Odessa was not even informed that anyone plans to limit their constitutional rights, and were not invited for this reason to the court which procedural norms require. In one case for 18 days (from 5 July) and in another – 12 days (from 14 September) in the «free city by the sea» (as literature named Odessa) the rule was in force that «no more than three people may gather».

On 6 November around a thousand Kyiv police employees began enforcing a court order on removing constructions erected by Crimean Tatars[11] on Mount Ay-Petri which belongs to the territory of the city of Yalta. These buildings were constructed on land sites seized by Crimean Tatars after their return to their homeland. The problem of distributing land in the Autonomous Republic of the Crimea and the problem of the rights of the Crimean repatriants are examined separately.

While with regard to our subject, it is worth noting that the Head of the Crimean Parliament Anatoly Hryshchenko approved the demolition of the self-styled buildings and stated that resistance to the demolition had been shown by «radically inclined» Crimean Tatars. At the same time the Crimean Tatar civic organizations «Fellow Villager» [«Koideshper»] which had in fact shown resistance to police officers on 6 November stated that land disputes in the Crimea were being made more difficult by the excessive corruption of Crimean officialdom. According to the Head of the organization «Ibrahim the Military», «Crimean officials have become immersed in corruption as regards land relations.

As a result of scuffles between the police and Crimean Tatars, more than twenty repatriants were detained (according to a report from the Centre for Public Liaison of the Chief Department of the MIA for the Crimea. Those detained received administrative punishments. However reports of the use of guns both by the Crimean Tatars, and the police, did not receive a proper reaction from representatives both of the Crimean authorities and Crimean police, as well as from Crimean Tatar organizations. Whatever the situation, we know of a person who received a serious gunshot wound to the legal during the above-mentioned events.

Unfortunately the management of the MIA refused to create any kind of commission, including with the participation of members of civic organizations in order to investigate the incident on AI-Petri. However, in our view, the creation of such a commission would be of significance at least on the grounds that the actions of the Crimean Tatars have lasted until the present time and will undoubtedly continue under the final resolution of the land issue on the peninsula. Perhaps the most important result of the work of this body would lead to recommendations on averting conflicts similar to that on AI-Petri.

On 16 November the First Deputy Head of the Mejilis of the Crimean Tatar People Refat Chubarov accused the local authorities of obstructing protest actions by the Crimean Tatars. He said that on 9 November the Executive Committee of the Simferopol City Council had received notification of mass protest actions on the central square of the city. According to his information, a hearing of the Zaliznichny District Court in Simferopol had taken place that same day and had allowed the application by the City Council to prohibit the protests. He added that the Crimean Tatars suspect the judges who prohibited the erection of tents on the square outside the Council of Ministers of the Autonomy of being biased, since, for example, the representative of the Mejilis who

[11] The Crimean Tatars were deported from the Crimea in 1944 and returned at the beginning of the 1990s.

had submitted notification of the planned action, had not been informed about the court hearing. «People simply stamped the ruling that the authorities wanted, absolutely not trying to understand the processes», he said.[12]

Despite the opposition of the authorities, the tents began being erected on 7 November. They were dismantled by the Crimean Tatars themselves on 17 December when they decided to temporary suspend protest actions.

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».

2. The MIA should systematically set up commissions with the participation of members of the public to investigate incidents during peaceful assembly arising with the involvement of 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 local and appellate administrative courts

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.ï.

7. Pass a 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.

8. Bodies of local self-government and public authorities 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. The Institute «Republic» and the Ukrainian Helsinki Human Rights Union give such cases priority when providing legal assistance.

[12] The authorities are obstructing mass protest actions by the Crimean Tatars // UNIAN information agency, http://human-rights.unian.net/ukr/detail/186292.

X. FREEDOM OF ASSOCIATION[1]

1. OVERVIEW

There was no major change in the situation as far as freedom of association is concerned in 2007. 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.

Nonetheless in the second half of the year some positive movement was observed. This was linked with the development by the Ministry of Justice, in conjunction with a working group which includes members of the public, of a draft law «On civic associations». The draft law could provide a major step towards safeguarding freedom of association in Ukraine, and as it stands at the present moment does basically meet international standards. In September 2007, the draft was looked at by the Cabinet of Ministers and sent back for reworking. The time limit for agreeing the draft law was extended to 1 March 2008, with it being sent meanwhile to be agreed with the Ministry of Employment and Social Policy (letter from the Ministry of Justice from 27 November 2007 No. 18-12=1076). Another public discussion with the Ministry of Justice was held in February 2008.

In November 2007 the Cabinet of Ministers approved a Strategy for the promotion by executive bodies of the development of civic society[2] drawn up in close cooperation with civic organizations. This contains virtually all necessary amendments needed to improve safeguards to freedom of association.

2. THE 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) are discriminatory. There is no logical reason for why charities are registered within a month or two, civic organizations within 3 days (in practice this period cannot be adhered to), which an enterprise is registered between 3-5 days. 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 two. 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. The latter makes it possible for an organization to not have income taxed (this takes between one and two months). While a civic organization should, according to legislation, be registered within 3 days, in practice, the authorities may give a certificate regarding the registration within this time period, however registration by the State registrar (the second necessary registration) takes around two or three weeks. The period required is therefore at least three weeks

[1] Prepared by Volodymyr Yavorsky, UHHRU Executive Director
[2] Cabinet of Ministers Instruction No. 105-I from 21 November 2007

just at this stage. And this is when the authorities have a positive attitude to the organization which happens all too seldom.

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. This is primarily linked with an extremely scrupulous check of the charter for any failure, however minor, to comply with legislation.

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. This formalistic approach runs counter to the practice of the European Court of Human Rights, as reflected, for example, in the case of the *Turkish Communist Party vs. Turkey*.

The Kyivsky District Court in Kharkiv on 19 February 2007 passed a Resolution which declared unlawful the behaviour of the Kharkiv Regional Department of Justice in cancelling via notification in writing the legalization of the Eurasian Youth Union. On 4 December 2006, the claimant, together with two other people, had founded the Union and applied to the Department of Justice to be legalized via notification. However on 11 December, a letter arrived from the Head of the Department of Justice returning the application for it to be brought into line with current legislation, in particular, by stating the general name of the civic association. The court ruled that the law allows for rejection only of an application for registration, and not of legalization of civic associations, and that the authorities did not therefore have the right to refuse to legalize a civic association via notification in any circumstances. The Union was legalized by Order of the Central Department of Justice for the Kharkiv Region No. 70/2, dated 24 April 2007, with the appropriate entry being added to the register of civic associations through entry No. 264 from 24 April.

The Ministry of Justice via Order No. 843/5 from 28 September 2007 allowed for the possibility of checking that a decision of the statutory body on changing the makeup of the governing bodies comply with the charter of the organization and legislation. The Law «On State registration of legal entities and individual entrepreneurs» also envisages submission of notification about changes in the governing bodies however it does not cover civic organizations legalized by means of notification, or representative offices and branches of foreign nongovernmental organizations. It is difficult to predict the consequences of this Order. It could encourage interference by Ministry of Justice bodies in the internal procedure of associations which would run counter to international standards[3].

The Ministry of Justice also acknowledges that there are considerable problems with registration. The Minister of Justice has stated: «According to present Ukrainian laws, the procedure for creating non-profit making organizations – political parties, civic organizations, charities etc, is unwarrantedly cumbersome in contrast to the procedure for profit-making enterprises. The existence of double registration is an impediment to the formation of institutions of civic society, slows down ensuring the right to freedom of association and creative activity». The Minister adds that legislation regulating the specific features of registration of non-business societies is not coordinated with other laws.[4]

An important problem from the point of view of freedom of association 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 engage in defending the rights of its own members. This provision is reflected in the Law on Citizens' Association and entails considerable restrictions on

[3] Order of the Ukrainian Ministry of Justice No. 843#5 from 28.09.2007 «On amendments to the Procedure for preparing and formalizing decisions to legalize civic associations and other civic formations» // Legislation for organizations of civic society. Electronic Bulletin, No. 10, October 2007 http://www.ucipr.kiev.ua

[4] See Information on the results of the work of the Ministry of Justice in 2007 // www.minjust.gov.ua

their activities. The provision effectively prohibits organizations of public benefit. Since charities are not entitled at all to engage in human rights protection. 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.

Another problem not in keeping with European standards is the maintenance of an association's territorial status with this limiting the association's activities exclusively to the place where it is registered. This means that an association registered in the Podol district of Kyiv does not have the right to hold events in the Pechersky district. It is good that the authorities are not overly strict in observing this provision of legislation nevertheless there have been cases where they were applied where it suits, for example, in order to suspend the activities of the European Youth Union (see below). Profit-making organizations do not face such restrictions with this serving yet again to demonstrate the discriminatory attitude in relation to civic associations.

During the year the Constitutional Court twice scrutinized the constitutionality of the norms of the Law on political parties. In its judgment of 12 June[5], it reviewed the procedure for creating political parties and judged as follows:

– It confirmed the constitutionality of the ban on financing of political parties by charitable and religious organizations, as well as by businesses, institutions and organizations whose property is partially owned by non-residents;

– It found unconstitutional the quota of signatures to form a political party in districts (raion) of the region (oblast). The Law demands that signatures be collected in two thirds of the districts of no less than 2/3 of the regions, and also imposes the requirement to create and register local party branches in raions and cities within 6 months of the party's registration.

At the same time the Ministry of Justice has been drawing up a draft law on amendments to the Law «On political parties in Ukraine». With Ukraine's joining the Group of States against Corruption (GRECO), and its commitment to adhere to key principles on combating corruption prepared by the Council of Ministers of the Council of Europe, the law requires amendments to bring it into line with general rules for fighting corruption in the financing of political parties and electoral campaigning.

In its next judgment of 16 October[6], the Constitutional Court confirmed the constitutionality of the norms of the Law which state that in order to create a political party, no less than 10 thousand signatures are required from no less than 2/3 of Ukraine's regions (oblasts), Kyiv and Sevastopol, as well as the requirement to create and register the relevant branches in these regions within six months of the party's registration.

Considerable 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.

On 16 April Parliament ratified the European Convention on the Legal Status of Labour Migrants, by which it 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.[7] However the legislation has not yet been brought into line with the norms of the international agreement which in turn infringes the norms on ratification of an international agreement according to which amendments to legislation should precede ratification.

As of 1 January 2008, certificates of articles of association agreements and other documents from legal entities are attested by a notary on condition that State duty of one minimum income

[5] Judgment of Ukraine's Constitutional Court from 12.06.2007 following a constitutional submission by 70 National Deputies concerning the adherence to the Constitution (constitutionality) of the provisions in Article 10 § 1.3, paragraphs two, five and six of Article 11, Articles 14 and 24, and item 3 of Section VI «Concluding provisions» of the Law «On political parties in Ukraine» (case on the creation of political parties in Ukraine).

[6] Judgment from 16 October 2007 in a case brought via the constitutional submission of the Ministry of Justice asking for an official explanation of the provisions of Article 11 § 6 of the Law «On political parties in Ukraine» (case on the creation and registration of political organizations in Ukraine).

[7] Legislation for organizations of civic society. Electronic Bulletin, No. 3, March 2007 http://www.ucipr.kiev.ua Ukraine ratified while adding its provisos, as here.

before tax [17 UAH] has been paid.[8] This has led to double payments to the Budget in cases, for example, where amendments are registered to articles of association, where first the State duty is paid for a notarized confirmation, and then another for registration.

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 is only approximate information regarding local associations.

Statistics of associations' registration[9]

Type of association	2005	2006	2007	Total registered
Political parties	24	12	4	144
Structural branches of political parties	around 99 700	around 20 400	over 3 200	over 154 000
All-Ukrainian charities	67	86	82	929
Local charities	over 700	over 400	400	over 4 000
Civic associations with all-Ukrainian status	181	265	277	2 546
Local civic association	over 2 400	over 1 600	over 1 500	more than 22 000
All-Ukrainian trade unions legalized by the Ministry of Justice	4	4	11	113
All-Ukrainian associations of trade unions legalized by the Ministry of Justice	1	1	Not one legalized	14

Statistics on refusals to register associations from the Ministry of Justice[10]

Type of association	2005	2006	2007
Political parties	21	4	3
Civic organizations	91	85	26
Charities	29	9	3

According to information from Departments of Justice, during 2007 670 executive committees of city councils and executive bodies of local self-government and village councils were checked on how they were exercising the authority given them to register civic organizations. The Ministry of Justice departments found the following typical shortcomings in the work of these executive committees:

– control and supervisory files on civic associations are not kept;

– the legislative requirements regarding applications by the foundations are not adhered to;

– registers and a record of civic associations are not kept (This, for example, explains the lack of exact data regarding the number of civic associations);

– Certificates of registration of civic associations are not issued or are issued with infringements of the Cabinet of Ministers Resolution of 26 February 1993 No. 140;

– Proper legal expert assessments of the articles of association are not carried out;

[8] Law of Ukraine «On amendments to Article 3 of the Cabinet of Ministers Decree «On State duty» regarding act of associations documents», No. 811 from 23.03.2007

[9] Information 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.

[10] Based on information from the Ministry of Justice. The information does not include refusals by regional and local Departments of Justice or executive committees of bodies of local self-government. Such overall information is not accessible, and probably does not exist.

– The time limits for consideration of civic associations' status are infringed since the frequency of meetings of the executive committees of local councils does not take into consideration the three day time limit for review of such documents;

– The executive committees of local councils do not pay sufficient attention to monitoring the activities based on these articles of association of registered civic organizations/

The lack of registration files on civic associations is a serious problem. Documents are attached to the decisions of the executive committees and every 3-5 years are passed to the State Archive. This makes it impossible to register amendments to the articles of association of civic organizations and exercise any supervision over their activities.

A separate problem is with the formation of trade unions, the legalization of which encounters certain artificial administrative obstructions.

In March 2007 a case was being considered in the Lviv Regional Court of Appeal based on a suit filed by the Sambir Free Trade Union of Science and Education, against the Regional Department of Justice over its refusal to legalize a local trade union. This is an infringement of the right to freedom of association since legislation provides no grounds for refusing to legalize trade unions.

Many problems also arise when registering religious organizations, and this receives separate attention in the section «Freedom of thought, conscience and religion».

However the difficulty of registering civic associations is explained not by the exceptionally bureaucratic procedure for registration in the Ministry of Justice and its territorial departments. Many problems arise during the next stage, this being registration of associations in the State Tax Administration and inclusion in the Register of non-profit making organizations in order to receive concessionary tax and reporting status.

3. THE RIGHTS OF ASSOCIATIONS, FREEDOM OF INTERNAL ORGANIZATION AND CHECKS INTO THE ACTIVITIES OF CIVIC ASSOCIATIONS

In accordance with the Ministry of Justice's plan for 2007, checks were carried out of 325 All-Ukrainian civic associations registered in 1995 (against over 250 in 2006). These checks found three civic associations not to be at the legal address stated in the articles of association. Checks in 2004-2005 were only able to find 4 civic organizations which had not been identified earlier.

Checks in 2007 of over 6.5 thousand civic associations with local status (against 5.5 thousand in 2006) carried out by territorial Departments of Justice led to written warnings being issued to over 550 such associations (against 790 in 2006), as well as the relevant material being submitted to the courts to have certain civic associations forcibly dissolved.[11]

The Ministry of Justice issued an Order on warning the international civic organization «International Committee for Human Rights Protection». The warning was issued over the unlawful use of the name of a State institution which is viewed as an infringement of Article 8 of the Law «On citizens' associations» (the prohibition on interference in the activities of State bodies) which creates a dangerous precedent for sanctions against civic organizations.[12] Although, on the other hand, human rights organizations had long drawn attention to the activities of this organization and its link with the UN International Human Rights Committee.

The forms for reporting by associations to the State Statistics bodies have become stricter. Since 1 January 2008 the central statutory bodies of legalized civic associations must submit by 10 March each year extended reports to the Statistics offices for their area. Besides information about the number of members of the branches, as well as the procedure for using funding, the civic organiza-

[11] „Information and analysis report on the activity of the Ministry of Justice and its territorial bodies regarding legalization of civic associations and other citizens' formations http://www.minjust.gov.ua/0/13796

[12] Order of the Ministry of Justice № 35/5 from 15.01.2008. «On issuing a warning to the international civic organization «International Committee for Human Rights Protection» // Legislation for organizations of civic society. Electronic Bulletin, No. 1, January 2007 http://www.ucipr.kiev.ua.

tions also have to indicate the number of rallies, seminars, training seminars and other events held in accordance with their tasks as per their articles of association.[13]

3.1. TEMPORARY BAN ON TYPES OF ACTIVITIES AND THE LIQUIDATION OF ASSOCIATIONS

The Kharkiv Area Administrative Court on 19 September 2007 issued a Resolution allowing the administrative suit brought by the Deputy Prosecutor of the Kharkiv Region in the interests of the State as represented by the Central Department of Justice for the Kharkiv Region, against the civic organization «Eurasian Youth Union» asking for a three-month ban on its activities. The application was argued on the grounds that the Union had:

– violated the territorial principle in its activities beyond the confines of the Kharkiv region where it was registered;

– carried out activities not in keeping with the aim of its creation;

– bases its ideological principles on non-recognition of Ukraine's statehood and territorial integrity;

– it presumes extremist methods for upholding its political views and restricts the universally recognized rights of others.

The grounds for the application, according to the Prosecutor were information from the SBU [State Security Service) about a mass protest action held by the Union on 12 June 2007 in front of the Central Department of the SBU with demands supposedly of a political nature, that the SBU revoke its ban on entry into Ukraine of the leaders of the International Eurasian Movement. During the action material had been distributed with content deemed as showing that the Union's aim was, via revolutionary means, to create a single Eurasian Empire on the basis of Russia which would include Ukraine's territory. The material also denied Ukrainian sovereignty and statehood. The fact of the Union's participation in this protest action was confirmed by a letter from 8 June 2007 signed by the Head of the Union.

In its ruling, the court stressed that the Union had engaged in unlawful behaviour earlier as well. For example, on 27 February 2007, on being detained by customs officers at the customs control point «Hoptivka», a video disk had been removed from the Head of the Union. The disk contained material disseminated via the Internet regarding the dismantling of the Memorial to the fighters of the UPA [Ukrainian Resistance Army] in Kharkiv's Youth Park on 20 December 2006, as well as literature, including some containing the ideological principles of the Eurasian Youth Union, based on the non-recognition of Ukraine's statehood and territorial integrity. A criminal investigation had previously been launched over the dismantling of the memorial. The organization had also failed to provide documents for a check to the Kharkiv Regional Department of Justice, over which it had previously received a warning.

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/

Effectively the activity of the Union was banned on the formal grounds of non-observance of the territorial restriction of the activities of a civic organization which does not comply with international standards. Since such activities are carried out by the majority of associations without any sanctions being applied, one can with full justification assume that the application was part of a deliberately policy by the authorities aimed at stopping the activities of the Eurasian Youth Union by any means.

There were no other cases recorded where the activities of associations were banned.

There were also no cases noted where associations were liquidated which would be a violation of freedom of association.

[13] Order of Ukraine's State Committee of Statistics № 365 from 01.10.2007 «On approving instructions for filling in State Statistical Observation form No. 1 – civic organization. «Report on the activities of a civic organization». // Legislation for organizations of civic society. Electronic Bulletin, No. 10, October 2007 http://www.ucipr.kiev.ua.

3.2. PARTICIPATION IN ASSOCIATIONS: JOINING, SANCTIONS FOR PARTICIPATION, FORCED MEMBERSHIP

No cases were observed during the year of people being forced to join associations, or of having sanctions applied for taking part in such associations.

However problems do exist with regard to membership of trade unions.

In the course of monitoring observance of the labour rights of public sector employees in Ukraine, it was found that in many institutions there are no protocols for the formation of primary trade unions, nor applications from employees to join these organizations and have their membership fees deducted. An employee is automatically added to one of the trade unions from the day the employment commences, and membership fees are changed. There is thus often no voluntary membership of a trade union.

Cases also remain common of representatives of independent trade unions being persecuted by the administration of an enterprise.

On 12 December 2007 the Head of the primary trade union of the Kyiv local trade union «Defence of labour», electrical appliance technician Volodymyr Demyan was dismissed from the limited liability company «Metro Cash and Carry Ukraine», as a result of his trade union activities. This event came after a long battle following his creation of a trade union organization on 19 February 2007. During the year, according to reports from the trade union, they constantly tried to dismiss him, the security people threatened physical reprisals and the administration constantly carried out surveillance over his activities and exerted pressure in other ways. After his dismissal, the conflict heightened, and a number of pickets were held, and an application lodged with the court to have his job reinstated.[14] It was only after the intervention of the Moscow office of the Global Federation of Trade Unions and private negotiations, that the disputing parties reached an understanding and the trade union representative was reinstated and negotiations began on signing a collective agreement.[15]

4. RECOMMENDATIONS[16]

1. Change the current law «On citizens' associations» by passing a law «On civic associations» 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 via the introduction of a single registration fee;

– 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

[14] More details in Russian can be found here: «Dismissal of labour leader Volodymyr Demyan «Struggle for trade union rights in the TNK network are beginning» http://livasprava.in.ua/index.php?option=com_content&task=view&id=481&Itemid=75; The website of the Kyiv Local Trade Union «Defence of Labour» http://www.zpworkres.narod.ru.

[15] Press release: The Development of Social Dialogue and Social Partnership in the company Metro Cash and Carry, Ukraine http://www.uni-cis.ru/news2.php?nid=427.

[16] 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.

– 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 braches 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.

2. 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.

3. Remove Article 186-5 which establishes liability for the activity of unregistered civic organizations from the Code of Administrative Offences

4. Sign and ratify the Convention on recognizing the legal rights of an international nongovernmental organization (ETS № 124), which came into forced on 1 January 1991.

5. 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.

6. 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.

7. 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.

8. 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

9. 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 RESIDENCE[1]

The situation with freedom of movement did not change significantly in 2007. Problem areas remain the move from a system of «propiska» to registration, with a lot of procedure not yet agreed. Problems encountered by homeless people are still unresolved. For example, there has been no resolution on making it possible in all areas for them to register their main place of abode.

1. FREEDOM OF MOVEMENT

Restrictions on freedom of movement can be established with regard to movement within the country, and with international movement (travel from or to Ukraine).

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.

In 2007 the Cabinet of Ministers cancelled[2] the rules for buying named train tickets exclusively on the basis of passports or other identification documents. This step gives more freedom for movement to people and has also removed the possibility for the State to follow people's movements.

Serious difficulties with movement were created by the problem with issuing passports. From May until November, it was virtually impossible to get a passport for travel abroad due to artificially created obstacles.[3] Over 60 thousand people waited in line for such passports and could therefore not travel abroad, this seriously restricting their freedom of movement.

At the end of the year the situation to some extent normalized although issue of passports remains unacceptable, with it taking too long and requiring that people overcome a lot of bureaucratic procedures. It is also uncoordinated which leads to numerous abuses and corruption in this sphere.

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.[4]

Conflict arises periodically over refusals by Ukraine to admit certain foreign nationals.

The most notorious of such cases was the ban on entry to Ukraine of Russian Federation State Duma Deputy Zatulin in 2006, which ended in 2007. Zatulin lodged a court appeal about this action by the SBU [Security Service]. The High Administrative Court in Ukraine [HACU] on 16 May 2007 issued a ruling which rejected Zatulin's cassation appeal. However Zatulin in turn lodged an application with the European Court of Human Rights against Ukraine although it is hardly likely to succeed.

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[1] By Volodymyr Yavorsky, UHHRU

[2] Cabinet of Ministers Resolution № 252 from 19 March 1997 «On the procedure for serving citizens on trains»; Article 2.2.2 of the Order of the Ministry of Transport № 297 from 28 July 1998 «On approving Rules for carrying passengers, baggage, freight and post by trains in Ukraine»

[3] More on this in the section on the right to privacy.

[4] More information can be found in the report «Human Rights in Ukraine – 2006»

THE ZATULIN CASE (EXCERPTS FROM THE HACU RULING)

In September 2006 Mr. Zatulin lodged a claim with the court against the SBU, the Central Department of the SBU in the Autonomous Republic of the Crimea, and the Head of the Central Department Mr. O. He called for the decision of 3 June 2006 to ban Zatulin's entry to Ukraine to be declared unlawful, for the instructions to the State Border Guard on preventing his entry to be revoked, and for a statement to be placed in official media outlets regarding the decision to revoke the ban on his entry into the country.

The said decision had been to prohibit him from entering Ukrainian territory for a year, beginning on 3 June 2008. It was made on the grounds that his speeches and statements in the mass media, at press conferences and rallies in Ukraine create conditions for unlawful actions connected with encroachments upon Ukraine's territorial integrity and inviolability, incitement to national enmity and represent interference in Ukraine's internal affairs. Mr. Zatulin claimed that such conclusions were far–fetched and drawn without justification by the respondents in violation of Ukraine's legislation and international law.

The Shevchenkivsky District Court in Kyiv on 5 October 2006 rejected the claimant's application, with this upheld on 30 November 2006 by the Kyiv Court of Appeal.

The courts established that the claimant had been prohibited from entering Ukraine for one year on the basis of Article 25 § 2.2 of the Law «On the legal status of foreign nationals and stateless persons» from which it follows that entry of foreign nationals into Ukraine may be prohibited in the interests of Ukraine's security. The respondents justified their conclusion on the grounds that the claimant, while in Ukraine, had held press conferences as well as spoken at rallies where he expressed his views regarding the fact that US armed forces were on Ukrainian territory, about Ukraine's state policy in the Crimea, about the possibility of holding «Sea Breeze 2006» military exercises with the participation of NATO ships, and had given a negative assessment of the internal and external policy of the country's leadership. From the claimant's addresses, the respondents had concluded that this was flagrant interference in Ukraine's internal affairs which could create the preconditions for unlawful manifestations linked with the unlawful actions connected with encroachments upon Ukraine's territorial integrity and inviolability, as well as to incitement to national enmity.

In their cassation appeal, Zatulin and his representative asked that the court ruling be revoked and that his claim be allowed.

Article 3 of the Law «On the fundamental principles of Ukraine's national security» states that national security covers the person and citizen, their constitutional rights and freedoms; society – its spiritual, moral and ethical, cultural, historical, intellectual and material values; the information realm and natural environment and natural resources; the State – its constitutional order, sovereignty, territorial integrity and inviolability. In accordance with Article 7 of the Law, at the present stage the main real and potential threats to Ukraine's national security, and social stability are the possibility of conflict arising in the area of inter–ethnic and inter–religious relations, radicalism and manifestations of extremism in the activities of associations of national minorities and religious communities, the threats of demonstrations of separatism in some regions of Ukraine.

In accordance with Article 25 § 2 of the Law «On the legal status of foreign nationals and stateless persons», entry into the country may be refused to foreign nationals and stateless persons in the interests of national security or to protect public order.

Article 2 § 1 of the Law «On the Security Service of Ukraine», the Security Service is vested within the limitations stipulated by legislation, with the authority to defend State sovereignty, the constitutional order, territorial integrity, and Ukraine's economic, scientific and technical, and defence potential, the legitimate interests of the State and the rights of citizens from the reconnaissance or subversive activities of foreign security services, encroachments from organizations, groups, or individuals, as well as ensuring protection of State secrets.

…Thus the rulings of the first instance and appeal courts were correct in banning Zatulin's entry to Ukraine, the respondents acted within the limits of their authority and in a manner allowed for by domestic and international legislation.

…Governed by Articles 223, 224 and 231 of the Code of Administrative Proceedings, the panel of judges rejected the cassation appeal brought by Zatulin and his representative.

The number of Ukrainian nationals travelling abroad, as well that of foreign nationals entering Ukraine increases each year.

Tourist movement[5]

	Number of Ukrainian nationals travelling abroad[218]	**Number of foreign nationals who visited Ukraine in total[219]**	**Number of tourists served by the Ukrainian tourist industry in total[220]**	**From the total number of tourists:**		
				foreign	Ukrainian tourists who travelled abroad	Domestic tourists
2000	13422320	6430940	2013998	377871	285353	1350774
2001	14849033	9174166	2175090	416186	271281	1487623
2002	14729444	10516665	2265317	417729	302632	1544956
2003	14794932	12513883	2856983	590641	344 332	1922010
2004	15487571	15629213	1890370	436311	441798	1012261
2005	16453704	17630760	1825649	326389	566942	932318
2006	16875256	18935775	2206498	299125	868228	1039145
2007	17334653	23122157				

Entry of foreign nationals into Ukraine in 2007i[9]

	Number of foreign nationals who entered Ukraine in total*	**Of these, for the following reasons:**						
		work-related, business or diplomatic	tourism	private	studies	employment	immigration	Cultural and sport exchange, religious, other
Total	**23122157**	**908964**	**1444962**	**20563044**	**49481**	**7814**	**24032**	**123860**

2. FREEDOM OF CHOICE OF 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»][10].

The problems are on two levels:

– The exercising of many rights and freedoms continues to depend on ones official place of registration;

– Citizens who do not have their own homes, and the number of such people 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.

[5] Website of the State Committee of Statistics http://www.ukrstat.gov.ua/operativ/operativ2007/tyr/tyr_u/arh_vig.html
[6] Not including one-day visitors (according to figures from the Administration of the State Border Guard Service of Ukraine).
[7] Not including one-day visitors (according to figures from the Administration of the State Border Guard Service of Ukraine).
[8] According to the State Service for Tourism and Tourist Resorts.
[9] According to figures from the Administration of the State Border Guard Service of Ukraine. Available at: http://www.ukrstat.gov.ua/operativ/operativ2007/tyr/tyr_u/arh_vig.html.
[10] This was a permission-based system of registration, which the Constitutional Court in 2001 declared was in contravention of the Constitution of Ukraine (translator)

The first 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 interests of public order. However such registration should not entail the difficulties and inconveniences which people encounter at present.

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

3. THE RIGHTS OF THE HOMELESS

There remain problems with protecting the rights of the home. 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.[11]

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 programmes.

Furthermore this legislation has only been implemented in some areas. According to government figures, at the present time only 44 social institutions for the homeless are functioning, with 13 of these not State-owned. However just these 44 centres have provided their services to 10 thousand people (approximately 227 people a year per centre)/[12]

There are also only 22 centres of social and psychological assistance which provide shelter, psychological, information, legal and medical assistance, food and give help in organizing documents to individuals and families with children in difficulty. This means that there are not even as many as there are regional centres.

Although progress is evident: according to government figures as of 1 January 2006 there were only 5 night shelters functioning with places for only 168 people, where in 2005 1,893 people stayed, and 8 places specially allocated where services were provided to the homeless with 220 places, and a turnover over 1,762 people.[13]

In Kyiv, as part of a joint Ukrainian – Dutch project, a social adaptation centre was set up for homeless women with 80 places. However in 2007 it was decided to close this. The building is n an at-

[11] 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, No. 31»; Resolution No. 404 of the Cabinet of Ministers from 30 March 2006 «On approving a standard provision on a registration centre for the Homeless and Order No. 98 of the Ministry of Employment and Social Policy from 3 April 2006 N 98 «On approving standard provisions on social hotels».

[12] Concept strategy for social protection of the homeless, approved by Instruction of the Cabinet of Ministers from 17 April 2008, № 639-

[13] Fifth Periodic Report concerning rights covered by Articles 1 – 5 of the International Covenant on Economic, Social and Cultural Rights E/C12/UKR/5 14 August 2006. Item 285.

tractive location and was reconstructed using project funding. The Kyiv City State Administration has now decided to change the designated purpose of the building and obviously sell it for no small amount.

A Decision by the National Security and Defence Council on 18 January 2006 «On measures to improve the fight against infectious diseases», brought into force through a Presidential Decree from 14 February 2006 № 132, instructions are given to the Ministry of Employment, the Ministries of Finance and of the Economy, the Council of Ministers of the Autonomous Republic of the Crimea, the regional, Kyiv and Sevastopol State administrations during 2006 to carry out measures to ensure the creation and functioning of institutions of social protection for homeless people. However the development of a network of such institutions is being hampered due to inadequate financing and the decisions of the authorities are not being implemented. To carry out this work, according to the estimates of the local authorities 99 extra institutions are needed in the near future, of which 29 are registration centres for the homeless, 48 night shelters 19 reintegration centres and three social hotels, with a total number of 2,107 places.[14]

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. Broaden the grounds for registration (as was done, for example, in the Law on the electoral register) and also review legislation in order to prevent the possibility of exercising ones rights being contingent on ones place of registration. The procedure for cancelling registration in private flats should also be simplified, and the inter-dependence of the fact of registration with the right to the given flat in the State and communal accommodation funds should be eliminated. Without these measures, it will be impossible to create a realistic system of registration.

6. 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).

7. 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.

8. Abolish the practice of restricting travel abroad for people having access to state secrets.

[14] Concept strategy for social protection of the homeless, approved by Instruction of the Cabinet of Ministers from 17 April 2008, № 639.

XII. SOME ASPECTS OF THE RIGHT TO PROTECTION FROM DISCRIMINATION AND THE STRUGGLE AGAINST RACISM AND XENOPHOBIA[1]

In this section we consider the problem of discrimination on the grounds of race, skin colour, ethnic origin and language. Religious discrimination is addressed in the section on freedom of conscience. Particular attention is given to the significant increase in racism and xenophobia during 2007.

The situation has in no way changed for the better since the human rights organizations' reports beginning from 2004, and the summary of the problems regarding discrimination and inequality from «Human Rights in Ukraine – 2006»[2].» remains current. There were no changes to legislation in 2007 and none of the problems identified in earlier reports were resolved. The analysis, therefore, and recommendations given in the subsection «Legal mechanisms for ensuring protection from discrimination and inequality»[3] regarding language issues continue to be relevant. The situation as regards sexual minorities also saw no change in2007.

We would note at the outset that there is virtually no direct, or law-generated, discrimination. There is, however indirect discrimination. The most widespread social discrimination is according to age and state of health.

In 2007 racially-motivated violence became a considerable problem, with relations between different ethnic and linguistic groups becoming more fraught. This requires analysis, development and implementation of measures of a special nature for fighting racism and xenophobia.

1. 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.[4]

[1] Prepared by Yevhen Zakharov, Co-Chair of KHPG. Material has been used of Viacheslav Likhachev, Head of the xenophobia monitoring programme of the Congress of National Communities of Ukraine and by Oleh Martynenko, Doctor of Law, from the Ministry of Internal Affairs.
[2] Human Rights in Ukraine – 2006, Kharkiv, Prava Ludyny, 2007
[3] Ibid.
[4] European Commission against Racism and Intolerance: Third Report on Ukraine, Strasbourg: CRI(2008)4, 2008, п.117.

According to information from the Congress of National Communities of Ukraine [CNCU], these 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 already approximately 90 victims, with five of them killed; while in the first tree months of 2008 45 people suffered such attacks with 2 fatalities.[5] 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, the Ministry of Internal Affairs [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 Eternal 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.[6]

In Ukraine the most active and aggressive are considered to be the far-right groups from the so-called «White Power – Skinhead Spectrum», the Ukrainian branch of the worldwide extremist network «Blood and Honour», and 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, Zaporizhya, Lviv, Sevastopol, Chernihiv and the Crimea. Whereas in Russia there are tens of thousands within the skinhead movement, according to preliminary figures from the Ministry of Internal Affairs (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.[7]

It was in 2005 that closed festivals of neo-Nazi groups from Ukraine and Russia became regular events in Lviv and Kharkiv. They are organized unofficially by the Ukrainian National Labour Party with overtly racist songs. The organization «Patriot of Ukraine» which in 2007 held a series of torch marches in Kyiv and Kharkiv, using xenophobic and racist slogans, regularly organizes so-called military «training» for its activists at abandoned industrial sites, in forest camps and tourist bases. There are no less than 30 permanent websites of a neo-Nazi or nationalist nature (Radical Ukrainian Nationalism, the real patriots' site, Nachtigal, Blood & Honour Ukraine and others.[8].

At the same time, 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 has doubled – from 604 in 2002 to 1178 in 2007. 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 %. The greatest friction is seen in the Crimea, Kyiv and the Odessa, Donetsk, Lviv and Kharkiv regions[9]. 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.

The rise in racially-motivated crime forced the authorities to react. 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 MIA drew up an «MIA Action Plan on countering racism for the period up till 2009».[10]. Since the beginning of 2008 special criminal investigation units for fighting racially-motivated violent crimes have been

[5] Viacheslav Likhachev, Xenophobia in Ukraine. Material from monitoring, 2007-2008, Kyiv
[6] http://www.rbc.ua/rus/newsline/2008/04/02/340999.shtml ; http://www.ridnews.com/content/view/809/77/
[7] Oleh Martynenko: Racism and xenophobia in Ukraine: new challenges in human rights protection http://www.khpg.org.ua/en/index.php?id=1212543971
[8] ibid
[9] ibid
[10] http://www.mvs.gov.ua/mvs/control/main/uk/publish/article/83652

functioning in Kyiv, Odessa, Lviv and Luhansk The first court sentences under Article 161 of the Criminal Code (violation of equality on the basis of race, ethnic origin or attitude to religion). Whereas 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), in the first four months of 2008 four sentences were handed down under this article for assaults on foreigners.

On the other hand 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 basis of racial, national or religious enmity or discord.».

Overall from 2005-2007 only seven criminal investigations were initiated under Article 161. One of the reasons is that the victims of racist attacks do not report such attacks as they don't expect to receive real protection. Another is the unsuccessful, in our view, wording of the crime which in many cases seriously complicates proving guilt. Article 161 punishes for «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 imposition of direct or indirect privileges on the basis of race, skin colour, political, religious or other convictions, gender, ethnic or social origin, property, place of residence, or on the basis of language or other grounds».

It is firstly extremely difficult to prove intent to commit these acts, especially when dealing with publications of a xenophobic nature. In the second place, one cannot use this article to prosecute in cases which unfortunately arise quite frequently when the denigration or insult to ethnic honour and dignity is not against a specific person, but against an ethnic group or people as a whole. Criminologists are divided with respect to the possibility of applying Article 161 in such cases. For example, one theoretical-practical commentary to the Criminal Code states that «in committing a crime offending the feelings of an individual in connection with his nationality or religious convictions, the culprit plans in this way to denigrate the nation as a whole. Therefore the manifestation of only personal animosity to a representative of another nation (race) – the reluctance to establish close relations, accept the rites of worship of another religion and become friendly – does not establish the elements of the crime foreseen in Article 161.»[11]. In another commentary we read an opposite view: «denigration of ethnic honour and dignity of citizens takes place if there is deliberate offence to a specific individual in connection with their belonging to one or other nation.»[12].

In our view, it is not possible to apply Article 161 to an ethnic group or nation since the article refers to «deliberate actions aimed at ... denigrating ethnic honour and dignity, or causing offence» specifically to individual citizens. .Furthermore, the very title is about citizens, and the article is in Section V of the Special Part of the Criminal Code «Crimes against the electoral, labour and other personal human rights and civil liberties». The present version of the Code does not allow at all for attacks on the honour and dignity of ethnic groups, races, peoples and ethnic groups. Articles therefore need to be added to the Code with the corresponding elements of crimes, not forgetting however the need for proportionality with respect to intrusion into freedom of expression.

The fact that foreign nationals are not sure that complaints about unlawful actions against them will be thoroughly examined and recognized is linked with discriminatory attitudes towards them by law enforcement officers. There is, for example, the problem of ethnic profiling, when police officers check identification papers of foreigners and Ukrainian citizens with a non-Slavonic appearance. This is what a Kharkiv resident, Viacheslav Manukian, wrote in a statement to the Kharkiv Human Rights Protection Group:

> I am compelled to turn to you over the fact that for a long time the Kharkiv police have been flagrantly violating my human and civil rights as set down in the Constitution, laws, as well as in international legal documents on human rights.

[11] Theoretical-practical commentary to the Criminal Code. – 4th edition, revised and supplemented // Y.V. Aleksandrov, P.P. Andrushko, V.I. Antipov and others. Kyiv: ACK, 2005, p. 300.
[12] Theoretical-practical commentary to the Ukrainian Criminal Code. In three volumes. Volume 2: Special Part (Articles 109-254) / P.P. Andrushko, T.M. Arsenyuk, O.F. Bantyshev and others. – K.: Forum, 2005, p. 164.

> I am regularly stopped for no reason by police officers in city streets and particularly in the metro. Since there are no grounds, reasons or causes for systematically «checking my identity», I have every justification for assuming that this behaviour is linked to my ethnic origin and my appearance. Such checks occur every month, sometimes twice or even three times a month. They have not once ended in anything but a formal excuse that some measures were being carried out. In response to one of my complaints I was told directly in writing that I had been stopped because my characteristic appearance elicits the need in police officers to check the «legality of my being on Ukrainian territory and my citizenship». Despite my numerous complaints at this racist behaviour by the police, I continue to be stopped in the metro and on the street.
>
> Such checks, based on nothing but racial prejudice and possibly on illegal orders and instructions are, as far as I have observed, inflicted specifically on people of «foreign appearance», although the Ukrainian nation includes people of all nationalities.
>
> I would ask you to pay attention to the practice of ethnic profiling – unlawful checking of documents and stopping people based solely on ethnic grounds.

Mr. Manukian filed a civil law suit against the law enforcement agencies in the Kharkiv District Administrative Court. At first instance level the claim was rejected. The appeal proceedings are continuing.

Foreign nationals have also contacted KHPG by telephone complaining that the police regularly demand money, «gifts», etc, from them. These complaints have been anonymous since the victims refused to make the necessary official statements for fear of reprisals. KHPG carried out an anonymous questionnaire among foreign students studying in Kharkiv, the results of which were staggering. Out of 68 people asked, only two had never been stopped by police officers, and 49 had been detained even when they had documents with them. 34 foreign students said that they had only freed themselves from the «close attention» of the police officers by paying money (different amounts were named, from 20 UAH to 60 dollars), buying beer or coffer, «giving them» certain items, etc. That means that 50 % of the respondents attested to police officers having behaved in a corrupt fashion towards them. These are shocking figures which the law enforcement agencies should certainly think about and take appropriate measures to stop such shameful practice.

It is typical that the vast majority of those surveyed had not even approached any authorities for help since they believed that they wouldn't get any. And they have all grounds for thinking so since in the case of the 20 students who did complain about being unlawfully detained to their embassy, to the dean of their institute or to the police indeed received no assistance.[13]

If discrimination against the Roma, immigrants from the Caucuses, Asia and Africa increased significantly in 2007, 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 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 gradual reduction in the anti-Semitic activities of the Inter-regional 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

[13] Georgy Kobzar: «Many people think that this is normal» http://www.khpg.org/index.php?id=1215648060

third (the period of the election campaign) and 75 in the fourth. This reduction continued through the first months of 2007. 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 licence, the closing of several branches have 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. 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. «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. One half the Roma are able to eat each day. 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 on 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.[14]

2. THE SITUATION FOR THE CRIMEAN TATARS

Discrimination towards the Crimean Tatars increased noticeably in 2007. 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.[15]. 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. Sometimes conflict over land sites or everyday rows turn into mass inter-ethnic confrontations with a large number of participants on each side and a large number of people hurt.

The law signed on 30 January 2007 by the President «On amendments to some legislative acts of Ukraine on increasing liability for squatters occupying land sites» allows for a heightening of ad-

[14] European Commission against Racism and Intolerance: Third Report on Ukraine, Strasbourg: CRI(2008)4, 2008, 65-83.
[15] «Voice of the Crimea», № 47, 16 November 2007

ministrative liability and the introduction of criminal liability for occupying land and building on it. In the Crimea this law began being applied against the Crimean Tatars after the end of the holiday season, at the beginning of November.

On 1 November there was a clash in Simferopol between representatives of the construction firm «Olvi-Crimea» which was laying claim to an area of land of 2.6 hectares in order to build a residential block, and the Crimean Tatars who had seized this piece of land and built twenty temporary buildings. Several hundred people on each side were involved in the confrontation and it was only the intervention of the police that averted a mass brawl. The Crimean Tatars, moreover, complained about the behaviour of the police, alleging that the latter had taken part in beating up Crimean Tatars. Several dozen men, including police officers, received injuries. It should by noted that the Crimean Tatars at the beginning of 2006 held an indefinite picket against what they believed to be the unlawful decision by the Simferopol City Council to hand over the land site to «Olvi-Crimea». The Crimean Prosecutor protested against the ruling handed down by the court in favour of the firm and lodged an application with the court to have the City Council's decision declared unlawful.

On 6 November a special police operation was carried out against Crimean Tatars on Ai-Petri. In the morning, up to a thousand police officers, military service men from the internal military forces, and the «Berkut» unit, together with technology and arms carriers. They demolished a building belonging to a private businessman Y. Mukhatayev, on the basis of a court warrant allowing the demolition, and another seven unfinished buildings and the cafй-bar «Eden» which there had been no court order to demolish. There were no more than 40 Crimean Tatars; they tried to stop the bulldozers, but were brutally beaten and subjected to special methods. Seven Crimean Tatars were hospitalized with medium severity injuries, one of whom had a bullet wound in his stomach. The police detained 28 Crimean Tatars and 23 had protocols drawn up on administrative offences under Article 185 of the Code of Administrative Offences (persistent non-compliance with a legitimate instruction or demand from the police). Following a ruling from the Yalta Court, 18 of them received administrative arrest of between 3 and 13 days. Five were fined.

Crimean Tatars asserted that the bullet wound was inflicted by the police. The fate of the criminal investigation initiated over the wound is not known.

In response Crimean Tatars held a number of mass events demanding an independent enquiry into the behaviour of the Crimean police and the dismissal and punishment of its head Anatoly Mohylyov.

We should also point out the long-standing problem over the failure to allocate land to the Crimean Tatars for the construction of a Soborna [Assembly] Mosque. The Crimean Tatars have been trying in vain to get land for the Mosque for ten years already. On 30 November deputies of the Simferopol City Council revoked their own decision passed in June 2004 to allocate land on the outskirts of the city, after all the necessary documents had been gathered and the design drawn up and agreed. Up till 2004 the Crimean Tatars had had three applications for land sites turned down and the land had been used for other purposes.

The statement issued on 6 November by the Mejilis of the Crimean Tatar people asserts among other things: «In a situation where the Ukrainian government is openly ignoring the need to reinstate the rights of the Crimean Tatar people, numerous problems continue to accumulate and deepen regarding the return and settlement of the indigenous people in their native land – the Crimea. This includes the allocation of land; employment; the return of places of worship; education in their native language; the development of their national culture; the restoration of historical names, and many other issues. Such State policy is perceived by the authorities of the Autonomous Republic of the Crimea as the leadership in intensifying discrimination against the Crimean Tatars. Their numerous appeals receive no positive reaction from the executive and representative bodies of power in the Crimea and the agreements reached between the Mejilis of the Crimean Tatar People with the autonomy's leaders on problem situations are not fulfilled. For example, the issue of allocation of land sites for the construction of housing and places of worship has not been resolved.» It is hard not to agree with this assessment of the situation for the Crimean Tatars.

3. 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. Improve the procedure for the gathering of information by the law enforcement agencies and the courts regarding hate crimes. This includes statistics on the use of Article 67 § 1.3 of the Criminal Code.

10. The MIA should carry out generalization of investigative operations and other action on prevention and investigation of crime in order to eliminate discrimination on the basis of ethnic origin or other factors.

11. 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. THE RIGHT TO FREE ELECTIONS AND TO PARTICIPATE IN REFERENDUMS[1]

In 2007 early parliamentary elections took place, as well as 132 pre-term elections for city, settlement and village heads. Last year Ukrainians also attempted to exercise their right to a nationwide referendum, while in some places representatives of territorial communities initiated local referendums.

In this section we will analyze the trends with regard to safeguarding the right to take part in nationwide and local referendums and to freely elect and be elected to the State authorities and bodies of local self-government.

1. PRE-TERM ELECTIONS TO THE VERKHOVNA RADA (PARLIAMENT)[2]

During the election campaign human rights groups identified infringements both of electoral rights and of other rights linked with the elections.

1.1. RESTRICTIONS TO ELECTORAL RIGHTS AT THE LEGISLATIVE LEVEL

The preparation and holding of the pre-term elections of National Deputies (MPs) took place amidst a fierce political crisis and was made more difficult by the lack of realistic norms in electoral legislation which could ensure appropriate legal regulation for the early parliamentary elections.

The adoption of the needed amendments to the Law on the Elections was made possible only via political deals which regrettably took into account the interests of specific political parties, not of the voters.

For example, the amendments effectively made it impossible for a considerable number of citizens to take part in the voting. Absentee voting papers were cancelled, which is in contravention of the commitments taken by OSCE member States which stipulate that reliable mechanisms must be created for citizens temporarily away from their place of residence to enable them to vote.[3]

Serious problems were also presented for people temporarily outside the country. The State Border Guard Service had to provide electoral commissions with information about such people. Committee of Voters of Ukraine (CVU) experts predicted that this procedure would only confuse and complicate the electoral process and if the norm were enforced, it would restrict the electoral rights of people returning to Ukraine in the last three days before the elections, including even voting day itself, since they would have been taken off the voter lists.[4] CVU considered the norm to be

[1] Prepared by Dementy Byely, Kherson Regional Branch of the Committee of Voters of Ukraine (CVU)
[2] In the preparation of this section, we used CVU monitoring reports on the early parliamentary elections which are available at: http://www.cvu.org.ua.
[3] Existing commitments for democratic elections in OSCE participating States – Warsaw: OSCE – ODIHR, 2003. – p. 17
[4] CVU Report on monitoring the preparation for the pre-term elections of National Deputies of Ukraine from 19 July 2007.

retrograde which made inclusion of people who were abroad on the electoral list significantly more difficult. In order to vote, these Ukrainian nationals had to be registered with a consulate.

Restriction of voters' rights was thus already set in place by norms at legislative legal. During the election came, other serious problems also emerged of an organizational nature, with these also causing electoral rights infringements.

1.2. THE MAIN INFRINGEMENTS OF VOTERS' RIGHTS. PARTICULAR FEATURES OF THE PRE-TERM ELECTIONS

According to the OSCE Mission, the early parliamentary elections in Ukraine were conducted mostly in line with international commitments and OSCE and Council of Europe standards. At a press conference in Kyiv on 1 October 2007, Tone Tingsgaard,, the Special Co-ordinator of the short-term election observers said that the elections «confirm an open and competitive environment for the conduct of election processes». She stressed that the constitutional right of citizens to gather and express their will had been respected, and that the Mission considered the elections to have passed peacefully, and that the voting process had been transparent. At the same time she noted that the last amendments to legislation on the elections had had an adverse effect on their running. Of particular concern to the Observer Mission was the low quality of the voter lists, the loss of the right to express their will of people who crossed the border after 1 August, as well as the fact that people were unable to vote with absentee ballot papers. She added that there had also been no legislative possibility for ensuring honest and transparent home vote. However «despite difficult circumstances, these elections were conducted in a positive and professional manner.»[5]

According to the report of the European Network of Election Monitoring Organizations (ENEMO), the pre-term elections in Ukraine were on the whole free of pressure and threats against voters, political parties and their blocs, and in the main complied with international standards.[6] The international observers found infringements concerning adherence to legislative procedure by electoral commissions, campaigning by public officials, problems with the voter lists, etc.

The all-Ukrainian civic organization – the Committee of Voters of Ukraine (CVU), which carried out monitoring of the elections in all regions of the country, concluded that the election campaign had been free, competitive and transparent. CVU did not find significant or systematic violations or cases of pressure on voters, although it did identify other violations.

Summarizing the reports on observing the election campaign, one can highlight three man tendencies in infringements of voters' rights during the early parliamentary elections.

Hundreds of thousands of voters were denied their chance to express their will because they either weren't placed on the voter lists or were unwarrantedly removed from them. Nor was the procedure for checking information about voters organized properly due to the incompetence of the authorities and electoral commissions. The Committee of Voters therefore considers that the elections were not universal

A significant violation was seen in the constant and demonstrative campaigning by public officials at all levels for various political forces which in our view infringed the rights of Ukraine to free expression of their will.

The elections were also marked by violations of other human rights. One should firstly note the mass-scale violations of the labour rights of members of electoral commissions. Over the course of several days, the members of precinct electoral commissions, effectively volunteers from political parties were forced to work around the clock without appropriate pecuniary compensation. For example, voting day for members of the commission, in accordance with legislation, was supposed to begin on Sunday 30 September at 6.14 a.m. with a morning meeting, and conclude on Monday 1 October, in some places even Tuesday 2 October, following the acceptance in constituency electoral commissions of the bulletins and protocols on the vote count.

[5] Ukraine's elections open and competitive but amendments to law of some concern, international observers say http://oscepa.org/News/Media/168-Ukraine%5C's%20elections

[6] Organization of election observers: http://www.electiondog.net/doc.php?lang=rus&docid=3167.

We also saw the content of certain rights being twisted. For example, during the elections, the right to freedom of speech was transformed into the right of participants in the elections to place political advertising or covertly commissioned news items [«jeansa»] in media outlets.

Oleksandr Chekmyshev, Head of the «Equal opportunities» Committee, which carried out nationwide monitoring of the media in August and September 2007, said that a specific feature of the 2007 electoral campaign had been the shift from censorship to commissioning. «Instead of «temnyky», we have «jeansa»[7] The political «jeansa» of 2007 has replaced the «temnyky» of 2004. After all, the voter doesn't receive objective information when, under the guise of real news, s/he is presented with paid advertising material»

He adds that «in coverage of the activities of the participants in the electoral process, there remains a tendency for there to be virtually no objective material, that is, material which the newspaper itself has commissioned, or which reflects the position of its author. With very rare exceptions, articles are «jeans», i.e. covert and paid advertising for political parties, and not a source of objective information, or the personal opinion of the journalists. Essentially the Law on the Elections itself encourages such buyer-orientated behaviour from the local press which turns its editorial policy into that of a leaser letting «vending space» in their newspaper.»[8]

This campaign resulted in the emergency of a serious threat to one of the foundations of democratic society – freedom of speech. «Society does not have a social institution which through mass coverage and refutations can uncover cases of political corruption in pro-regime structures and in business. There is basically a threat in the Ukrainian media of losing their professional calling, just as in the times of «temnyky».[9]

1.3. EXAMPLES OF HUMAN RIGHTS VIOLATIONS DURING THE ELECTION CAMPAIGN AND ON VOTING DAY

1.3.1. The use by public officials, the authorities and bodies of local self-government of administrative resources

The Committee of Voters of Ukraine only recorded isolated cases of pressure or intimidation of voters by public officials, as well as a not major number of cases where representatives of the authorities placed obstructions on carrying out election campaigning. The reduction in such cases is undoubtedly a positive feature.

According to the Donetsk branch of the Bloc of Yulia Tymoshenko [BYuT], it applied to the Donetsk Prosecutor's Office to investigate alleged persecution on political grounds of Senior Police Lieutenant and District Inspector of the Proletarsky Police Station in Donetsk, V. Shebanov. The application stated that on 4 September in non-working hours he had been present at a public rally with Yulia Tymoshenko which aroused displeasure among the management. Immediately after this event, the application asserted, the persecution of Shebanov by the management of the city police had begun. There had been a search carried out, for example, of his working place, and Shebanov himself had been asked for explanations about shortcomings in his work. After this, his official identification document had been taken away.[10]

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[7] «temnyky» were the instructions issued to media outlets under President Kuchma telling them what to cover, and how, and what was to be left without coverage. «In recent times, and especially in connection with the elections, many media experts have expressed concern about the «news items» which are clearly being produced and broadcast, especially on television, for money. The term for such material is «jeansa» (translator)

[8] From a Resume of the results of press monitoring during the pre-term elections in 2007 (August – September)) http://www.prostir-monitor.org/results2007.php?reg=19&period=all&zmi=zvit&typ=all&typ2=p&menu=22&menu2=2

[9] Most of the news features about the participants in the elections were commissioned – monitoring of the Ukrainian media // Interfax-Ukraine – 25 September, 2007 http://www.interfax.com.ua/ua/press-center/press-conference/69093/

[10] Analysis of the electoral campaign for 6-14 September 2007, CVU Monitoring bulletin № 6. 14.09.2007 http://www.cvu.org.ua/?lang=ukr&mid=fp&id=1470&lim_beg=90

Another case was recorded in the Rivne region. The Dubnya branch of the Party of the Regions reported that on in the centre of the city on 25 August 2007 pressure had been brought to bear on their members by the Mayor of Dubnya who represents «Nasha Ukraina» [«Our Ukraine»]. He had allegedly demanded that they stop their campaigning and take away their tent.[11]

In other regions similar isolated incidents were also reported.

The greatest problem related to the use of administrative resources during the pre-term elections, was the fact that public officials from the authorities and bodies of local self-government combined their official duties with their role as leaders of electoral headquarters or parliamentary candidates.

In general, CVU calculates that around one third of the heads and deputy heads of local administrations and bodies of local self-government were formally involved in the electoral campaign on the side of different political forces. Despite numerous statements, the majority of them did not go on leave. And those who announced that they were going on leave, most often continued to carry out their duties.

The following are standard examples of such violations made public by long-term CVU observers in September 2007.

Sevastopol

The Head of the Sevastopol City State Administration [SCSA] S. Kunitsyn (No. 2 on the candidate list of the bloc «URA» – Ukrainian Regional Activists), while on leave, continued to carry out his duties, hold meetings, briefings, take part in official events as the Head of the SCSA (for example, a trip to Moscow), appointed and removed civil servants. He stated at a briefing: «you should all be pleased that while on leave I'm carrying out my duties. Incidentally, many officials in Kyiv are doing the same.»

The Kherson region

After considerable criticism, on 31 August the press service of the finally announced that the Head of the Administration and all heads of district State administrations [DSA] had gone on leave. The CVU did not however find confirmation of this among Instructions of the Head of the Kherson Regional State Administration [RSA] sending his subordinates on leave which are posted on the Administration's official website.

In the newspaper «New Day» No. 33 from 16 August interviews with candidates from the Socialist Party [SPU] who are public officials (the Head of the Beryslavka DSA, Volodymyr Stetsenko, the Deputy Head of the Holoprystansk DSA, Petro Shevtsov, the Head of the Service for Juvenile Affairs for the Kherson RSA Natalya Ivanenko), in which the above-named people explain why people should vote for the Socialist Party. The article has the expressive title: «The socialists are convinced that ...». The article does not say that those people are candidates for National Deputy, only their positions are given. The article was not clearly identified as political advertising.

The Cherkasy region

From 1 September the Head of the RSA O. Cherevko who headed the regional headquarters of Our Ukraine – National Self-Defence and the heads of the DSA heading district headquarters went on leave. However, while on leave, Cherevko together with the DSA Heads «on leave» held a travelling gathering of the Regional State Administration in the town settlement Mankivka.[12]

Such activities by public officials led to the use of State and communal resources in the electoral campaigns of political parties in power, and merged the image of non-party power with a specific political force. These actions violated the principles of free electoral campaigns, and also influenced the expression of will of the voters. One can cite the following occasions:

[11] The use of administrative resources at the pre-term elections of National Deputies. CVU Monitoring bulletin № 5. 07.09.2007 додаток до http://www.cvu.org.ua/?lang=ukr&mid=fp&id=1461&lim_beg=105
[12] Ibid

Luhansk region

In Slavyanoserbsk (Luhansk region), a rally was held on the central square with the use of flags, songs and mottos of the Party of the Regions. During working hours employees of organizations of the district centre (including civil servants) were sent by order to the rally.

As the Stakhaniv «Telegazeta» reported, «The first deputy of the Mayor of Stakhaniv, who is also the head of the city branch of the Party of the Regions Serhiy Hladkykh, spoke during a rally to mark the Day of the Miner about the need as he put it to uphold the reforms begun by the government of Viktor Yanukovych. The event dedicated to a professional festive and organized from the city budget, was effectively turned into a pre-election rally for the Party of the Regions.

Kherson region

On 21 and 22 August the Head of the Kherson Regional State Administration B.V. Silenkov presented the residents of Kakhivka and Nova Kakhivka with President Yushchenko's social initiatives. An advertisement about the event with the participation of the Head of the RSA was printed in orange. After the presentation, campaigning material from the bloc «Our Ukraine – National Self-Defence» were handed out.[13]

We should note attempts by the Central Election Commission [CEC] to put an end to such covert pre-election campaigning by those involved in the election process.

The CEC reacted to pre-election campaigning by President Yushchenko which took place on 15 September 2007 in Lviv. In his address during a «People's viche», the President used the following words: «I would ask you to support my team – «Our Ukraine – National Self-Defence». I am convinced that as President and citizen, I have the right to make this request since it is precisely with this force – patriots and professionals which is capable of effectively helping me to implement our plans». The CEC issued a judgment on 22 September 2007 № 471 found the actions of Ukraine's President V.A. Yushchenko to have violated the electoral rights of citizens, the rights and legitimate interests of participants in the electoral process, and ordered Ukraine's President V.A. Yushchenko to refrain from participating in pre-election campaigning during the pre-election campaign for the pre-term elections of National Deputies of Ukraine on 30 September 2007.

1.3.2. Violation of the principle of universality of the elections

A considerable number of Ukrainian citizens were deprived of the right to vote in the elections due to the unprecedented poor quality of the voter lists; the unsatisfactory work of the working groups on voter records, and the electoral commissions on drawing up and checking voter lists, as well as in the lack of a developed mechanism for border guard officers to record information about Ukrainian nationals who had gone abroad and then returned. Such problems were identified in all regions of Ukraine.

One can name the following reasons for these problems:

The voter lists taken as the basis already contained numerous shortcomings. These were the lists which had been used during the 2006 parliamentary elections, although in certain cases the 2004 lists (!) were used. This meant that the shortcomings from the 2006 lists were repeated in 2007. Information began emerging from many regions on the eve of voting that the «new» lists had not retained the corrections made by voters themselves during the 2006 elections.

There was a lack of coordination, efficiency and a single format for the work of State structures. Information from many of these structures, for example, bodies of the Ministry of Internal Affairs, State Registrar offices, military registration offices, reached the working groups on voter records belatedly. Furthermore the information from different bodies often came in different formats which made processing the data extremely difficult. For example, the records from passport offices are kept on paper making the information as a rule little suited for processing by the working groups. There simply was no single system for a computerized exchange of information which also presented obstacles to establishing the lists.

[13] Ibid.

The fact that personnel at local level were not ready for innovations in collecting data caused additional problems with the voters' lists. Considerable problems in forming the lists were created by the ill-considered attempt to computerize the process for checking the lists modelled on the electronic register of voters. The use of software which had not been properly tested, as well as the inadequate qualification level of the technical workers (who, due to lack of time, did not received the proper training, when added together led to systematic distortions of the lists in some constituencies. As a result of all these problems arising during work on the lists, the voter lists had many varied inaccuracies with no indication of the year of birth or no full address, (the number of the apartment block or flat not being given), and people were either not included on the voter lists, or included twice.

The working groups on voter records, and later also the electoral commissions, proved unable to adequately make amendments to the voter lists. This affected entire groups of the population: those who had only recently turned 18; students in their first year at higher academic institutes; as well as people who had recently changed their last name, or their place of registration.

The State Border Guard did not cope with the task it had been given and as a result the information which it passed to the electoral commissions was not satisfactory. On the basis of lists provided by the border guards, 570 thousand people were removed from the voter lists, although a considerable percentage of these people had returned to Ukraine as much as a month before the elections. The rights of several hundred thousand Ukrainian citizens were thus violated.[14]

As well as the poor quality of the voter lists, CVU also identified other problems linked with the organization of the elections, for example, the lack of ballot papers at some special polling stations, with this also depriving some voters of the chance to vote.

Most of the above-mentioned reasons were caused in the first instance with the inability of the authorities and volunteers from political parties in the electoral commissions to appropriate implement the new norms of electoral legislation on drawing up the electoral list.

We must state that the wish of the legislators to avoid vote-rigging by making the procedures for preparing and checking the voter lists more complicated, ended up with the authorities being unable to ensure the rights of hundreds of thousands of voters to take part in the voting.

The following are typical examples of infringements and problems identified regarding participation by voters on the eve of voting day.

Kyiv region

In Vyshneva, 11 streets ad hostels of a milk factory, involved more than 600 voters, were not added to the list at polling station № 72.

Lviv region

In Sokal, Territorial Electoral District [TED] No. 118, the polling stations received old voter lists. None of those voting for the first time were included, and there were also names of people who had died. In the hostels attached to the Lviv Ivan Franko National University (TED No. 112), the electoral list contained the names of fifth-year students who had left the hostel. Students from other regions were included on the voter lists twice – at home and at the student hostel.

Odessa region

In the Suvorovsky district of Odessa TED No. 132, a lot of young people aged between 18 and 20 were not included on the list; in TED № 132, polling station № 44: 5 buildings from the sector of private housing were not included; TED № 132, polling station № 151, which includes 5 hostels attached to the Odessa Mechnikov National University did not have approximately a third of the students from the hostels on their list.

[14] CVU speaks of the first problems with voting in the pre-term elections. CVU Press release http://www.cvu.org.ua/?lang=ukr&mid=fp&id=1486&lim_beg=75

Kherson region

TED № 187: The village of Novourkrainka, Skadovsky district. There are 400 voters in the village. 170 of them were not included on the list, while there were the names of people who had died a long time before.

TED № 187: Polling stations № 121 and 122 ascertained that 900 voters from one village (Velyki Kopani) had been erroneously recorded as being from the village Dobrosillya. This was due to a technical error when inputting the information and the situation was rectified.

Khmelnytsky region

The working groups on voter records based the voter lists on those used in 2004 for the first round of voting in the Presidential elections. The lists did not therefore contain a part of the streets, and buildings housing up to 400 people (Starokostyantynivske shosse 9 in the town of Shepetivka).

Cherkasy region

In the lists of polling station No. 14 of TED № 199 (Cherkasy) for one of the hostels there were 500 names of people who had already graduated, while the list did not contain the names of 250 students who had begun living in the hostel that year.

The nine-storey multi-apartment blocks № № 71-79 on Gagarin St in Cherkasy were «forgotten about», with this becoming known thanks to the CVU helpline and vigilance of voters[15]

On voting day problems with voter lists and not being able to vote were on an ever greater scale. The following are standard cases recorded by CVU observers throughout the country on voting day.[16]. For convenience, we have systematized the problems which led to voters being deprived of their right to take part in the voting. *«Forgotten» by the authorities when they were drawing up the voter lists*

Dnipropetrovsk region

TED № 28: from 800 to 1500 students who should have voted at polling stations located at the student hostels were not included in the lists. The same number of students who had already graduated were «dead souls» on the list.

Transcarpathian region

160 buildings on Kapushanska St in Uzhhorod were not included in the lists.

Kyiv

TED № 221, polling stations № № 61, 63, 67: approximately 300 voters in each of the stations were not included in the voter lists. There were mainly students' polling stations.

Rivne region

TED № 154, town of Dubno – two blocks (with a total of around 60 flats) on Starobudska St were not included in the lists.

Kherson region

TED № 187, Tsurupynsk. For the second elections in a row a street (Internationalna in the centre of the city) was «mislaid» and not on the voter lists. On the street in the evening of 30 Sep-

[15] Analysis of the election campaign from 19-27 September 2007 and a general assessment of the pre-election campaign at the pre-term elections. CVU Monitoring bulletin № 8 from 28.09.2007 http://www.cvu.org.ua/?lang=ukr&mid=fp&id=1480&lim_beg=90

[16] From press releases on the results of the work of CVU observers on voting day № № 1-4:
http://www.cvu.org.ua/?lang=ukr&mid=fp&id=1484&lim_beg=90,
http://www.cvu.org.ua/?lang=ukr&mid=fp&id=1485&lim_beg=90,
http://www.cvu.org.ua/?lang=ukr&mid=fp&id=1489&lim_beg=75,
http://www.cvu.org.ua/?lang=ukr&mid=fp&id=1491&lim_beg=75

tember there was a large-scale disturbance as voters deprived of their right to vote expressed their indignation.

Khmelnytsky district

A crowd of voters who had not been put on the list gathering near the building housing the District Electoral Commission [DEC], demanding that they be given the chance to vote.

Cherkasy region

TED № 205, polling station № 2 (Uman): Around 500 students living the hostel were not included on the voter list. There were 2,000 voters in all at the polling station.

1.3.3. Problems of voters who left the country on the eve of the voting

Dnipropetrovsk region

People came with complaints about the voter lists to the DEC from the entire region, but especially those from big towns. The overwhelming majority complained of having been removed from the list as the result of information received from the Border Guard service.

Donetsk region

The Donetsk City Mayor Oleksandr Lukyanchenko at his polling station № 3 (TED № 39), together with journalists, was unable to vote. His name had been removed from the voter list on the basis of information from the State Border Guard Service although he had received an invitation to come and vote. At the beginning of September Lukyanchenko had been abroad, but had returned on 3 September.

TED № 42, Artemivsk: More than 40 complaints were made to various polling stations over voters having been removed from the lists although they had returned to the country long before voting day.

Transcarpathian region

TED № 69, town of Berehovo: Apporximately 50 percent of the voters were removed from the voter lists. A similar situation was seen in other border areas. This occurred due to the border guards not having collected people's card stubs when they returned to Ukraine.

Overall, around the 69th electoral district 16,000 voters were removed from the lists on this basis. Around the 70th electoral district) there were 21 thousand such voters; around No. 67 – 7,500 voters; around the 66th – 6,000. The District Electoral Commission for the 68th electoral district (Mukachevo and the district around it) refused to provide such information.

Ivano-Frankivsk region

TED № 80, poling station № 55, Tysmenytsya. A voter was removed from the voter list according to information from the Border Guard Service despite having returned on 2 September.

TED № 84, polling station № 11, Kolomya. A couple returned to Ukraine on 22 September. The husband was included, but the wife removed from the voter list.

Ternopil region

According to CVU observers, the DEC № 165, in Ternopil received a lot of complaints on voting day from people who had returned from abroad, sometimes a month earlier, but had been excluded from the voter list.

Kharkiv region

TED № 173. On voting day in the DEC a huge queue formed of voters writing complaints over their unlawful removal from the voter lists. In general, almost all the voters who could not find their names on the lists had travelled to Russia in September and had been removed from the lists on the basis of information from the Border Guard Service.

Kherson region

TED № 184, polling station № 113: two voters – husband and wife – arrived at the polling station where they had been on the voter list, but found that their names had been removed on the on the basis of information from the Border Guard Service

Khmelnytsky region

DEC No. 195: 700 people were unable to vote due to information not being provided on time from the Border Guard Service.

Luhansk region

TED № 103, polling station № 26: 906 students from the East Ukrainian National University came to vote having received invitations, yet found that they had been removed from the list.

Kherson region

TED № 184, polling station № 83, Kherson. A voter arrived at the polling station where she had always been on the voter list on voting day. It turned out that she had been removed from the list on the basis of Precinct Electoral Commission Decision № 184 from 20.09.2007 at the submission of the Komsomolsk Department of the Ministry of Internal Affairs.

TED № 184, polling station № 81, Kherson. Two voters were unable to vote since they had been removed from the voter list as deceased on the submission of the working group on voter records.

Not enough ballot papers on voting day

Kyiv region

In the SIZO [pre-trial detention centre] at Bila Tserkva, polling station № 76 – there were 45 voters, but only 17 ballot papers. On 29 September an attempt had been made to solve the problem however the District Electoral Commission did not have spare ballot papers.

Kherson region

TED № 184, polling station № 47: Special (hospital) polling station. 32 ballot papers were issued even though there are 50 voters on the list. The elections could not continue and the members of the commission approached the District Electoral Commission № 184.

TED № 184, polling station № 151, Kherson: The polling station ran out of ballot papers: 116 were received, however there were 126 voters.

TED № 186, polling station № 56, Kakhovka: Special (hospital) polling station. There were not enough ballot papers, and patients were told they would need to go to vote at their own polling stations, according to their place of registration.

Cherkasy region

TED № 199, polling station № 61 – special polling station in a hospital for war veterans. There were 145 voters on the list, yet the polling station received 102 ballot papers. This was despite the fact that the head of the commission had complained of this in plenty of time to the DEC. The shortfall in ballot papers was not rectified and around 40 voters were not able to vote. The veterans were extremely offended at such treatment.

TED № 199, polling station № 124 – special polling station in a maternity hospital: there were around 140 voters on the voter list, yet only 60 ballot papers. The head of the commission sent a complaint to the prosecutor's office.

1.3.4. Problems with voting for those who checked information about themselves in the voter lists on the eve of voting day

Kyiv

TED № 222, polling station № 144: A person who had turned 18 on 23 September applied to the Precinct Electoral Commission to be included on the list. The Commission stated that the person had been added, however on voting day the person's name was not on the list.

Cherkasy region

TED № 202, polling station № 3 (town of Zolotonosha): a Mr. Moreiko who had in advance checked that he was on the voter list, on voting day itself proved not to be there. He is convinced that the lists were changed. He has made a complaint and intends to make an application to the prosecutor's office.

Chernivtsi region

10 voters approached both the CVU and DEC № 207. They had applied to the DEC to be included in the voter lists before 26 September, i.e. in full accordance with the legally established timeframe, yet did not find their names on the voter list. It is clear that the DEC did not register and deal with their application.

Other infringements of electoral rights were also noted, however, in contrast to the above-mentioned, they were not of a systemic nature, but rather isolated incidents.

The pre-term parliamentary elections of 2007 thus continued the tradition set by the 2006 parliamentary elections. They passed on the whole in a democratic and transparent manner, without systematic pressure on voters' expression of will and on those taking part in the electoral process. The most serious infringements were seen in the fact that some voters were prevented from voting due to undemocratic amendments to electoral legislation and the inability of the authorities and electoral commissions to carry out legislative procedures on drawing up and checking voter lists. As a result, there was large-scale infringement of the constitutional principle of the universality of elections during the 2007 parliamentary elections.

2. PRE-TERM ELECTIONS OF CITY, SETTLEMENT AND VILLAGE HEADS

As already mentioned, in 2007 132 pre-term elections were held for city, settlement and village heads. These elections can be divided into two groups.

1) Those called due to a head standing up for personal reasons (illness, accidents, etc). In the majority of cases these elections passed in a calm atmosphere without infringements of voters' rights;

2) The pre-term local elections came about due to a worsening of the socio-political situation in connection with a new surge of redistribution of communal property and land of the territorial communities. The wave of such pre-term elections began at the end of 2006 with scandalous elections in the city of Cherkasy which were accompanied by various infringements and controversial court practice. Most of the attempts to exercise the right to hold local referendums (described in more detail below) can be viewed within this group.

Perhaps the most revealing in this respect were the pre-term elections for the Mayor of Irpin (Kyiv region). On 3 April 2007 deputies of the Irpin City Council adopted a decision to terminate pre-term the powers of the Mayor Myroslava Svystovych. One of the reasons for her dismissal lay in the different approaches taken by the Mayor and by the majority of the deputies to resolving land issues. Despite the fact that on 4 April Myroslava Svystovych lodged an appeal with the court against the decision of the City Council, by 5 April already the Verkhovna Rada had declared the date of new elections. At that moment the legal status of the Verkhovna Rada itself was unclear since the President had just issued his decree dissolving parliament.

On 17 June 2007 the voting took place. Representatives of the Committee of Voters of Ukraine who observed the voting and vote count recorded a number of flagrant violations of electoral legislation which in their view could have influenced the outcome. This included campaigning by public officials of the National University of the State Tax Administration in favour of one of the candidates and probable attempts to influence how students of the university themselves voted. For example, the CVU received information that students of the Tax Academy had been offered 50 UAH for their vote. They apparently had to vote for one of the candidates and use their mobile telephones to photograph the ballot paper with the relevant proof while in the polling booth. The most suspicions regarding the possibility of such violations were aroused by polling station No. 11 (inside

the Tax Academy). Students voted there in groups, holding their mobile telephones in their hands and after voting headed off for the faculty of the tax police which the security guards did not allow outsiders to enter.

The Irpin city territorial electoral commission through its own unlawful decisions made the work of observers considerably more difficult and effectively provoked the declaration of results invalid at some polling stations.

For examples, on 6 June 2007, the territorial electoral commission passed an unprecedented decision stipulating that observers on voting day and during the vote count must keep at least 2 metres away from members of the precinct commissions. And although on voting day the territorial commission checked this decision and recommended that the heads of the precinct commissions allow observers to go up unimpeded to members of the commissions with comments, acts or complaints. However not all electoral commissions took this clarification into consideration. It was for this reason that at the fifth polling station the vote count was disrupted and the voting there declared invalid.

The poor quality of the voter lists could have also had impact on the outcome. For example, two multi-apartment blocks, where residents supported Myroslava Svystovych, were missing from the voter lists

The elections of the Mayor of Irpin continued a dangerous trend of holding local elections with infringements of electoral legislation and democratic principles begun at the elections of the Mayor of Cherkasy in 2006.[17]

The winner in the elections was declared to be Oleh Bondar who received 293 votes more than Myroslava Svystovych.

This was with the voting at one polling station where there were a large number of Svystovych supporters, having been declared invalid (840 people had cast their votes at that station).

In the territorial electoral commission's protocol on the results of the elections, 3,102 ballot papers were declared invalid. The number of voters who took part in the voting was, according to this protocol, 12,568, however if you add the number of invalid ballots mentioned in the protocol with the votes for each candidate, as well as the votes against all candidates, it comes to 2,767 ballot papers more than the number of voters stated on the protocol to have taken part in the voting.[18]

On 12 November the Kyiv Administrative Court of Appeal revoked the decision by the Irpin City Council on 3 April 2007, reinstated Myroslava Svystovych as Mayor of Irpin. However she only succeeded in receiving the court ruling a week later, and for another week she was unable to ensure enforcement of the court ruling. City Council was declared unlawful and Ms Svystovych reinstated as Mayor. At first private security guards did not allow her to enter the City Council, and then deputies of the Council themselves. Then on 26 November the Kyiv Administrative Court of Appeal suspended enforcement of its own previous ruling in connection with the launching of proceedings on newly-emerged circumstances. The civic network and website «Maidan» reported that the second decision had been taken by a judge who had not been on the panel of judges who considered the Svystovych case. Immediately after this, the judge fell ill, and after recovering went on leave, and therefore in the Court of Appeal they informed that the case would be examined no earlier than at the end of January 2008.[19]

We can thus note that the non-adherence to democratic norms and violation of voters' rights and those of participants in the electoral process during local elections remain problems for Ukraine's political situation.

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[17] More detail is available in «Infringements at the elections for Irpin Mayor could influence the outcome» CVU Press Release from 18.06.07 http://www.cvu.org.ua/?lang=ukr&mid=fp&id=1356&lim_beg=120 in Ukrainian and in English at: http://www.khpg.org.ua/en/index.php?id=1194996548&w=Irpin and http://www.khpg.org.ua/en/index.php?id=1183585746&w=Irpin

[18] IRPENIADA. On Monday Irpin residents will picket the President and court http://maidanua.org/static/news/2007/1197040522.html

[19] Ibid

3. EXERCISING THE RIGHT TO INITIATE AND TAKE PART IN NATIONWIDE AND LOCAL REFERENDUMS

Another problem area in safeguarding citizens' rights remains the right to initiate and take part in nationwide and local referendums. It should be noted, firstly, that initiating referendums and gathering signatures in support of their own initiatives remains an effective strategy for political parties to involve people. It is actively used on the eve of and during various political, and in particular, electoral campaigns. Secondly, some of the provisions of the current Law on referendums are out of date and require clearer wording. Most importantly, they make it virtually impossible for people to exercise their right to initiate referendums.

At the beginning of August 2007 the Bloc of Yulia Tymoshenko [BYuT] began a campaign for a referendum on amendments to the Constitution. In almost all regions of Ukraine held meetings of initative groups on holding a referendum. The participants in these meetings passed proposals on holding a nationwide referendum at the people's initiative on amendments to the Constitution and approved the wording of 9 questions which it was proposed to put to a nationwide referendum.[20]

All the documents on registration of initiative groups were submitted to the relevant bodies of local self-government. From the end of August, the Central Election Commission [CEC] began regularly passing decisions refusing to register the initiative groups. It justified its position by citing Constitutional Court Judgment No. 3-rn from 27 March, in accordance with which a check was carried out by the Central Election Commission into the compliance of nationwide referendums at the people's initiative with the Constitution.[21] According to the results of this legal check, the CEC found that issues put forward for a referendum do not comply with existing constitutional norms.

At the same time, the Party of the Regions also initiated a referendum, this time regarding Ukraine's possible joining of NATO, and granting the Russian language the status of second State language. Party of the Regions activists began collecting signatures although the CEC had not previously registered any initiative groups. According to Andriy Mahera «There are all grounds for being aware of this information. However in my view there are no legal grounds for sending these signatures to the President and drawing up a CEC protocol.»[22]

3.1. LOCAL REFERENDUMS

There are no open general statistics regarding initiatives to hold local referendums which makes monitoring of practice in holding local referendums and observing the rights of citizens to take part in initiating and holding local referendums difficult.

From information we were able to obtain, we can speak of numerous infringements of this right. On the one hand, representatives of the authorities who have no interest in carrying out «spontaneous» initiatives of the people use formal norms of an old-fashioned law on referendums, court procrastination, and so forth in order to turn down people's applications to hold referendums. On the other hand, members of the initiative groups are often unable to fully implement the procedure of the Law.

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[20] The questions were as follows: *1. Do you support a Presidential form of government whereby the President of Ukraine is elected by universal franchise, is the head of the State and heads the Cabinet of Ministers? 2. Do you support a parliamentary form of government whereby the post of President of Ukraine is abolished, the Cabinet of Ministers is appointed and dismissed by the Verkhovna Rada, and the Prime Minister is the head of State? 3. Do you support the election and dismissal of judges by the people? 4. Do you support extending the rights of self-government by granting all bodies of local self-government the right to from their own executive bodies? 5. Do you support the establishment of effective control over the authorities by granting constitutional status to the parliamentary opposition? 6. Do you support the abolition of immunity for higher leaders of the country, National Deputies and judges? 7. Do you support the cancellation of all benefits for higher leaders of the country, public officials and National Deputies? 8. Do you support stripping deputies of their mandate if they have broken their promises to the people? – with the right to pass the relevant decisions being given to congress of the party (bloc)? 9. Do you support simplifying the procedure for holding nationwide and local referendums in order to involve the people in directly exercising power?*

[21] See, for example, the decision of the CEC № 238 from 27 August 2007 http://www.cvk.gov.ua/postanovy/2007/p0238_2007.htm

[22] The CEC will not consider signatures gathering in support of a referendum on joining NATO // Deutsche Welle *www.dw-world.de.*

All attempts to hold local referendums can be divided into two groups:

A smallish first initiative group seeking to hold referendums – those initiated by the local councils themselves to resolve issues of concern to the community or to give legitimacy to sometimes extremely dubious regions by the majority of the deputy corps.

We recorded referendums held in three territorial communities. In two of them (in the Kosivsk district of the Ivano-Frankivsk region on 4 March 2007 and in the town of Bila Tserkva on 27 May) they did not eventuate due to low turnout. For example, in the Kosivsk district 29 % of the population voted, while in Bila Tserkva 25 % of the voters. Many years experience of observing shows that such a turnout of voters is typical for local elections and reflects the level of activity of the local communities. This means that the turnout requirements set out in the Law on referendums since Soviet days present a serious obstacle for the active percentage of territorial communities given the indifference of voters to local problems.

A larger second category of initiative groups for holding local referendums is linked with attempts to get either city or village mayors, or deputies of local councils dismissed. Most of such initiatives come from the local political opposition. They all end in failure for the initiators themselves.

Members of the territorial communities of Kyiv, Kharkiv, Odessa, Sumy, Kherson and many other cities, settlements and villages held meetings to create initiative groups for preparing referendums. They even collected signatures in support of these initiatives, however on no occasion were they able to achieve the announcement of a local referendum.

In each individual initiative group problems arose at very different stages, during the meetings, when submitting documents to register the initiative groups with the city executive committees, etc. in individual cases on the basis of the signatures collected, it remained for the deputies to announce the start of a referendum, yet the deputies voted against the holding of a referendum.

The following are typical examples of the «obstacles» which arise at various stages in preparing local referendums.

In Kherson on 11 March members of the public who had a meeting schedule to elect an initiative group on holding a local referendum on suspending ahead of term the mandate of the local authorities, were unable to get into the hall of the local Palace of Youth at the time designated for the meeting. The hall was already totally crowded out by supporters of the local authorities and the meeting was disrupted.[23]

On 30 March the residents of Kherson did manage to hold the meeting[24], however the local authorities refused to register the initiative group due to infringements when holding this meeting. The court upheld the decision of the local authorities.

The next attempt to hold a meeting aimed at initiating a local referendum took place in Kherson only on 24 November 2007. The meeting was held on the territory of one of the industrial enterprises in the city. As a result, several people who were unable to get to the meeting lodged a suit with the court against the infringement of their right to take part in such events. . It was only on 21 February 2008, after several hearings, that the Komsomolsky District Court in Kherson rejected the suit. At present the case regarding the lawfulness of the location for the meeting on initiating a local referendum on the dismissal of the Mayor of Kherson is under consideration in the Odessa Administrative Court of Appeal.

In Kyiv at the end of 2006 and beginning of 2007, three meetings were held to create initiative groups on a local referendum aimed at ousting the Mayor of Kyiv. A check was made by the Department for legal back-up of the Kyiv City Council Secretariat of the documents for their adherence to the Law «On all-Ukrainian and local referendums», submitted by the initiative groups, and formal discrepancies were found. For example, 42 people had not signed undertakings to observe Ukrainian legislation on referendum, while 23 people had mistakes in their personal information,

[23] BYuT has taught the Kherson authorities to respect the community // BYuT website, http://www.byut.com.ua/ukr/news-3101

[24] In Kherson supporters of Yulia Tymoshenko are initiating a referendum // BYuT website, http://www.byut.com.ua/ukr/news-3433

etc.[25]. Usually if such inaccuracies are identified during the registration of candidates for National Deputy, the Central Election Commission gives them time to rectify them or to remove the names of specific individuals. In the cases involving initiative groups, the local authorities turned down the right of the whole initiative group to exist.

In Kharkiv last year a civic organization «Kharkivyanin» tried three times to initiate the holding of a referendum. All attempts failed for the simple reason that the Mayor refused to register the initiative groups, and the courts dragged out review of the cases.

For example, at a meeting on 3 April an initiative group was formed to organize a Kharkiv city referendum. One of the issues approved by the meeting was the revoking of the decision by the 11th session of the 5th term of the Kharkiv City Council «On approving items of community problem of the territorial community of the city of Kharkiv which may be granted in concession (№ 26/07).

However the city authorities did not register the initiative group. On 3 May the initiative group filed a suit with the court. The preliminary court hearing took place almost a month later, on 30 May. The court did not take into account the application regarding Article 3.11 of the Code of Administrative Justice with regard to examination of a case within «a reasonable timeframe», that is, the shortest timeframe for examining and passing a decision of an administrative case sufficient for providing timely (without unjustified procrastination) judicial defence of infringed rights, freedoms and interests in public-legal relations. The first court hearing on the application lodged on 3 May was scheduled for 9 July.[26]

In Odessa on 16 November 2007 a meeting took place aimed at creating an initiative group for holding a local referendum. The Mayor of Odessa did not register the initiative group on the grounds that the notification about the meeting was sent late. It arrived at the Mayor's address on 7 November. The Legal Department of the Odessa City Council concluded that the meeting on holding a local referendum which took place on 16 November 2007 had infringed requirements of current legislation (the ten-day term for notifying the authorities of a scheduled meeting had not been kept)[27] However on 22 November the Mayor of Odessa did register, through his Instruction № 1322-01r another initiative group of the Odessa City Council on a local referendum. This group was not able within a month to collect the requisite 74 thousand signatures of Odessa residents in support of the local referendum.[28]

The Mayor of Sumy on 27 December 2007 registered an initiative group on holding a local referendum which was formed at a meeting on 1 December. In the space of a month, the initiative group gathered 28,635 signatures which they submitted to the City Executive Committee. The latter carried out a selective check of the signatures. In all they considered 7 thousand signatures and checked 3,536, or 12.3 % of the total. Of these they identified and formally recorded 1,549 faked signatures, this coming to 43.81 %.[29]

Even though 24,635 signatures of Ukrainian citizens and members of the territorial community of the city of Sumy were needed to support the holding of a local referendum (and there were enough votes), the City Executive Committee refused to accept the signatures and to hold the referendum. In justifying this decision, an analysis was also used of the content of the questions to be raised at the referendum for their compliance with Ukrainian legislation.[30]. However, after some hesitation, the Sumy Mayor H. Minayev on 27 February did put the issue of setting a local referendum «On the pre-term revoking of the mandates of the Sumy City Council of the fifth term and

[25] Another two initiative groups on holding a local referendum // KCSA official website:, http://day.kmv.gov.ua/news.asp?IdType=1&Id=84901.
[26] More detail on the situation can be found here: http://hds-kharkiv.org.ua/2007_07_02/426.htm
[27] See the instruction of the Mayor of Odessa from 03.12.2007. № 1364-01 http://www.misto.odessa.ua/index.php?u= vlast/document/docod,1,12,2007,1333
[28] Instruction of the Mayor of Odessa № 1589-01r. from 28.12.2007 // The newspaper «Odessa news» http://izvestiya.odessa.gov.ua/Main.aspx?sect=Page&PageID=9487.
[29] With a majority of votes the deputy corps of the Sumy City Council has rejected a proposal from an initiative group to hold a local referendum. // Sumy City Council official website http://www.meria.sumy.ua/ua/archive/news_events/2008/02/21/referendum.
[30] Ibid.

the City Mayor H.M. Minayev» forward for consideration at the City Council session. There was a named vote in which the deputies did not support the holding of a local referendum..[31]

The situation was almost identical in the city of Kalush in the Ivano-Frankivsk region.

On 16 December a meeting of Kalush residents to initiate the holding of a local referendum was held. 460 members of the gathering were registered, and they formed an initiative group made up of 53 members. In 10 days the initiative group collected 7 thousand signatures of Kalush residents (5.4 thousand signatures were needed). The deputies of the City Council considered the question of a referendum at a special session on 25 January 2008. During the discussion they found inconsistencies in the protocols of the meeting which had elected the initiative group (in the list of registration, some of the participants had given the name and number of their street, but not the name of the city, the protocols for submitting the signatures did not have a date, and some signatures of people on the registration list and on the undertakings to adhere to the Law on referendums were slightly different. They also found other similar mistakes).[32]. It is curious that these «inconsistencies» were not a problem at the stage of registering the initiative group. As a result, the majority of deputies voted against calling a local referendum.

We could continue the list of unsuccessful civic initiatives.

We thus see that during the electoral processes, a large number of manipulative techniques are used aimed at achieving their ends at any cost. At local elections so-called corporate raid set ups are used and one encounters dubious court rulings.

This situation arouses concern not only from the public, but also from representatives of the judiciary. For example, the Plenary of the Higher Administrative Court of Ukraine, in a Resolution No. 2 from 02.04.2007, stated that «a study of court practice in cases on disputes linked with the election process or referendum process shows that some courts make mistakes in applying the provisions of the Code of Administrative Justice of Ukraine».

There are a large number of infringements of people's right to take part in local elections and local referendums. There is also effectively no control over the observance of voters' rights and those taking part in the elections at local level by the law enforcement agencies, the mass media or the public.

4. CONCLUSIONS

In 2007 there were a considerable number of elections and attempts to hold referendums at various levels – from pre-term parliamentary elections to pre-term local elections in some territorial communities and initiatives for holding both nationwide and local referendums.

We can point to the consolidation of the positive trends in observance of electoral rights during the holding of national elections seen during the elections to the Verkhovna Rada in 2006. There is no information about the use of political pressure or deliberate attempts to influence the free expression of citizens' choice. Nor were there cases of vote-rigging, obstructions from the authorities put in the way of those taking part in the elections being able to campaign, etc. Although there were sporadic attempts by public officials to use their official position to benefit their own political party, in conditions of political competition, these were in the majority of cases neutralized. The electoral commissions should, nonetheless, have been more severe in reacting to them. At present, the problems of first priority are those linked with the right to universal elections. Due to unwarranted legislative restrictions and the inability of the authorities and electoral commissions to carry out existing procedure on preparing and checking voter lists, hundreds of thousands of voters were deprived of their right to vote.

In contrast to the elections at national level, serious concern is aroused by the observance of the rights of citizens during local elections and with regard to the initiating of local referendums. Last

[31] On 13 April there will be no local referendum – the deputies have decided // Sumy City Council official website, http://www.meria.sumy.ua/ua/archive/news_events/2008/02/27/referendum

[32] There will be no referendum on dissolving the Kalush City Council // The newspaper «Vikna» , http://vikna.if.ua/print.php?id=3672.

year at local level, there were cases of administrative pressure, obstructions from the local authorities, attempts to rig results, and others.

5. RECOMMENDATIONS

Experience of election campaigns has demonstrated that current legislation on the elections and referendums in many ways fails to meet generally accepted international standards, does not ensure the needs of the organizers of elections, those taking part in the elections, or, in fact, of the voters. Cosmetic amendments to legislation before each lot of elections partially resolve urgent issues, however systemic changes are needed. In 2009 -2010 Ukraine awaits regular Presidential and local elections, although one cannot exclude the possibility of pre-term parliamentary or local elections, and nationwide or local referendums.

Uncoordinated and contradictory electoral laws need to be standardized and united in a single electoral code which should consist of a general part, standard for all types of elections, and specific part, unique for each type of elections and referendums.

5.1. THE ELECTORAL SYSTEM

Shortcomings in the existing electoral system must be eliminated. This system leads to problems of excessive centralization of the parties; the possibility of usurpation of power by a narrow circle of the party leadership; a considerable number, not only of non-party candidates who do not wish to link themselves with existing political parties, but also regional members of political parties, are prevented from standing for office. One of the options for resolving the problem could be the introduction of elections with open regional candidate lists.

Elections to different bodies should be separated in time. Holding such elections together makes them much more difficult to organize and reduces control.

5.2. REGISTER OF VOTERS

The State authorities should ensure implementation of the Law on the State Register of Voters, although the timeframes for its implementation, envisaged in this law, have already been missed. The Central Election Commission should, at long time, hold an open tender to draw up software. The preparation of this register should be completed by the end of 2008.

The norm in the electoral code about using information from the State Border Guard Service in order to remove voters from the voter lists at polling stations should be revoked. Practice showed that the norm was virtually impossible to implement.

5.3. ELECTORAL COMMISSIONS

The Central Election Commission should be made up of specialists chosen on professional and not political criteria. The CEC should become an independent body organizing electoral processes, and not be held hostage to political intrigues.

District and precinct electoral commissions should be made up of professions who have undergone the relevant training. The periods allowed for the formation of electoral commissions should be sufficient to enable careful selection of members of such commission. The timeframes for preparation by the electoral commissions of the procedure for voter should also be increased. Pay for members of electoral commissions should be significantly increased.

A staff reserve for members of district electoral commissions needs to be set up.

5.4. VOTING AND THE VOTE COUNT

Voting and the vote count according to open candidate lists will require additional measures for educating both the voters and members of the commissions. Present procedure for vote count-

ing demands more from commission members than is physically possible for members of Precinct Electoral Commissions. It would therefore be worth considering the expediency of introducing a centralized vote count in District Electoral Commissions. The Precinct Electoral Commissions should simply ensure the actual process of voting, while the vote count would be undertaken by trained professions under the vigilant control of participants in the election process, the public and the media.

Ukrainian nationals presently abroad need to be given a real chance to take part in the voting. The current system deprives several million of the most active citizens from taking part in the voting. It would be sensible to organize postal voting within each country or allow voting over 10 days up to the election, with the use of the appropriate measures of control.

5.5. NATIONWIDE AND LOCAL REFERENDUMS

The Law on referendums passed in 1991 has long been out-of-date. The national referendum in 2000 and attempts to hold local elections have shown that with this law it is impossible to hold a productive referendum. The question of holding referendums must be clearly regulated and not dependent on the political climate.

There should, in the next months, be an unequivocal legal assessment of the millions of signatures collected in order to hold three nationwide referendums during the electoral campaigns of 2006 and 2007, which should be handed to the CEC.

XIV. PROPERTY RIGHTS[1]

1. OVERVIEW

Observance of property rights has always been rather problematical for Ukraine due to the inadequacy of the judiciary, failings in regulation of residential and land relations and the lack of registration of property rights on various sites. This year was no exception to the general trend over recent years for a deterioration of the situation.

We would highlight certain key elements worthy of note. This is in the first instance the problem of enforcement of court rulings as one of the basic issues in defending property rights. It is vital that the presently inadequate court control over enforcement of rulings be tightened. This particularly applies to bailiffs who are failing to fully carry out their duties on enforcing court rulings. There is effectively the paradoxical situation at present where even at a legislative level, the State defends the debtor more than those endeavouring to retrieve debts, and provides legal opportunities for them to avoid implementing court rulings. In addition, there is still a moratorium on compulsory sale of the property of State enterprises and those of the fuel and energy industry, with these in many cases being extremely profitable enterprises. We thus have the ongoing situation where some are required to implement court rulings, while others are granted an exception.

It is equally important to mention that in 2007 an effective system for registering rights to different forms of real estate did not end up being created with this in turn leading to an exacerbation of the problem of seizure by force of land or enterprises. No legislative act was passed to regulate the activities of joint stock companies, and provide clear, understandable and transparent rules for privatization. All of this makes the problem of raider takeovers very real.

2007 also did not bring an end to the moratorium on the sale of agricultural land which is one of the reasons for continuing violations of the right of owners to dispose of their property, and for the development of dodgy set ups for selling land.

Cases of fraud and machinations with housing and land remain common. The government has failed to create an effective system to protect against such abuse and the victims of such crimes remain effectively left to deal with their problems alone.

At the same time the situation has developed where theft of property on a small scale, that is, up to 772 UAH, is not defined as a crime, which in turn leads to the lack of protection of the property rights of people for whom this figure is by no means an amount not worth mentioning.

We must also mention the dangerous situation which has emerged with the appropriation of property to meet public needs. During 2007 attempts were made to approve normative acts which posed a clear threat to the rights of owners of land sites and housing. For example, the Verkhovna Rada passed a Law «On appropriation of land in private property» which was later vetoed by President Yushchenko. It also considered a draft Housing Code which copies many dangerous norms from the Law On comprehensive reconstruction of residential areas (micro-districts) from the obsolete housing fund, which could seriously weaken property rights on residential accommodation.

[1] Prepared by Maxim Shcherbatyuk, UHHRU lawyer.

2. SAFEGUARDS OF PROPERTY RIGHTS

2.1. STATE REGISTRATION OF PROPERTY RIGHTS ON REAL ESTATE

One of the most important safeguards of property rights is provided by a transparent and effective system of State registration of the right to real estate. This provides official State recognition and legal confirmation of property rights.

At present registration of rights to various types of real estate is carried out by different bodies on different databases, while registration of the rights to certain types of property is not envisaged at all. For example, registration of land sites is undertaken by land resources offices, while the right to the real estate on plots of land is carried out by the bureau for technical inventory, notaries are responsible for registering bans and arrests on appropriation of sites or buildings, and mortgages.

A Law «On State registration of material rights to real estate and limitations of these rights» was passed on 1 July 2004. This envisages a single State register of rights based on State records of land sites of all forms of property and other real estate located on them, the registration of material rights to items of real estate, their restrictions and authority in relation to real estate. However his law has not been implemented.

Admittedly this law does not allow for the integration of the database of the State Register of Rights with those of such registers as the Single Register of Bans on Appropriation of Real Estate, the State Register of Legal Authority, the State Register of Mortgages which clearly indicates that it is impossible to achieve a full State register of rights.

Furthermore, the State Register of Mortgages and the Single Register of Bans on Appropriation of Real Estate are «open» registers» meaning that extracts from them are available to any individual or legal entity. At the same time, according to the law, a restricted circle of people entitled to receive information from the State Register of Rights is established. This means that these registers will have to become virtually closed to access, which will restrict the present scope of the right to information.

In 2007 President Yushchenko vetoed the Law «On amendments to the Law of Ukraine «On State registration of the material rights to real estate». The idea behind these amendments was to hand responsibility for State registration of real estate property rights and restrictions of such rights with the Ministry of Justice and to create a single system of registration of real estate property rights and their restrictions within this ministry. However, at the same time, the amendments could make exercising these rights to real estate, including land sites, more difficult.

Thus, in Ukraine virtually nothing is improving with regard to registering rights to real estate, and in fact the situation is worsening.

Another problem is the lack of clear legal regulation for the revoking of collective ownership and the existence of several legislative acts which treat this issue in different ways. For example, the Law «On property» recently became void as therefore did the general norms on the right of collective ownership. However the legislators did not allow for transitional norms when revoking this form of property, for example, as regards registration of rights which leads to discrepancies and numerous conflicts.

2.2. PROTECTION OF PROPERTY RIGHTS TO CORPORATE RIGHTS

Another of the burning issues in Ukraine is safeguarding property rights during hostile mergers. According to World Bank estimates, Ukraine is trailing badly in their rating for protection of property rights, and hostile and unlawful mergers have taken on particularly large proportions.[2] All of this is linked with inadequacies in legislation which is failing to adequately impede corporate raid attacks on enterprises and organizations. We would highlight in this respect procrastination in passing a comprehensive law on joint stock companies, the lack of transparency and contradictions in legislation which is intended to regulate the privatization process.

[2] Head of State asks that the Inter-departmental Commission of Countering Unlawful Mergers and Takeovers of Enterprises be reinstated, http://www.president.gov.ua/news/9064.html

The weak protection of property rights has also been acknowledged by the Supreme Court which recently approved recommendations on fighting corporate raiding which recognize that lack of normative regulation and legislative clashes prepare the ground for carrying out corporate raids. It notes that among other things, the attacks are being organized with the help of lawful means, using legislative failings and discrepancies, as well as abusing the law.

One of the most vital methods for safeguarding property rights is to improve the court system, especially anti-corruption mechanisms. It is the courts which provide the main mechanism for defending these rights and where they are not functioning as they should, the scope becomes wide for corporate raid takeovers, non-transparent privatization and re-privatization, as well as other rights infringements.

2.3. ENFORCEMENT OF COURT RULINGS PROTECTING PROPERTY RIGHTS

One of the greatest problems at present is linked with enforcement of court rulings defending property rights.

This is both a general problem reflecting the inefficiency of the system for enforcement of court rulings, discussed in more detail in the unit on the right to a fair trial, and the result of specific problems linked with property rights.

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 proceeds of the sale have been re-channelled to specialist organizations. Statistics also paint a gloomy picture. In 2007 property valued at 746.4 million UAH presented by the State Bailiffs was awaiting sale in specialist retail organizations. Property worth 215 million UAH, or less than a third, was sold. It should be noted that over recent years there has been a reduction in the level of sales of debtor property.

A significant problem influencing the entire system of legal procedure in the country is posed by the lack of an effective mechanism for enforcing rulings on recouping debts from the State and State sector institutions. We would note that it is precisely this which is generating numerous applications to the European Court of Human Rights.

In 2007 8,115 writ documents for a figure of over 73 million UAH were due for enforcement as per court rulings. Only 3,476 were executed, less than half.

Problems are also caused by a number of legal norms which directly prohibit repayment of debts through the seizure of certain types of property. There is, for example, a moratorium on compulsory sale of the property of State enterprises and those of the fuel and energy industry (which are, incidentally, the most financially viable enterprises around), with this making the enforcement of a significant number of rulings impossible.

In connection with the Law «On imposing a moratorium on the compulsory sale of possessions», passed back in 2001, execution was made more difficult on almost 88 thousand writs, amounting to over 6 billion UAH, this being a third of the total amount from enforcement proceedings suspended due to various moratoriums.

Furthermore, the adding of enterprises to the Register of Enterprises of the Fuel and Energy Industry which take part in the procedure for repayment of debt in accordance with the Law «On measures aimed at ensuring the stable functioning of enterprises of the fuel and energy industry», makes it impossible to retrieve considerable amounts on the basis of writ documents on retrieving debt from enterprises of the fuel and energy industry, including money owed in wage arrears.

We should also mention the procedure for adding enterprises to the above-mentioned Register. The lack of clear criteria, as well as the fact that the Ministry of Fuel and Energy has been given the right to add enterprises to the Register, in practice leads to numerous cases of abuse and unconcealed corruption. On the basis of such decisions, enforcement was stopped on 45.3 thousand writ documents for a sum of almost 9 billion UAH. Of this, more than 25 million UAH was on the basis of court rulings on paying back debts on unpaid wages.

In connection with bankruptcy proceedings initiated by economic courts, the enforcement of 54,8 writ documents was suspended, involving a sum of 5.8 billion UAH. Overall, at the beginning of 2008, according to the Law «On enforcement proceedings», almost 169 thousand writ documents amount to a figure in excess of 18 billion UAH had been stopped.

Overall in Ukraine at the present time, the possibility of not enforcing court rulings is legislatively affirmed by the following laws:

– «On particular features of privatization of enterprises of the State joint stock company «Ukrrudprom»;

– «On pipeline transportation»;

– «On imposing a moratorium on the compulsory sale of possessions»

– «On measures of State support for the shipbuilding industry in Ukraine»;

– «On measures aimed at ensuring the stable functioning of enterprises of the fuel and energy industry»..

Article 124 § 5 of the Constitution states that judicial decisions are adopted by the courts in the name of Ukraine and are mandatory for execution throughout the entire territory of Ukraine. Therefore no laws may establish norms restricting the enforcement of such rulings. Moreover, Article 13 of the Constitution stipulates that «The State ensures the protection of the rights of all subjects of the right of property and economic management, and the social orientation of the economy. All subjects of the right of property are equal before the law». The granting of any advantages to individual owners or the establishment of concessionary arrangements is a direct violation of the Constitution. In essence this means that at some stage for reasons of expediency unconstitutional practices were introduced which are still current to this day.[3]

It is absolutely vital to establish procedure for enforcement of rulings for this category of cases and at very least in order to ensure proper enforcement of rulings on compensation for damages inflicted on individuals or legal entities by the State authorities in cases where the seizure is carried out from the State Budget, to set aside money for this when drafting each year's Law on the State Budget.

2.4. SAFEGUARDS TO LAND OWNERSHIP RIGHTS

Problems should be noted linked with protecting the right to plots [shares] of agricultural land, as well as the rights of owners of land sites in large cities.

In this context the case of land sites taken away from villagers in the Kyiv region is highly indicative. In fact there are hundreds of such cases however there is one difference in this case: they will most likely not succeed in depriving the people of their land. .

Residents of the villages Shchaslyve and Hora in the Boryspol district of the Kyiv region in full accordance with the law gained ownership rights over agricultural land sites.

In March 2007 in response to suits from a number of shareholders of the open joint stock company – the factory «Bortnychi» against the Boryspol District Department of Land Resources fro the Kyiv Region and the Boryspol District Branch of the State enterprise «Centre of the State Land Cadastre under the State Agency for Land Resources, the Boryspol City District Court cancelled registration of the State acts to the land. As a result, 541 residents of these villages were deprived of their right of ownership to the land, even those not involved in the court case. This is almost 2,000 hectares of agricultural land. Despite current legislation, the court justified its ruling on the basis of evidence which it had not demanded from the relevant State bodies and which had not been checked to ascertain its accuracy. And this means that the case was examined in total secrecy from all owners of the land, representatives of the Shchaslyve and Hora villages, as well as the Boryspol District State Administration.

The villagers learned of this clearly unlawful ruling only after building work began on their land. the rulings passed by the court were appealed both by the owners and the Boryspol District State Administration. The Kyiv Regional Prosecutor also took the side of the cheated landowners. Finally, on 16 August 2007, the first victory in the case was achieved. The Kyiv Administrative Court of Appeal renewed the

[3] M. Onishchuk. The State Bailiffs' Service on the path to reform and efficiency // the newspaper «Weekly Mirror», № 9 (688) 8 — 14 березня 2008 http://www.dt.ua/1000/1050/62281/

period for the villagers to appeal against the court rulings and they were allowed to take part in the cases. On 31 August the Kyiv Administrative Court of Appeal passed a ruling in three of the cases revoking the unlawful ruling by the Boryspol City District Court which had removed their land rights, and terminated the proceedings into the cases.[4]

Although the ruling of the court of appeal is the first promise of a long-awaited victory, it would be premature to assume this is the end of the story. For example, at the end of July 2007 a judge of the Krasnodon City District Court of the Luhansk Region Y.M. Afanasyevsky passed a ruling prohibiting the Boryspol District State Administration from transferring the land sites into the possession of residents of Shchaslyve and Hora, changing the designated purpose of the land and taking any action with respect to the said land.[5] *It effectively thus limited the ruling of the court of appeal, and can only arouse bemusement.*

2.5. SAFEGUARDING THE PROPERTY RIGHTS OF INVESTORS ON THE HOUSING MARKET

People are also not sufficiently protected against fraudulent dealings involving land. Inadequate safeguards of property rights in law lead to mass-scale rights abuse on the construction market. At the present time, the State is basically not exercising any effective control over the activities of the financial structures which attract money for investment in housing.

After the biggest building scandal in Ukraine's history over the Elite Centre, the State proposed various options for improving protection of real estate ownership rights. For example, in March 2006, the President signed a decree which obliged the Cabinet of Ministers to draw up within a two-month period a package of draft laws to strengthen the rules of play on the primary real estate market. The President insisted in the first instance on introducing a ban on selling housing until it has been made ready for exploitation. However to this day not one of the «ordered» laws has been created or passed.

Property scandals take place all over the country, although admittedly on a more modest scale. No cardinal changes have appeared in legislation aimed at preventing such cases. Chaos continues on the property market, with this suiting only corrupt officials and companies holding a monopoly. In October 2006 the Head of the Kyiv Central Department of the Ministry of Internal Affairs Vitaly Yarema stated that after the scandal over the Elite Centre had come out, the police had identified a further 20 cases of fraud on the property market. «We have initiated around 20 criminal investigations over abuses. They are, of course, smaller in scale and losses, however there have been such cases», the Head of the Kyiv Police said.

At the same time victims of such real estate machinations are left to face their misfortune alone. This was glaringly apparent in the case of the Elite Centre victims. The Kyiv authorities have still not created a transparent mechanism for compensating investors for their losses. Although the authorities are not obliged to compensate damages, the decision was taken for political motives.

Only at the end of February 2007 did the Kyiv City State Administration make public the results of an investment tender for a company which will build housing for the victims. Only one company – Kyivmiskbud – took part in the tender which, in the absence of competitors, it of course won. Of five sites proposed by the authorities, Kyivmiskbud only liked three. It has promised to give 25 % of the flats in the three buildings to the victims. The Kyiv City State Administration claim that 14 of the biggest construction companies were invited to bid, as well as another 80 companies which are members of the Association of Builders of Ukraine, 60 banks and 10 insurance companies.

Moreover at the present time there is no mechanism for dividing the housing among the victims. And there are therefore no guarantees that they will be given the flats. When the buildings are completed (in 2-3 years), the victims will no longer have the right to demand housing orders from the builders or from the authorities since by that time the period for lodging claims in the Elite

[4] Land redistribution. Even a State act of private ownership of land is already no guarantee of protection against outside encroachments // The newspaper «Weekly Mirror» № 28 (657), 4 — 10 August 2007, http://www.dt.ua/2000/2675/60020/

[5] V. Borovyk: Insatiable land raiders or attacks on the land of the Boryspol region continue http://antiraid.com.ua/articles/p200709111.html

Centre case will have expired. The Kyiv City State Administration (KCSA) promises that nobody will be cheated. Kyivmiskbud is constructing a building: 25 % of the housing will be handed over to the Kyiv investment agency which is the communal property of the city and the middleman agency will in turn hand over the square metres to the victims.

However in the Mayor's office they say openly that not all victims will receive flats. Back in spring 2006, soon after being elected Mayor, Leonid Chernovetsky stated directly that the investors would be divided between the «real victims» and «bourgeois». Nobody would compensate those who had put money into buying flats in order to earn money. During 2007 the City Administration's position on this did not change. According to the Acting Deputy Head of the KCSA, Vitaly Zhuravsky, 25 % of the housing area in the three buildings (no more than 150 flats for almost 1500 Elite Centre investors) will be given to the investors who «suffered the most and only via a court order». The criteria for making this selection are more than strange. Only those who ended up without housing at all, having sold their old flat in order to put money into a new flat from the Elite Centre can hope for a flat. Yet, to be exact, those who suffered most are those investors who are continuing to pay off a loan together with interest taken out to buy non-existent housing. Around 300 people are in this position. The majority of them hoped to improve their living conditions (two-three families are living in one flat), however they chose another source of financing.[6] This overtly discriminatory approach is baffling though it is to a considerable measure explained by the fact that the decision is political and not based on norms in legislation on compensation for damages. This cannot, nonetheless, justify such discrimination.

2.6. PUNISHMENT OF THOSE INFRINGING PROPERTY RIGHTS

Another problem which remains acute is the lack of protection of owners in the case of petty theft. At present, in order for a criminal investigation to be launched, the losses incurred must be valued at no less than 772 UAH 51 kopecks (around 150 USD). Anything smaller is deemed petty theft and does not entail criminal liability. It is instead considered as an administrative offence and is punished in most cases by a small fine which is four times less than the maximum amount of losses inflicted.

You can envisage a situation where a person has stolen something worth 772 UAH, and if he is immediately caught at the scene of the crime, the police draw up an administrative protocol and take him to court. And if the offender was not caught it is practically a waste of time to turn to the police. There, of course, they will take the report, however refuse to launch a criminal investigation for want of the elements of a crime given its small scale.

The Criminal Code in Article 155 distinguishes several types of theft, with a break-in, committed more than once, or by prior conspiracy by a group of people. For the Code of Administrative Offences none of these aggravating circumstances have any significance.

The Supreme Court sent local bodies an explanation regarding burglaries if the offender is caught but the amount stolen does not reach the necessary minimum. The Court explains that the person should be charged under Article 162 of the Criminal Code – unlawfully entering a person's home. This sounds good, yet what can you do when in district police stations sometimes even senior officers have no idea that such an article exists. Furthermore the investigation under this article is carried out by the prosecutor's office since this article was in general thought up with the idea that a normal person will not go wandering around other people's flats, if he or she is not a criminal. It was aimed primarily against police officers who carried out unlawful searches for which they could be imprisoned for a period from two to five years. There are now virtually no criminal investigations under this article since burglars are not the kind of people on whom the prosecutor's office should waste working hours since they should be investigating crimes under that article.

The issue of compensation for material damage to victims of petty theft is generally unresolved. When a person takes something from a factory or supermarket, s/he is either caught red-handed or not caught at all and therefore the question of compensation for damages is not so important. Yet

[6] N. Honcharuk. Phantom buildings // The weekly «Contracts», № 10 from 05.03.2007. http://www.kontrakty.com.ua/show/ukr/article/8629/1020078629.html

in the case of theft of personal possessions the situation is different, with the offender sometimes having time to sell the items and spend the money.

Where a criminal investigation is launched, the issue of compensation is decided in parallel with the punishment of the offender. The investigator makes a decision on recognizing the victim as civil claimant and the judge, when passing sentence, also announces his or her decision as to whether to allow or turn down the civil claim for compensation. , However in an administrative case the State only seeks punishment of the offender, and the victim must defend his or her own material rights, by privately bringing a civil suit.

Current legislation has thus mainly and quite painfully hit the poorest layers of society. In general the legislators are coming to understand the depth of this problem. There are already proposals for legislative amendments, for example, suggestions that the cut-off point be calculated different to take into account the fact that for each victim one and the same thing may have different significance depending on their income. The authors of the amendments propose introducing additional criteria for classifying theft, specifically by qualifying the crime if the value of the stolen items exceed 10 % of the monthly income of the victim [7] Admittedly in such cases nobody can predict the lawfulness or unlawfulness of their behaviour because it is impossible in advance to classifying certain acts as a crime. This can in turn lead to violations of the individual's rights. At the same time, all these proposals remain drafts, and the problems mentioned remained unresolved.

3. BEHAVIOUR OF THE AUTHORITIES IN RESTRICTING PROPERTY RIGHTS

One of the most important aspects to consider regarding safeguards of property rights is the question of whether restrictions on these rights imposed by the State are well-founded and legitimate. We need to consider first of all the situation with regard to restrictions on owning, using and disposing of land sites and real estate, as well as the legal regulation for appropriation of these on the grounds of public need.

At the present time there is no legislative act regulating compulsory purchase of land sites of private owners for public needs. In 2007 efforts were made to regulate this issue.

For example, on 19 April 2007 the Verkhovna Rada passed Law No. 214 «On appropriation of land in private ownership». This law does not, however, establish criteria by which the authorities have the right to choose any particular land site for appropriation, effectively leaving this to the discretion of officials. It also fails to set a clear mechanism for compulsory purchase and appropriation of land sites to meet public needs. Some articles of the law are also in conflict with each other, for example Article 8 states that purchase of a land site is only possible with the consent of the owner, but does not stipulate the legal consequences where the owner refuses. At the same time Article 13 envisages that in the case of an owner reusing to sell the land to meet public needs, or not concluding an agreement within the legally established period, the local or central authority «lodges an application with the court for the compulsory purchase of the land site». These and other shortcomings prompted the President to return the Law to the Verkhovna Rada for reworking on the grounds that it does not ensure the constitutionally guaranteed inviolability of the right of private property, is conceptually flawed and does not set out mechanisms for lawful and justice appropriation of land sites.

It is important to note that the moratorium on the sale of agricultural land imposed until legislation is passed regulating relations on the land market continues. Yet the situation deteriorates with every year and the rights of those people who have ownership rights on land are being significantly restricted. The owners of the land are effectively deprived of the possibility of disposing of their property. Moreover there are shadow set ups for selling or changing the designated purpose of the land on the land market. All of this leaves the owners without protection from legislation.

Over the years since independence, Ukraine has still not managed to create legislation regulating the land market, and laws «On the Land Cadastre», «On the land market» and others have not

[7] National Deputies suggest increasing liability for theft of property // the Internet publication «Glavred», http://ua.glavred.info/archive/2008/02/21/112900-16.html

been passed. One feels that this moratorium is never-ending, and therefore there is no end to violations of the rights of those owning pieces of agricultural land.

This all results in a shadow market flourishing in rural areas, or, quite simply, a free-for-all. Rural residents sell their land shares for cheap; they fall victims to firms involved in land raiding which, under the protection of the courts, buy up the deeds to their land; local councils change the designated purpose of hundreds of hectares of land in order to then sell them, etc. While in cities, due to the lack of general zoning plans for future construction, land on a mass scale is handed over for a song to firms on long-term lease for them to build on. This is, of course, with the possibility of later buying the land. Land auctions are a great rarity.[8]

A great number of issues were raised by the draft Housing Code which was the subject of widespread discussion in 2007. Particular concern is aroused over the procedure for appropriation of housing to meet «public needs». The Law «On comprehensive reconstruction of residential areas (micro-districts) from the obsolete housing fund» appeared back in December 2006. The Ukrainian Helsinki Human Rights Union has already written a great deal about the unconstitutionality of this Law, about the violations of owners' rights during so-called reconstruction of districts. In essence, this Law, using «public needs» as its cover (there is, incidentally, no definition of the term «public needs» in current legislation, nor an indication f who is empowered to determine the presence or lack of such needs), allows the compulsory appropriation of housing from its owners in order to carry out investment projects at the level of districts.

Without thinking too long, the authors of the draft Housing Code copied part of the norms from this masterpiece of law-creating. For example, Article 162 of the draft specifies the conditions for resettling tenants and owners of residential buildings when implementing investment projects for reconstruction of residential quarters (micro-districts). Paragraph 1 of this Article is immediately staggering – implementation of investment projects for reconstruction of residential quarters (micro-districts) can be carried out with the compulsory purchase of land to meet public needs, or without such purchase.

It would seem that the legislators forgot that under the Constitution compulsory appropriation of private property can only be applied as an exception due to «public need» on the basis and according to legally established procedure, and on condition of prior and full compensation of its value. It follows from this that the wish of the investors to receive profit (Article 13 § 13.6 of the draft Code), even if 50& of the residents of the building agreed to it, cannot be deemed constitutional grounds for forcibly depriving other owners of their flats in this building. Furthermore, the Constitution does not envisage appropriation of private property on the grounds of «public need». The difference in our view between need and necessary is crucial. Be that as it may, the issue of resettlement of property owners may only be resolved on a voluntary basis, with compulsory eviction allowed only from buildings in a dangerous state, or in cases of really extreme necessity.

In general, resettlement according to the draft Code is carried out by means of notification via the media or in person a month earlier. According to the Code, the people affected are provided with other accommodation in the same district, however it is not stipulated on what conditions and according to what procedure this is handed over. For example, if a person lived on the first floor, and received a flat on the ninth, will this be a violation of their rights? There are scores of such norms, for example, «obsolete housing fund», etc. Back in the expert opinion of the Law «On comprehensive reconstruction of residential areas (micro-districts) from the obsolete housing fund», the Verkhovna Rada experts stated that «under these conditions the situation could arise where quarters in Kyiv will be constantly rebuilt, however investors will ignore districts with huge numbers of «Khrushchovki» [standard, cheap and old apartment blocks from Soviet times)». They also demanded that the term «reconstruction of a district (quarter)» be changed to «quarter (micro-district) of obsolete buildings or a separate residential building, since in a district there might be buildings still in satisfactory condition.[9]

[8] «How to make the most of land resources» // The Weekly Mirror, № 34 (663), 15 — 21 September 2007, http://www.mw.ua/2000/2060/60448/

[9] S. Sakhatsky. The Draft Housing Code of Ukraine: an inept response to the housing problem // The Weekly «Legal Week», № 37(58), 11 September 2007., http://www.legalweekly.com.ua/article/?uid=82

It should be noted that in Ukraine there has long been a problem with the obsolete, unsystematic and fragmentary nature of normative documents on restricting ownership rights to certain types of possessions. The list of items which may not be private possessions of individuals, civic associations, international organizations or legal entities of other countries on Ukrainian territory is to this day established by the Verkhovna Rada Resolution from 17 June 1992. This normative act is based on no clear conception and only provides fragmentary resolution of certain issues regarding restriction to property rights to individual types of property and leaves out a number of important issues. To this day there is no law which gives comprehensive, exhaustive, as well as well-balanced, exact and unequivocal regulation of the above-mentioned issues[10]

4. RECOMMENDATIONS

1) Create a transparent and effective system for State registration of the rights to real estate;

2) Improve safeguards of the ownership rights of land shares, create mechanisms for combating forced seizure of this land.;

3) More effectively combat the prevalence of fraud scandals over real estate, and also ensure effective protection of the victims of these offences.

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) Made amendments to legislation aimed at strengthening protection against petty theft.

6) Adopt a law which will systematically and comprehensively regulate the activities of joint stock companies, and also improve methods for fighting corporate raid attacks.

7) Regulate appropriation of land and accommodation on the grounds of public necessity in clear compliance with the Constitution and Ukraine's international commitments.

8) Improve regulation of issues linked with restricting ownership rights to particular types of possessions.

[10] The right to peaceful enjoyment of ones possessions: Precedents and commentaries / compiled by O. Hrabovska – P: «TeRus», 2005.

XV. SOCIO-ECONOMIC RIGHTS[1]

1. TRENDS WITH REGARD TO OBSERVANCE OF SOCIO-ECONOMIC RIGHTS

Ensuring socio-economic rights is always a political issue. Each political party or force is ever concerned to demonstrate their concern for ordinary people. Of course in the majority of cases there is no ability behind their words to guarantee their fulfilment. As a result, we have declarative and inflexible legislation, a huge imbalance in the sphere of social insurance as well as a deepening divide between rich and poor.

Particularly staggering is the calculation of the subsistence minimum which is the base indicator for the entire system of social protection. The selection of food and non-food items and services included in this indicator already fails to meet the minimum requirements for survival. The very method for calculating the subsistence minimum is outdated and does not make it possible to receive reliable data. The fact that the population is rapidly decreasing is as clear an indicator of the problem as could be needed.

The declarative nature of legislation is most vividly demonstrated by the failure to implement the judgment of the Constitutional Court regarding the Law «On the State Budget for 2007» which declared unconstitutional some of its provisions restricting socio-economic rights. Moreover, everything indicates that the government has no intention of implementing it. This is confirmed by the fact that the law on the Budget for 2008 repeats many of the restrictions which the Court found to be unconstitutional.

In 2007 the divide between rich and poor continued to increase, as well as the imbalance between different fields in payment for labour. The mechanical increase in the minimum wage without the requisite reform of the actual system of remuneration could not improve people's standard of living. Ineffective reaction by the government to inflationary processes virtually nullified the impact of a growth in the population's income. There is also a deepening rift between labour productivity and payment which can lead to extremely negative consequences for the economy, and therefore for the entire population.

Industrial safety remains a problem with the number of accidents and fatal injuries continuing to rise. Virtually no money is allocated for preventive measures and control over adherence to safety requirements in many spheres is insufficient and ineffective. There has been more than one prominent accident in mines and major industrial enterprises as well as a huge number of smaller cases which did not gain prominence.

Despite big plans, the problem of introducing an accumulative pension system has remained unresolved for a number of years. It is clear that in view of present demographic trends, the existing system will soon be unable to provide pension security for the elderly. The government is clearly unable to cope with the task of building a balanced, flexible and effective pension system.

Finally, it is extremely important to make a principled distinction between legal regulation defining socio-economic rights and benefits which are essentially privileges Politics remains about promises and slogans however it is extremely important to ensure and guarantee socio-economic rights which should not be dependent upon political moods and wishes. Furthermore, in accordance with interna-

[1] By Maxim Shcherbatyuk, UHHRU

tional standards, and the above-mentioned judgment of the Constitutional Court, one may not reduce the scope of existing rights, yet privileges can be cancelled and sometimes even need to be.

2. THE RIGHT TO AN ADEQUATE STANDARD OF LIVING

There has been a lot of talk recently about the standard of living and quality of life improving. Government bodies report of an increase in the population's income, a rise in wages and reduction in unemployment. Few however reflect on what the right to an adequate standard of living actually means.

This right entails in the first instance the right to a standard including everything, clothes, accommodation, medical care and requisite social services needed to maintain ones own health and well-being and that of ones family. Even more, the right means that each person should be able, with no embarrassment or unwarranted hurdles, to be a fully-fledged participant in ordinary, everyday relations with other people. This means, among other things, that people should be able to satisfy their own need with dignity. Nobody should live in conditions where their only way of meeting their needs is through degrading themselves or forgoing their own fundamental freedoms, for example, through begging, prostitution or labour bondage.

If we look at the realities of life, we see how far we still are from the high level established in European countries. No wonder that the UN Committee on Economic, Social and Cultural Rights, commenting in its concluding recommendations for Ukraine on the failure of the level of income in our country to provide an adequate standard of living, recommended taking the necessary measures to safeguard this right as soon as possible.[2]

From the purely material point of view an adequate standard of living entails being above the poverty line as defined in any given country.

In Ukraine the main social indicator used as the starting point in determining both the poverty level and the minimum wage is the subsistence minimum. This is also the basis for determining State social guarantees and standards regarding the population's income, housing and communal, everyday, social and cultural services, medical care and education.

This is one of the key problems since the method for calculating the subsistence minimum has not changed over many years, is obsolete and does not meet modern day needs. There is also a clear violation of legislation on the subsistence minimum. The law stipulates that the range of food items and of goods and services should be designated by the Cabinet of Ministers at least once every five years.[3] Yet the last document approving this basket was the Cabinet of Ministers Resolution No. 656 from 14 April 2000.

The existing method does not meet modern needs and underestimates human requirements. For example, 52 kilograms of meat per year is stipulated for an able-bodied individual instead of the medical standard of 80 kilograms. Purchases of outside winter clothing are envisaged once in five years, and it is proposed that a woman wears one skirt and three blouses. There are a lot of such examples. With all of this, income tax which each person pays is not excluded from the calculation for subsistence minimum and this accordingly reduces the money actually received. All these factors lead to a distortion of the real subsistence minimum, and therefore also to other social indicators.

The Ukrainian Helsinki Human Rights Union has on many occasions approached the Cabinet of Ministers, as well as the Ministry of Employment and Social Policy, over the need to reassess outmoded norms. Yet the answers received suggest that the draft for a new methodology is wandering around different offices, and nobody knows when any kind of decision will be taken. The President has also pointed out the shortcomings of the system for calculating the subsistence minimum.

The problem is exacerbated by the fact that for calculating many social guarantees, it is not even the subsistence minimum that is used, but such an indicator as the level to which the subsistence minimum is provided for. The State effectively demonstrates that it is not capable of fulfilling

[2] UKRAINE Concluding Observations of the Committee on Economic, Social and Cultural Rights E/C.12/UKR/CO/5 23 November 2007 http://www2.ohchr.org/english/bodies/cescr/docs/cescr39/E.C.12.UKR.CO.5.pdf

[3] The Law «On the subsistence level» from 15 July 1999 (with amendments and additions / The Verkhovna Rada website http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=966-14

even obligations which are lower than the minimum, according to a standard subsistence minimum for everyone, and establishes yet another which reflects the financial capacity of the State to safeguard socio-economic rights.

A natural consequence of ineffective policy on ensuring an adequate standard of living is the constant worsening of the demographic situation in the country. During 2006 Ukraine lost 297.7 thousand people, in 2007 (despite a small increase in the birth-rate – from 9.7 to 10.1) – 290,22 thousand. Average life expectancy in 2007 was 67.9 years, or 62.1 for men (against 64.2 in 1991), and 73.5 (against 74.2 in 1991) for women.[4] In this, Ukraine is 11 years behind Germany; 12 behind France; 13 behind Sweden, and even behind its closest neighbours – Hungary and Bulgaria by 4 years and Slovakia by 5.

This negative trend is occurring against a background of a general loss in the regeneration of generations and deformation of the age spread of the population, with the number of people of a reproductive age being reduced. Between 2003 and 2007 the ratio of the population over 50 increased from 32.8 to 33.4 %. Health figures are worsening for all age groups: in 2006 on average for each 100 people there were 175 registered illnesses. Labour migration of the able-bodied part of the population is increasing, with expert assessments estimating that there are more than 3.5 million Ukrainian nationals presently working abroad.[5]

The situation is particularly bad in rural areas. According to the Accounting Chamber there has not been and remains no systematic government support for socio-economic development of the countryside. This is eloquently reflected in the figures – from 1991 to the beginning of 2007 the rural population fell by almost 2 million or 11.8 %. The lack of positive moves in ensuring the viability of the rural population which could provide the basis for an improvement in the demographic situation and the development of the labour potential is leading to a situation where the negative trends in the rural social sphere are worsening.

Rural areas are becoming depopulated. From 2001-2005 in 3.6 thousand villages (12.5 % of the total number) not one child was born, and in 3 thousand villages there were no children under the age of five. Since independence the number of rural populated areas has fallen by 305. The level of depopulation of the rural population clearly indicates demographic catastrophe.[6]

We thus see that the rapid rate of increase in nominal income is not adequately reflected in an improvement of the quality of life and protection of socio-economic rights.

An important element in guaranteeing the right to an adequate standard of living is ensuring proper quality of food items, and in this there are considerable problems. This is confirmed not only by consumer rights organizations, but even by government bodies. For example, the State Committee on Technical Regulation and Consumer Policy [the State Committee) points to the need for new requirements regarding the safety and quality of products set down in the Law «On the safety and quality of food items».

The Head of the Scientific Research Centre for Food Testing attached to the State Committee Volodymyr Semenovych says that at the present time the main normative document in use on the quality of food products is the obsolete «Medical and biological requirements regarding the quality and safety of food products», drawn up and approved in 1989, when the Law «On the safety and quality of food items» placed the responsibility on the Ministry of Health to draw up new standards. However the Ministry has still not come up with the necessary document. The obsolete normative act also contains a list of pesticides which do not take into account the increase in types of protection of plants used in the production of vegetable productions over the last decade.[7]

Furthermore the State Committee states that it would not be expedient to cancel the compulsory certification of imported food products and narrow the list of domestic food items subject

[4] The demographic situation in Ukraine in 2007.: Express Bulletin // The State Committee of Statistics of Ukraine, 2008 www.ukrstat.gov.ua.

[5] Expert report «Ukraine in 2007: internal and foreign position and prospects for development» The National Institute for Strategic Studies. http://www.niss.gov.ua/book/Eks_d2007/index.htm

[6] The countryside is being helped to die out. Information from Ukraine's Accounting Chamber http://www.ac-rada.gov.ua/achamber/control/uk/publish/article/main?art_id=955131&cat_id=411

[7] Standards for safety and quality of food products in Ukraine are well out of date // UNIAN information agency , http://health.unian.net/ukr/detail/187490

to certification drawn up during Ukraine's moves towards joining the World Trade Organization. Volodymyr Semenovych said that selective studies by his scientific research centre had shown that many products do not meet quality standards, and some are positively dangerous to health. For example, several cases were demonstrated where there was an excessive level of organo-phosphorous pesticides and nitrates in grapes from Turkey and Italy, as well as in green herbs and vegetables imported from Poland, Georgia, Turkey, Latvia and other countries.

Another vitally important area is ensuring a decent quality of drinking water, with this having a direct impact on people's health and the environmental and epidemic safety of whole regions. The Accounting Chamber's report states that in terms of water supplies, Ukraine is behind most countries in Europe. At the same time, the average use of water per city resident is 320 litres per day. Due to the water and sewage systems being run down, there is a constant increase in the amount of water wasted in transportation. Another problem is the fact that 15 % of rural town-like settlements, and 78 % of villages are not connected to central water supplies at all.

The unsatisfactory situation is confirmed by the Accounting Chamber which reviewed the audit into the use of funds from the State Budget on measures for the development and reconstruction of water supply systems. It found that the state of the water separation and supplies systems was critical, with the main stocks being run down and requiring urgent measures from the authorities.

For example, the authorities and bodies of local self-government in violation of the Laws «On ensuring the sanitary and epidemiological wellbeing of the population» and «On drinking water and drinking water supplies» have not taken the necessary measures to provide an adequate amount of decent quality drinking water.[8]

Despite very broad recognition of the rights linking with housing in all international, regional and national legal systems, there are few rights violated on such a scale and so severely as the right to adequate housing. It is however difficult to identify the scale of violations with any exactness. Furthermore, international documents do not simply affirm the right to housing, but to adequate housing which according to documents of the UN Committee on Social, Economic and Cultural Rights means the right to separate accommodation, a decent amount of living space, proper safety, lighting and ventilation, proper basic infrastructure and location from the point of view of work and basic services, and moreover all of this must be affordable.[9]

High prices for housing have always been a problem for guaranteeing the right to adequate housing. Over recent years the divide between the price per square metre and current wages has risen sharply. Back in 2006 the prices of accommodation in cities with a million or more inhabitants crossed the threshold of a thousand US dollars per metre squared and kept rising.

In Kyiv prices on the secondary market for that same metre squared are already about 2.5 thousand dollars, and in nearby suburbs – 1.5 thousand. This is with the average pay per month in most regions of the country going from 200 dollars, and in Kyiv from 450. Housing is still being pitched at an elite part of the population, with not only those poorly-off being ignored, but also the middle-income part of the population.

The situation is not being resolved. The Soviet mechanism for allocating accommodation has virtually died, and no sensible alternative has yet been offered. The relatively good figures of 22 square metres per head of population should not deceive anybody. According to State Committee of Statistics figures the amount of space for two out of every five households in the country was lower than the sanitary norm (13.65 metres per person). Incidentally the latter comes to us from the times of the Revolution and in the initial variant was «three square sanitary norms». However to this day 45 % of urban residents do not have it and 19 % do not even have two square sanitary norms.

In November 2007 the President put forward a strategy concept for resolving the housing issue[10]. A similar concept was also prepared by the Cabinet of Ministers. The President's proposals

[8] Millions dissolved in water. Information from the Accounting Chamber of Ukraine, http://www.ac-rada.gov.ua/achamber/control/uk/publish/article/main?art_id=1024010&cat_id=411

[9] The right to adequate housing (Art.11 (1)): 13/12/91. CESCR General comment 4. (General Comments) http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+4.En?OpenDocument

[10] Presidential Decree from 8 November 2007 «On measures for building accessible housing in Ukraine and improving the provision of citizens with housing.».

boiled down to the State providing money to some of those needing housing. In the President's words, «I am profoundly convinced that the State must ensure a single amount of free financial assistance for the first payment amounting to 30 % of the cost of buying housing».[11]

The government is asked to find 0.5 % of GNP (4 billion UAH) for that, beginning from 2009. Essentially that's all there is about those needing housing. Nor is there anything about it being accessible. It's hard to imagine accessible housing allocated by officials according to lists they have put together. And yet it is this, effectively, that is suggested.

In the most optimistic estimates this should ensure movement of the housing queue from 20 thousand orders per year to 70 thousand «sometime». Taking into account the fact that there are presently 1.3 million people waiting in line, the prospects are not difficult to estimate. Incidentally, 290 thousand of these should anyway be issued with accommodation either ahead of their turn, or as top priority. If one adds 133 military people waiting, it all becomes even more interesting. That means that the situation will definitely not be resolved before 2020. However even having divided the proposed 4 billion per year into the declared value of a square metre, we will have a little more than a million metres to hand out. That means one metre per person waiting in line.[12]

A particularly sore point and not just in the last year has been the problem of accessible housing for the military. While in the first instance this is true of those who have been waiting in line for a flat for many years. Those who have accommodation also encounter problems. After all, as a result of major reductions in the Armed Forces, the disbanding of particular units and military towns, a large number of families of military servicemen have remained alone with their problems since buildings have not been repaired over a long period of time, communications, heating and water supplies need to be updated or replaced. In order to resolve this issue at the State level a decision was taken to transfer the housing fund and buildings of the socio-cultural sphere to the balance of bodies of local self-government which, in the majority of cases, are scarcely able to make ends meet. It was planned to allocate additional funding for this programme.

However practice shows that in our country even with ideal plans, the end result often has nothing in common with what was planned. This is confirmed by the results of an audit into how effectively the funding is being managed of subventions from the local budgets for measures on transferring the housing fund and buildings of socio-cultural and everyday needs of the Ministry of Defence into communal property reviewed by the Accounting Chamber.

According to its conclusions, both the Ministries of Finance and of Defence controlled amounts in the many millions of public funds at planning and financing stages without proper cooperation and without justified accounts. This resulted in under-funding of approved scopes of work, funding of subventions not being made in a timely manner and the non-implementation of planned capital repairs and reconstruction of the transferred buildings.[13]

As we see, it is very difficult to speak of accessibility of housing and this also testifies to considerable difficult y in the State's fulfilment of its international commitment with regard to observing the right to an adequate standard of living.

3. THE RIGHT TO WORK

The right to work is an inalienable part of human dignity and each person should have the opportunity to do the kind of work which will enable him or her to lead a decent life. The right to work ensures the survival of the individual and his or her family and at the same time promotes the person's development and recognition in society, on condition that the type of work was chosen freely and without coercion. Work safety must be guaranteed, as well as decent and timely remuneration.

[11] I. Maskalevych «Housing: accessibility according to lists» // the newspaper «Weekly Mirror» № 45 (674), 24-30 November 2007, http://www.dt.ua/2000/2675/61244/

[12] Ibid

[13] Irresponsibility of officials deals a blow to the families of military servicemen. Information from the Accounting Chamber http://www.ac-rada.gov.ua/achamber/control/uk/publish/article/main?art_id=951813&cat_id=411

A period of economic growth on the whole had a positive impact on the level to which the labour potential was made use of. From 2000 – 2007 the percentage of the population employed, despite adverse demographic trends, rose by 4.5 %. At the end of 2007 the percentage of the population employed rose to 59.1 % and reached the highest level since 1999. Economic growth was accordingly accompanied by a gradual reduction in the level of unemployment. For example, from January to October 2007 the number of those officially registered as unemployed fell by 27.1 %. The level of unemployment determined according to the methodology of the International Labour Organization fell to 6.2 % which was the lowest reading since 1996. At the same time, unemployment took on an ever more pronounced structural character which is a reflection of the lack of reform and disproportional nature of the labour market. The latter is characterized by an imbalance in demand, with a combination of deficit and excess supplies of labour.

It should be noted that it is specifically the local level of pay which it is suggested is the most acute problem on the current employment market. Of all vacancies which employers informed employment centres about in 2007, more than 40 % offered wages below the subsistence minimum.

The size of the unemployment benefit is also low. For example, for those insured the minimum employment benefit is 40-55 % of the minimum wage. According to the State Committee of Statistics, the average amount of employment benefit last year was 294.3 UAH, and in agrarian regions – 230-250 UAH. One can in no way regard this level as adequate given the level of inflation.[14] This in turn was noted by the UN Committee on Economic, Social and Cultural Rights, with this body drawing attention to the need for active steps by the government on increasing the size of unemployment benefit.[15]

The norm of the Law «On mandatory State unemployment insurance» stating that unemployment benefit cannot be lower than the legally established subsistence minimum remains mere words to this day. It is claimed that there are no funds for implementing this part of the law.

The norm of this law is also not being implemented which stipulates the procedure and conditions for providing assistance in the case of partial unemployment. This form of assistance is practically not functioning at all and all attempts to bring it in have remained only attempts. This can be seen in the responses from the Ministry of Employment and Social Policy to information requests sent by the Ukrainian Helsinki Human Rights Union.

There continues to be high unemployment among the most vulnerable parts of the population, in the first instance, young people, those approaching retirement age and people with disabilities. Many of them cannot work full-time and need special working conditions. Employers don't want to make their lives more difficulty and therefore don't employ such people or take them on with less favourable conditions.

An example can be seen with people of pre-retirement age who are effectively outside the labour market. They are forced to waste time and effort on trying to resolve their employment problems themselves, mainly through relatives and friends. This situation forces them to hold on to their jobs excessively, even where neither the pay nor the conditions suit. It distorts the labour market, setting the ground for discrimination and inequality.

We should point out that the Law «On the State Budget for 2008 and amendments to some legislative acts» cancels the norm on guaranties to people of pre-retirement age of the right to early retirement, a year and a half fore before the legally established time. Consequently those people who still have a year and a half to go before retirement age do not receive their pensions and are forced to receive only pathetic unemployment benefit.

With regard to remuneration, it is worth noting that the average salary in 2007 in real terms reached around 70 % of the level in 1990. However, despite a significant increase in the average nominal wage, Ukraine still lags behind the vast majority of European countries, including Belarus, Bulgaria, Poland, Romania and the Russian Federation. For example, compared with 2004 the average wage had increased by 73 Euros in the Czech Republic; by 61 in Poland; by 52 in Russia. It

[14] Low pay is the biggest problem on the labour market // the newspaper «Den»», № 15, 29 January 2008 http://www.day.kiev.ua/195389/

[15] UKRAINE Concluding Observations of the Committee on Economic, Social and Cultural Rights E/C.12/UKR/CO/5, 23 November 2007, http://www2.ohchr.org/english/bodies/cescr/docs/cescr39/E.C.12.UKR.CO.5.pdf

is this which is probably leading to mass labour migration from Ukraine and the present shortages in some fields and regions.

The percentage of wages in GNP and in the cost price of products remains low which is not in keeping with general world practice. Wages have made up 45 % of GNP over recent years whereas in European Union countries they make up on average 65 percent. In the cost price of goods expenditure on wages comes to around 12 percent, with the figure in the majority of EU countries reaching 30-35 percent.

Wages which are the basis of the population's income remain too low to fulfil their basic functions. Whereas, according to the demands of the European Social Charter, the minimum wage should be no less than two and a half times the subsistence minimum, in Ukraine it is only about 81 % of the subsistence minimum for able-bodied people. 19.1 % of those receiving wages in 2007 earned less than the subsistence minimum. Thus over 2 million workers cannot, through their labour, meet a minimum level of consumption and basic social and cultural needs. And this is with a highly flawed and outdated system for estimating the subsistence minimum.

There remains a trend towards sharp differentiation between the level of remuneration depending on the type of economic activity with this having impact on the formation of rates of pay, rather than the amount, quality or results of the work. According to figures from the State Committee of Statistics, it was on average 10 % of the population with the highest income who profited most from the economic growth during the first half of 2007. Their income increased in nominal terms by 24 %, whereas the income of the remainder of the population increased by 16-17 %. This yet again demonstrates another very deep-lying problem, the divide between rich and poor is increasing which is, in turn, leading to a rise in social tension in society.

Mechanical increases in the minimal wage from 2005-2007, not linked with an according increase in labour productivity, could not resolve systemic contradictions in remuneration and did not encourage employers to reveal the incomes of their employees. As of September 2007, 6.3 % of employees were paid the minimum legally established wage. The largest percentage of employees with wages lower than the minimum were in fishing– 16.9 %, in agriculture – 15.6 %, in the communal services industry and in the sphere of culture – 8 %.

As already mentioned there is an economically unwarranted differentiation of wages between different fields with the wages in a number of fields between 2 or 2.5 times lower than the average for the country. Low wages are largely seen in fields paid for out of the State budget and in agriculture. For example, in September 2007, 25.5 % of educational workers and 26.6 % of those in healthcare earned less than the subsistence minimum for able-bodied people (561 UAH), which is worse than the figures for 2006 which were 21.0 % and 21.9 % respectively. Wages in industrial areas are also unsatisfactory; employees in the most technical fields (production of car and other equipment, of electrical, electronic and optical equipment) which provide other areas of the economy with new technical methods and technology, receive wages lower than those who use these methods and technology.

In today's circumstances practical mechanisms for indexation of payment of labour need to be drawn up to neutralize the negative social effect of inflation and to prevent a drop in buying power and demand. Indexation should be differentiated depending on the type of income. It should most concern those on low incomes and be one of the means of reducing differentiation of remuneration. A problem method of indexation will make it possible to reduce the social «cost» of adaptation inflation at the level of 10-12 % per year.

It should be noted that in 2007 a system was still not introduced for a minimal hourly rate of pay. This could be a positive step towards improving the system of remuneration, but it does require a very sensible approach in implementing it. This is important to avoid abuse on the labour market where a large number of people will be employed part-time and will accordingly not receive full pension entitlement or social security contributions.

The situation is somewhat improving as far as debt arrears on wages. Just in November 2007 the overall amount of such arrears fell by 7.6 %, and this was in the majority of regions. Two thirds of the total amount of arrears at present is in connection with enterprises which are not running or

which have gone bankrupt. The number of employees of functional enterprises not paid their wages on time, as on 1 December 2007 came to 1.5 % of the total number of workers.

At the same time, the problem of debt arrears remains crucial, especially as regards workers of the fuel and energy industry, as well as those working in agriculture. At the present time the assurances given by the President that arrears on wages – and this involves 700 million UAH – would finally be eliminated have not been kept.[16] The problems with wages arrears also contribute to the fact that despite considerable liability for their non-payment being envisaged, in practice most often there are only fines of from 15 to 50 times the minimum monthly wage before tax (255 – 850 UAH).

According to figures from the Prosecutor General in 2007, prosecutor's offices initiated 1659 criminal investigations (against 1,847 in 2006) over violations of legislation on payment of work. Of these 1502 were submitted to the court (against 1631 in 2006). In many cases, the wages were paid after the intervention of the Prosecutor. For example, merely on the basis of orders from the Dnipropetrovsk regional prosecutor's office, workers of the Mittal Steel Kryvy Rih joint stock company and of the state enterprise the Malyshev Factory debt arrears amounting to 42.3 million UAH were eliminated.[17]

Another area which cannot be ignored is that of work safety as an integral part of the right to decent employment. The number of jobs which pose a real threat to health is increasing. Almost one in three people work in conditions which do not comply with normative legal acts on safety at work. For these reasons, as well as due to the unsatisfactory provision of workers with means for individual and group protection, the level of work-related illness has risen – from 2.5-2.7 thousand in 1990-1992 to 5.7 thousand in 2005-2006.

The situation in 2007 brought no fundamental changes. The financing of measures aimed at preventing industrial accidents and work-related illnesses, increased somewhat however remained inadequate. Furthermore, even according to official figures from the Industrial Accident and Occupational Diseases which have caused Disability Fund, in 2007 compared with the same period in 2006, the number of fatal accidents at the work place increased by 3.6 %[18] The President stated that the level of work safety was half that of neighbouring countries. He also pointed out that over the previous year 1,176 people had received fatal injuries in the workplace, and that there had been 19 thousand injuries altogether.[19] Moreover, such cases are often examined inadequately and too slowly.

It should be mentioned that the official figures for accidents in no way reflect the severity of the problem since accidents at the workplace are often concealed. This is particularly true of small accidents which are widely kept out of records or investigations. For example, according to data from the Ukrainian Federation of Trade Unions in 2007 they uncovered 520 concealed accidents, among them fatal ones.[20]

All of this is confirmed by data from the Prosecutor General which indicate that prosecutor's offices last year initiated 555 criminal investigations over work safety, with 463 of these submitted to the court. 10 thousand people were issued with prosecutors' documents of response. Checks established numerous cases where employers exercised no control over adherence by employees of technological processes; lack of funding of work safety; providing directives on completion of work with infringements of industrial safety rules; failure to use measures for individual protection and to give instructions of work safety; neglect of the requirements of normative acts on work safety by employees of enterprises and cases where work injuries were concealed. The Prosecutor also states that adequate efforts are not being taken by the authorities and State controlling bodies to prevent deaths and injuries at the workplace.

[16] Information on the President's meeting with trade unions http://www.president.gov.ua/news/8822.html

[17] Information «On the level of lawfulness in the State in 2007 (in accordance with Article 2 of the Law «On the prosecutor's office») // the Prosecutor General of Ukraine, 10.03.2008 http://www.gp.gov.ua/ua/vlada.html?_m=publications&_t=rec&id=12985

[18] On a meeting of the board of the Industrial Accident and Occupational Diseases which have caused Disability Fund. http://www.fpsu.org.ua/activity/social-defence/4491492c87fc8/20080303-010/

[19] Information on the President's meeting with trade unions, http://www.president.gov.ua/news/8822.html

[20] Information from the Federation of Trade Unions of Ukraine http://www.fpsu.org.ua/news/ukraine-world/20080201-006/

Parliament has still not passed a nationwide programme for improving safety and hygiene at work 70 % if current normative legal acts were passed before 1990, and do not comply with modern work conditions.

The State Committee on Industrial Safety does not react to infringements of work safety legislation. Material on cases established which have posed a threat to life or created the danger of other serious consequences are not always passed to the prosecutor's office. There is still no proper control over the use of particularly dangerous machines and equipment. The State Committee on Industrial Safety issues permits for work suspended by its territorial offices although the infringements identified have not been removed.

The Industrial Accident and Occupational Diseases which have caused Disability Fund has not ensured full implementation of preventive measures aimed at eliminating harmful and dangerous industrial factors. No specialized medical and patronage services have been created.

Infringements of normative acts on work safety in the coal industry are still the most widespread. Out of the total number of injuries at the workplace in 2007, 38 % were suffered by miners. At the same time the Ministry of the Coal Industry is not providing proper State management of work safety in the coal industry and departmental control in this area. Modern rules for safety in coal mines have not been drawn up. There has been no implementation of a field programme on «Miners' health» for prophylactic measures against work-related illnesses of miners.

Mine workers are only 48 % provided with work boots; 50 % with gloves; and 86 % with anti-dust respirators. There are not enough individual lanterns and rescue alerts. There is a similar situation in other areas of the economy, for example in the metallurgic and chemical industries, in the agricultural industry and in construction.[21] This is yet another confirmation of how deep the problems of work safety go.

One of the main reasons for violations of labour rights is the fact that labour legislation is ignored on a wide scale, compounded by the lack of effective control over observance of this legislation by the State authorities, According to the Federation of Trade Unions this is resulting in an increasing number of infringements connected with wrongful dismissal. The level of infringements of labour rights remains fairly high regarding working hours (including being called upon to do overtime), time off, including having to work on public holidays and non-working days. [22]

What can one say when even virtually all ministries (the Ministry of Justice, the Ministry of Foreign Affairs, the Ministry of Employment and others), the prosecutor's office and other authorities, as a rule make their employees work at the weekend and out of working hours. Nor do the employees receive any extra payment or benefits – on paper this type of work simply doesn't exist and it is not carried out officially. This is among other things caused by a considerable overload with employees' work simply not possible to finish during working hours.

Cases where civil-legal agreements instead of labour contracts are drawn up have become extremely common with this leading to employees being deprived of the right to annual leave, to various types of social insurance and so forth.[23]

Problems remain with trade union rights. According to information from the Federation of Trade Unions, in 2007 they identified 129 infringements of the rights of trade union organizations which are part of the Federation. The most flagrant were interference by employers in the statutory activities of the trade union organizations, especially primary ones; prohibition on taking part in trade unions; obstructions put in the way of employees forming trade unions, especially at private enterprises, multinational companies; the creation of puppet trade unions; complicating the procedure for holding strikes; violation of the labour rights of members of trade unions in connection with their active participation in the trade unions; banning members of electoral bodies of trade unions and their authorized representatives from visiting without any obstruction enterprises, institutions

[21] According to information given during an extended session of the board of the Prosecutor General on observance of work safety legislation from 29 February 2008. http://www.gpu.gov.ua/ua/news.html?_m=publications&_t=rec&id=13405&fp=61

[22] Letter from the Ukrainian Federation of Trade Unions N07/01-15/576 from 17.03.2008 on observance of labour rights to the Committee of the Verkhovna Rada on Human Rights, National Minorities and Inter-ethnic relations, http://www.fpsu.org.ua/news/ukraine-world/20080326-005/

[23] Ibid.

and organizations where members of the trade union are working; wrongful dismissal of the heads of primary trade union organizations or members of the trade union committee; bringing disciplinary measures against them; changing the conditions of their work; employers' avoiding involvement in collective negotiations; obstructions to gathering trade union contributions or failure to transfer them to the appropriate trade union organizations; complicating the system of registration of trade unions; financial control over the statutory activities by the authorities, bodies of local self-government, etc.

They state that the main reasons for violations of the labour rights of members of the trade unions and the rights of the trade union organizations is the legal nihilism of employers; the failure to exercise the law by officials of the authorities and bodies of local self-government and their own powers to ensure observance of rights and liberties. Increased liability should therefore be imposed in cases where these individuals fail to carry out their duties. This applies first and foremost to the State and its authorities officials since the best thought-out mechanisms for implementing legal norms will be useless if the State is incapable of demanding that its own bodies and officials be held answerable for failing to fully or in any measure carry out their duties to protect people's rights.[24]

The Confederation of Free Trade Unions of Ukraine has also expressed deep concern over the violations of trade unions' rights. The Head of the Confederation Mr. Volynets has said that there were not just isolated cases where trade unions' rights were flagrantly violated in 2007. These involved unwarranted refusals to legalize trade unions; dissolution of trade unions; persecution of trade union leaders; dismissals and pressure on employees due to their participation in trade unions; interference by the administration or State authorities into the internal affairs of the trade union. Each of these provides glaring evidence of the lack of proper observance of trade unions' rights and the ILO Convention No. 87.

«*In the town of Shostka in the Sumy region at the enterprise «Zirka» the independent trade union which had dared fight against the failure over many months to pay wages became the target of reprisals by the administration. Employees did not receive their wages for five months. During that time the director recommended that they take out loans in the bank using their personal property as security. Despite the considerable arrears with wages, the administration openly ignored the Law «On trade unions, their rights and guaranties for their activities» and refused to provide the trade union with information about the financial incomings of the enterprise.*

On 20 August 2007 the head of the trade union Rostyslav Duplin received a letter from the director of the enterprise Kozlov saying that he was allowed to visit the working places of the members of the trade union only on warning about the date and purpose of the visit and specific structural premises which he planned to see. The trade union was thus effectively deprived of the possibility of working at the enterprise, carrying out its functions in work safety and protection, as well as direct trade union organizational functions.

It was only with the help of a deputy's appeal to the Prosecutor General that in three months the head of the trade union managed to get a pass to give him access to the enterprise.

During that time the office use by Duplin who had left his position as head of the department to take up the trade union work was burgled and the trade union documentation stolen. The provisions of the Code of Labour Laws of Ukraine and the Law ««On trade unions, their rights and guaranties for their activities» on the need to provide the trade union committee with separate appropriately equipped premises have still not been implemented; trade union activists have experienced persecution; the head of the trade union's deputies were dismissed under the pretext of job reductions with job advertisements for specialists for similar posts appearing at the same time in the newspaper.

The State Labour Inspectorate which the independent trade union approached on several occasions in connection with violations by the enterprise administration of the labour rights of their employees has systematically responded with fob-offs.»[25]

The Confederation of Free Trade Unions did not only find flagrant infringements in provincial towns, but in large cities also. According to Volynets, for example, Kharkiv is notorious for persecution of free trade unions.

[24] Ibid

[25] Infringements of the rights of trade unions: Ukrainian reality (Confederation of Free Trade Unions), http://www.kvpu.org.ua/news/25%20sichnia%202008.html

«In Kharkiv in August 2007 130 machine operators of the Kharkiv metro decided to joint the Free Trade Union of Train Workers of the Kharkiv Metropolitan in order to gain protection and representation of their labour and social rights. After this step, the management began a campaign of deliberate persecution.

On 29 August immediately after the notification to the administration of the State enterprise «Kharkiv Metropolitan» of the creation of the Free Trade Union, an overt measure of intimidation was carried out with the jeering title «Safety Day» in the depot «Moskovske». As a result, thirteen employees, all members of the Free Trade Union, faced disciplinary measures, had their bonus reduced by 20 %, were sent on an unscheduled test of their knowledge, and others. Two of the men – Y. Mykhevych and Y. Serdyuk received the penalties mentioned in advance so to speak, since at 4.30 when the protocol was being drawn up they hadn't yet arrived at work, and therefore they could not even theoretically have been guilty of the infringements listed in the protocol.

In another order № 541 from 8 October 2007, numerous speed restrictions on various parts of the metro were established with these being practically impossible to combine with the set timetable for trains. These and other orders, instructions and regulations, issued by the administration, both contradict one another and the instructions of the Ministry of Transport and Communications. They result in a situation where you can also blame and penalize an employee for breaches of this or that instruction.

At the present time, in conditions of extensive pressure on the Free Trade Union, 20 employees have already been dismissed on the initiative of the administration. All of them are machine operators from the electrical deport and members of the Free Trade Union.

Clearly such actions are not merely a violation of the labour rights of employees who are members of the trade union, but also a serious threat to the safety of thousands of passengers. Yet for the administration of the enterprise the main thing is their wish to get even with an independent trade union and to achieve slave-like docility from their employees.[26]

The largest passenger airline in the country – the company «Aerosvit» – also demonstrated an unprecedented case involving ignoring a trade union, Volynets reports.

«In 2006 the administration concluded a collective agreement with the trade union of pilots «League of airline pilots». However, as was evident from the very beginning, they did this without any intention of actually implementing it. The trade union counted no less than 10 infringement of the collective agreement beginning with remuneration and ending with providing food during flights..

In the airline company there has been a systematic failure to implement a number of fundamental requirements of the Order of the State Airline Service from 5 December 2004 № 920 with regard to working hours and time off for aircraft crews. As a result, on many flights the night working hours for crews are over 12 hours rather than the permitted. Furthermore there have been attempts by the administration to encourage the crews to fiddle the real time that they commenced work. This results in «day» norms of the working day being applied for night hours, and systematic falsification of the real time people begin work. On some flights pilots work up to 12.5 hours instead of the correct 8, which is highly dangerous and could have fatal consequences.

The former head of the «League of airline pilots», Serhiy Molody began a battle to have the rights and guarantees for pilots set down on paper observed in real life.

The result of this, of course, was his wrongful dismissal which was not agreed with the managing body of the primary trade union, not with the bodies of trade union associations which they belong to. Yet the court refused to reinstate him.»[27]

As we see, the rights of trade unions are systematically violated by many employers.

The problem with a considerable flow of able-bodied members of the population abroad as a result of social and economic shortcomings did not arise just yesterday. It is mainly people from the West and the East of the country who head abroad for earnings. Despite a certain economic stabilization observed recently, the rate and scale of labour migration, in the view of a number of experts, means that the State must take urgent and adequate measures. An extremely important step in protecting the rights of migrants was Ukraine's ratification in 2007 of the European Convention of the Legal Status of Labour Migrants which is aimed at improving the system of legal and social

[26] Ibid
[27] Ibid

protection for Ukrainian nationals who are working in countries of the Council of Europe in accordance with the legislation of the receiving party.

However in order to ensure that the protection of migrants is truly effective, there need to also be international agreements in the area of employment with particular countries, in the first instance with those where there are the greatest numbers of Ukrainian nationals. Furthermore the conditions need to be created to ensure that the mechanisms of protection set down into the contracts do begin working. At present such agreements have only been concluded with some countries. According to information from the Ministry of Employment and Social Policy, such agreements have been reached with Armenia, Azerbaijan, Belarus, Latvia, Lithuania, Libya, Moldova, Poland, Portugal, Russia, Slovakia and Vietnam. There are no such agreements yet, however, with Spain, Greece, Italy, Romania and other places where there are large numbers of Ukrainian migrants.[28]

4. THE RIGHT TO SOCIAL PROTECTION

Economic growth and an influx of funding of channels of the system of social security have at once highlighted a range of significant and systemic problems linked with being behind in reforming the social sphere. Among these are:

– inadequacy of the norms of social and labour legislation, the non-use of State social standards and social guarantees of current legislation, and the insufficient level to which social legislation to European Union law;

– lack of clear differentiation of social functions, duties and responsibility for resolving social problems between the centre and the regions.

These problems have considerably reduced the effectiveness of government social policy which ensures the appropriate social effect of the growth in economic indicators and has proven incapable of overcoming major social threats.

Among these threats are the low standard and quality of living of the population; a significant number of poor people, including those in employment; a sharper divide of the population according to the level of income and unfavourable conditions for the development of a middle class.

It should be noted that in recent years the priority in social policy has been support for the poorest, most socially vulnerable and non-able-bodied groups in society. This priority is seen in the absence of any national strategy as regards social policy. This has led to a narrowing in the social functions of the State, a sharp lowering in the efficiency of social policy as a whole, and social spending in particular. The evolution of a system of social protection seen from 2004-2005 led to an increase in a dependency mode among wide layers of society, the collapse of insurance principles of pension provision prompted the «levelling out» of the income of the vast majority on people not working and caused an excessive social load on the State Budget.

In 2007 the trend towards increase in spending on social protection and security continued. In the State Budget for 2007 spending on social protection made up 21 % (against 15 % in 2006); on education – 7 % (against 5 % in 2006); healthcare – 4 % (against 3 %). However no significant practical moves in the area of social protection were achieved. Mechanical increases in resources spent in the social sphere effectively substituted changes needed in the first instance in the organization and technology for meeting social needs and increasing the efficiency of social spending. There is no scientifically justified monitoring and systematic assessment of the effectiveness of expenditure on social needs.[29]

Development of possible directions of social policy has been replaced by constant expansion of the number of different types of social assistance and benefits with a low level of targeting and not supported by possibilities for funding from the Budget. At present the State has commitments to provide 150 types of social benefits, guarantees and compensations to 230 categories of the population, with the system of benefits being regulated by 46 normative legal acts. Benefits according to

[28] Human trafficking – an effective screen / the newspaper «Work and pay», № 11 from 19 March 2008.
[29] Expert report «Ukraine in 2007: internal and foreign position and prospects for development» The National Institute for Strategic Studies http://www.niss.gov.ua/book/Eks_d2007/index.htm

social indicators are granted on the basis of 24 legislative acts according to which 15 million citizens, or almost a third of the population, are entitled to such benefits. According to various estimates, the value of declared benefits is from 19-29 billion UAH per year which is several times in excess of the scale of budgetary funding actually allocated.

Due to the lack of real reform in the social sphere, the latter has turned into a remnant of the socialist system with a high level of paternalism, prevalence of a dependency mentality among a considerable part of the population, financial lack of justification for a large number of commitments and an extremely ineffective system of management. Deep-lying distortions have developed in the structure and spread of income and in the accessibility to the population of basic social services.

The strategic direction of social policy should therefore be a gradual reduction in the ratio of direct State funding of social needs and increase in the amount of funding by the population on the basis of an increase in all forms of income, especially salaries, pensions and other forms of social transfers.

With regard to reform of the system of social security, leading experts agree that such reforms should envisage:

– provision of all forms of social assistance (including social pension) on a targeted basis taking into account the total income of the whole family;

– introduction of a single form of targeted social assistance for unforeseen circumstances – the death of a relative, serious illness, natural disaster, social conflict, etc;

– simplification and unification of the mechanisms for receiving targeted social assistance together with the introduction of mechanisms for determining the real income of those applying for targeted social assistance;

– gradual transfer from provision of assistance on the basis of low income and subsidies for payment of housing and communal services and fuel to the provision of a single form of targeted social assistance;

– an increase in the student grants to orphaned young people studying in higher institutes and vocational training colleges to double the subsistence minimum;

– doubling the level of payments for those doing military service;

– an increase in the level of State assistance to families with many children to 50 % of the subsistence minimum taking into account income and supplementary benefits.[30]

In this context it is extremely important to consider the issue of pension reforms.

At the present time the State collects funds for pensions via a system of compulsory contributions and distributes them manually as needed regardless of how much each individual has actually paid into the Pension Fund. With this set up those who are presently working are effectively paying the pensions of those who receive them.

Unfortunately an accumulation system of mandatory State pension insurance has still not been introduced.

The inadequacy of the present pension system which is based on a purely fiscal redistribution of resources, effectively removing them from investment circulation, is obvious.

As international experience shows, it is only possible to ensure a decent standard of living for pensioners through a flexible and diversified pension system combining different methods and sources of funding. The most effective is a system of pensions made up of 5 elements: the zero level – a minimum social pension guaranteed to all citizens upon reaching a certain age (usually 5-7 years later than the general retirement age) regardless of length of social security payments and amount of contributions made; the first level – pension from a solidarity system which is paid to all those who have reached retirement age on condition that they have the necessary length of social security payments and according to the amount of contributions paid during their life; the second level – pension from a mandatory accumulation system which is paid to people of retirement age who paid the appropriate contributions through their life, with the accumulated investments of funds thus made in their time; the third level – pension from an additional accumulation system

[30] Ibid

to which employees and their employers make contributions on a voluntary basis; an informal level – support of elderly people by communities or their families.[31]

The solidarity system of pensions which Is in place at present will already in the near future be unable to provide a satisfactory level of pensions given the existing demographic situation (according to specialists in 2050 the ratio of those working to pensioners in Ukraine will be 50 %). Even today there are problems with financing the ever mounting scale of expenditure of paying out pensions.

The need to introduce an accumulation system of pensions is envisaged also by the Law «On Mandatory State Pension Insurance». In accordance with this the Cabinet of Ministers submitted a draft Law which envisaged the introduction of an accumulation system of mandatory State pension insurance for parliament's consideration. This draft law stipulated the time frame for introducing such a system, establishing the size of the deductions to the Accumulation Pension Fund, and linked tasks needing to be resolved before the system began.

Parliament passed this draft Law in its first reading on 24 April 2007. However there has been no more progress on passing the Law.

Later a Draft Law on introducing an accumulation system of mandatory State pension insurance was again table in parliament ((№ 0942), which had been considered by the Verkhovna Rada Committee on Banking and Finance. This document envisages the introduction of an accumulation pension system from 2009.

It must be stressed, however, that there are certain circumstances urgently needing resolution between the second level of a pension system can be implemented. In the first instance, there are certain prerequisites that must be established for the effective existence of an accumulation system. For example, the Final Provisions of the Law «On Mandatory State Pension Insurance» (Item 9) provide a list of requirements which must be met in order to implement an accumulation system. Among them are circumstances of a general economic nature, mainly steady economic growth in the country and the financial stability of the solidarity system of pension insurance; providing guarantees with regard to the minimum size of the pension and maintaining a level of income in introducing an accumulation system; fulfilling the requirements regarding a number of measures of an organizational-financial and legal nature, for example, creating institutional components for the functioning of an accumulation system of pension insurance and passing legislative and normative acts required for its functioning.

Overall at the present time we can speak of the fulfilment of only two of the requirements listed: a certain degree of economic growth and ensuring payment of pensions in the solidarity system at the level of the subsistence minimum.[32]

Extension of a system of non-State pension provisions is a problem. Over recent times this has been developing to some extent, with the number of registered funds increasing and their assets growing. However specialists say that this development is encompassing a rather narrow segment of the economy. The legally stipulated conditions for the functioning of private pension funds are entirely acceptable for employers largely of the banking sector, and can also to some extent be satisfactory for people engaged in business enterprises which use a monopoly on the market since they can make use of all the positive aspects of this type of insurance. In general the assets of such funds do not reach 1 % of the annual wages fund in the country.

In order to take well-justified decisions regarding the timeframe for introducing particular elements of an accumulation system it would be wise to bear in mind experience in carrying out similar measures in, for example, Poland and Hungary. The norms regarding payment of a life pension by insurance organizations at the expense of funds from an accumulation system in these countries came into force already after the opening up of an insurance market and the introduction of European standards for insurance activities. Yet in Ukraine there are at present no insurance organizations which could properly fulfil the demands on paying a life pension.[33]

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[31] Expert report «Ukraine in 2007: internal and foreign position and prospects for development» The National Institute for Strategic Studies http://www.niss.gov.ua/book/Eks_d2007/index.htm

[32] Pension reform: further, broader, deeper // «Legal Weekly» № 4(77), 22 January 2008. http://www.legalweekly.com.ua/article/?uid=241

[33] Ibid

It should be noted that this year with the adoption of the Law «On the State Budget for 2008 and on amendments to some legislative acts of Ukraine», there were some positive changes to the solidarity pension system. Firstly, the value of one year's inclusion in the pension system rose from 1 % to 1.2 % from 1 January 2008, and to 1.5 % from October 2008. The wages used for calculating pensions in 2004 were also more than tripled, from 306 UAH to 928 UAH. This could to some extent make it possible to move away from the previously introduced notorious «levelling» policy where the pensions of the majority of pensions were established at the level of the subsistence minimum for people who have become unable to work.[34]

We would like however to point out recommendations made by international experts on the development of a pension system. They recommend, among other things, avoiding discrete increases in the minimum pension and introducing 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. They also speak of the need to gradually increase the retirement age, making this the same for men and women, and to review the system of contributions for the self-employed, part-time workers and season workers.

They also point to the need to improve regulation and supervision of private pension funds taking into account international experience and consultations; to pass legislation on consolidating the functions of collecting all social contributions under the Pension Fund; and finally, work needs to be renewed on raising awareness about pension reforms, including private pension funds, since the present mistrust of them is linked with an insufficient understanding of how these organizations function.[35]

Another basic problem as regards the right to social protection is the way the State authorities ignore legislation in the area of social protection. This is seen by the failure to implement the judgment of the Constitutional Court from 9 July 2007 which found some provisions of the Law «On the State Budget for 2007» on restrictions of socio-economic rights unconstitutional.

This judgment effectively confirms the declarative nature of legislation on social protection of the population since the legal norms existing today are not being implemented with the government using different ways of getting around them. Furthermore, in the Law «On the State Budget for 2008» and «On amendments to some legislative acts of Ukraine» the very provisions are repeated from the law on the Budget for 2007 which shows that the State authorities have no plans to develop a mechanism for implementing the judgment of the Constitutional Court, or of carrying it out in any way.

There was no great progress in 2007 in creating a single system for social insurance. The necessary legislation was not passed for introducing a single contribution for mandatory social insurance, and the insurance funds in cases of temporary inability to work and insurance in the case of accidents at work were not merged into a single fund.

For such a system to work, mechanisms need to be developed for implementing it, and the size of insurance payments needs to be determined solely by contributions made. A single database for following insurance contributions and payments should also be created. It is important to ensure payment of contributions to the system of mandatory State insurance for all insured without exception (if contributions from the employer and / or the employee are not envisaged, then these should be paid for from the Budget), and payments should be made from the insurance funds solely for insurance cases (assistance for looking after a child, for a funeral, etc, must be funded by the Budget). Unfortunately however at the present time all of this is still at the planning stage.

There has also been no particular progress on reforming the system for providing social benefits. There is still no division in legislation into norms which guarantee certain socio-economic rights, and those which grant certain privileges linked with particular merits, position, etc. Reform of the system for providing social benefits will require:

[34] The government wishes to achieve social justice in the size of pensions. Information from the Ministry of Employment and Social Policy. http://pension.ukrinform.com.ua/news-january-08.html

[35] Recommendations on economic and institutional reform. The UNDP Blue Ribbon Commission http://www.un.org.ua/brc/ua_adp_src/Recommendations%20to%20ministriesUK.pdf

– a move to the principle of targeted benefits and creation of mechanisms for targeted provision of benefits to each particular person;

– the use of the criterion of a threshold income per person of a household in order to increase the degree to which benefits are targeted and avoid abuse in establishing the right to receive benefits;

– creation of an integrated database on the number and range of people entitled to benefits and the value of the services which should be provided; the implementation of a record of social benefits provided according to a single register for the country;

– step-by-step introduction of a system of providing benefits in cash form (at the first stage at the choice of those entitled to them);

– a move to provision of benefits linked with compensation for damage to health in forms and amounts directly linked to the scale and type of damage caused.[36]

The system for calculating housing subsidies which has long been outdated and not very effective also worked with problems this year. This was mainly due to a bureaucratic, complex, muddled and over-regulated system of providing this type of assistance. The inefficiency of the system of subsidies is compounded by the lack of transparency as to pricing in housing and communal services. it should be noted that there are no scientifically and economically based mechanisms for determining the size of tariffs on housing and communal services and it is therefore not clear what people are paying for, and consequently what they receive compensation for in the form of State subsidies.

There are also problems in creating a barrier-free environment for people with restricted physical possibilities. Legislation needs to be improved on ensuring such an environment as well as providing transportation for people with disability status, as well as on creating the conditions for the proper functioning of institutions providing social services. The requirements for ensuring access to people with disabilities to buildings of the State authorities, as well as to social infrastructure offices of bodies of local self-government and the Pension Fund are not complied with in full.

Strict control has not been imposed on ensuring that the needs of the disabled are taken into consideration with construction and repairs to buildings, cultural and healthcare institutions, educational institutions, residential and public buildings.

Ukraine has also not yet signed the UN Convention on the Rights of the Disabled and the Optional Protocol to this.

5. RECOMMENDATIONS

5.1. GENERAL 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.

5.2. THE RIGHT TO AN ADEQUATE STANDARD OF LIVING:

1) Improve the calculation of the subsistence minimum, approving a new subsistence basket of food items and commodities; adopt new methods for calculating this indicator.

2) Carry out reforms aimed at reducing the divide between rich and poor, as well as imbalance in remuneration for work between different fields.

3) Activate measures to support residents of rural areas.

4) Improve regulation of the quality of food items, as well as the quality and safety of drinking water;

5) Introduce measures aimed at making housing affordable.

[36] Expert report «Ukraine in 2007: internal and foreign position and prospects for development» The National Institute for Strategic Studies http://www.niss.gov.ua/book/Eks_d2007/index.htm

5.3. THE RIGHT TO WORK:

1) Increase unemployment benefit to the subsistence minimum envisaged by legislation.

2) Introduce assistance in cases of partial unemployment.

3) Reduce high unemployment among the most vulnerable groups of the population, in the first instance, young people, those approaching retirement age and the disabled.

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) Improve work safety to reduce the number of industrial injuries, including carrying out preventive programmes

7) Improve control over adherence to standards in the area of work safety and protection and ensure swift and effective investigations into cases of injury

8) Ensure strict observance of the rights of trade unions

5.4. THE RIGHT TO SOCIAL PROTECTION:

1) 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.

2) Provide all types of social assistance on a targeted basis taking into consideration the total income of the family;

3) introduce a single form of targeted social assistance for unforeseen circumstances – the death of a relative, serious illness, natural disaster, social conflict, etc

4) ensure a strict link between social benefits provided and the sources and mechanisms for compensation of their value to those providing them.

5) Introduce standardized approaches for determining the size of payments from the State Budget to compensate those providing benefit services.

6) Introduce in stages a system for providing benefits in cash form.

7) Continue reform of the pension system by introducing an accumulation level of this system and create the conditions for this.

8) 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.

9) Improve regulation and supervision over private pension funds taking international experience and consultations into consideration.

10) 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 2007»

11) Introduce a system of single social insurance and develop mechanisms for introducing it.

12) Promote the creation of a barrier-free environment for people with restricted physical possibilities

13) Activate policy on social protection for the homeless and their re-integration into society.

XVI. THE RIGHT TO EDUCATION[1]

1. OVERVIEW

Exercise of the right to education entails observance of the following fundamental principles:

Availability – functioning educational institutions and programmes have to be available in sufficient quantity. What they require to function depends upon numerous factors, including the developmental context within which they operate; for example, all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer facilities and information technology;

– *Accessibility* – educational institutions and programmes have to be accessible to everyone, without discrimination. Accessibility has three overlapping dimensions: Non-discrimination – education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds; Physical accessibility – education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighbourhood school) or via modern technology (e.g. access to a «distance learning» programme); Economic accessibility – education has to be affordable to all.

– *Acceptability* – the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students

– *Adaptability* – education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.[2]

An analysis of the situation with the right to education in the context of these fundamental principles highlights a number of fairly significant problems in Ukraine.

Firstly educational spending remains at a low level although it has been increased over the last few years. The problem is also compounded by inefficient use of money received.

The situation with educational institutions in rural areas is particularly serious. The rural school is on the brink of dying out and the State's measures to overcome this trend via such programmes as «School bus» are not achieving the necessary results. This situation in the majority of cases is the result of a general malaise in rural areas.

Access to educational institutions remains a serious problem for people with disabilities, especially those with impaired vision or movement.

The constitutional right to free education has become effectively on paper only for certain professions (lawyers, doctors). In semi-legal fashion institutes force students to sign contracts committing themselves to work for three years where the State sends them after graduation or to return the money spent on their education. These placements are usually made without taking into account the person or family circumstances or wishes of the graduate. They are also often poorly-paid

[1] Prepared by Maxim Shcherbatyuk, UHHRU lawyer.

[2] implementation of the International Covenant on Economic, Social and Cultural Rights General Comment No. 13 The right to education http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.1999.10.En?OpenDocument

jobs, meaning that effectively the State is returning the money expended on their education through other means. These contracts are not based on the law and fundamentally destroy the right to free education.

A significant problem impeding the development of modern education is the lack of academic freedom of educational institutions, as well as an old and inadequate system for gaining academic qualifications. Considerable State regulation of this system and excessive bureaucratization are not in keeping with the best world practice and international standards.

Improvement is needed of the system for the licensing and accreditation of higher educational institutions since at present institutes are mainly assessed on quantitative and not qualitative indicators and this has an adverse effect on educational services provided.

There are urgent problems also with student self-government and providing students with adequate academic and work practice.

Problems with student hostels and textbooks were not resolved in 2007. The problems remain real especially in the context of ensuring availability and acceptability of education. Clearly a proper educational process cannot be provided without the necessary textbooks and in premises which do not meet minimum sanitary and technical requirements.

An important move in 2007 was the development of independent external assessment which should ensure objectivity and transparency in providing educational services. It is however no less important to avoid the dangers inherent in introducing such a system especially those linked with the existence of a single body which itself prepares the methodology for assessment, carries it out and monitors the quality of its own work.

We should also add that there is no systematic education on human rights in educational institutions. Some institutions offer courses studying specific laws however this does not ensure a sufficient understanding and awareness of rights.

One has to note a certain lack of systematization in the implementation of the Bologne system of education in Ukraine. The main problem areas are:

– An excessive number of academic directions and specializations, 76 and 584 respectively. The best educational systems have five times less;

– Insufficient public recognition of a bachelor's degree as a qualification level and the lack of demand for it in the Ukrainian economy. As a rule admission to a higher institute is not for a baccalaureate but for a profession;

– A dangerously widespread and increasing deterioration in the quality of higher education;

– A widening rift between educational workers and employers, and between education and the labour market;

– An unwarranted confusion regarding the levels of specialist and of master's level. There should, on the one hand, be similarity of programmes for preparing specialists and those with master's level, and equivalence in their educational qualification level, yet on the other they have accreditation at different levels, III and Iv, respectively;

– Disregard for leading scientific research in educational institutions which is the basis of university training. Our system of academic levels is complex in comparison with general European levels which complicates mobility for our lecturers and scientists in Europe;

– Technical and vocational colleges are not adequately meeting the needs of society and of the labour market. This is with there being four times as many of them as higher educational institutions of III and IV levels of accreditation;

– The days have passed of a well-organized and centralized system for professional development and retraining. A new system meeting the needs of the market economy has not been created. The highly important European principle of lifelong education cannot at present be fully achieved in Ukraine;

– Uuniversities are not taking on the role of methodological centres. Innovators, pioneers of social transformation which the country can follow. The level of autonomy of a higher educational institute in these areas is considerably lower than on average in Europe. Educational institutions with national status are not assuming the role of methodological leaders although they make up around 40 % of the total number of higher educational institutions with levels III and IV accreditation.

2. PUBLIC SPENDING AND ENSURING THE RIGHT TO EDUCATION

It is important here to consider both the level of financing and how efficiently this money is being spent.

Despite an increase in educational spending during the year, the problems with low teachers' salaries, material and technical support for educational institutions, as well as with the reduction in the number of libraries built up over many years, remained unresolved.

Standard norms remain in place for allocating educational resources, with these not enabling educational institutions to react to the particular changes taking place in their area or their specific institution. There are still problems with ensuring autonomy for local authorities with regard to educational spending.

Although government educational spending rose in 2007 from 5 to 7 % of GNP, many problems built up over recent years remain.

The World Bank recommends that Ukraine not simply increase public expenditure on education, but increase the *efficiency* of this spending.

Although Ukraine has more teachers per head of population than in many European countries, the results of the educational system are considerably worse.

The resources which need to be invested to improve the quality of education could be found by increasing the autonomy of local authorities regarding spending and thus increasing incentives to direct services to meet the actual needs of the population.[3]

According to Pavlo Saavedra, World Bank economist, the main cause of inefficiency is the lack of flexibility in establishing budgets for educational expenditure with standard norms for material and technical resources not enabling the local authorities to redirect resources in response to changes in demand. This ineffectiveness is exacerbated by regulation and incentives linked with the mechanisms for establishing budgets, for financing and administrative management of local authorities and providing educational services. Despite the considerable role played by the local authorities within the system of State funding for education, their ability to allocate resources within the framework of the sectors to improve quality and efficiency is extremely limited.

Martin Raiser, economic adviser to the World Bank adds that in such conditions additional public expenditure will not solve the problem. The most urgent reforms must be aimed at eliminating the inflexible system for allocating expenditure, which should support present networks of educational institutions and provide greater incentives and opportunities for the local authorities to allocate resources to meet public needs. These measures of reform need to be carried out in such a way as to protect those on low income and take into account the social consequences of optimization of schools and staff reductions. Teachers deserve better conditions. Many of them will be forced to work differently, but will earn a decent salary which will result in an improvement in conditions and in a higher assessment of their work by students and their parents.[4]

Confirmation of the inefficient use of public spending on education is given by the Accounting Chamber report on government contractual work. The auditors found that almost 80 % of all government contracts were unfailingly aimed at training specialists, scientific-educational and manual workers, raising their professional level while on all other areas the figure was only between 0.6 and 4.2 percent. In establishing these amounts the Ministry of the Economy does not use a standard approach for determining the cost of training specialists. It makes corrections to funding manually with this leading to an increase in the constructed value for training one specialist, and as a result ineffective public spending. Furthermore the size of government contractual work was determined by the Ministry of the Economy at its own discretion, in a formal manner and without adequate justification. During 2004-2007 the auditors pointed out, government contractors had not defined or ensured priority government needs with regard to public sector employment of graduates with

[3] World Bank report «Improving future relations and spending «Overcoming fiscal, efficiency, and equity challenges in public education spending»
http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/ECAEXT/UKRAINEINUKRAINIANEXTN/0,contentMDK:21680301~pagePK:141137~piPK:141127~theSitePK:455681,00.html

[4] Ibid

higher education. As a result of this public funds of over 36 million UAH had been spent inefficiently.[5]

Such a formal approach can give the lie to the principle that the State ensures that the right to free higher education is exercised, and does not simply provide educational services. In view of this one needs to find a sensible balance between ensuring the needs of the economy and people's right to make their own choice of future profession combined with the right to free higher education.

The problem of inefficient public spending is eloquently demonstrated by the following example. In order to improve education many schools were provided with computer classes with 10-20 or even more computers. Such a step is only to be welcomed. However the subsequent servicing of these computers and computer networks was virtually not financed, and there are examples where such classes are not being used and the technology is aging. This situation is particularly often seen in rural schools where there is a great shortage of staff and the students don't know how to use computers at all.

3. THE PRINCIPLE OF AVAILABILITY

Serious problems remain with ensuring availability of at least primary education in villages. The closure of village schools is by no means always justified. 85 % of all schools closed are in village. In village schools there are usually from 10 to 30 children, though sometimes as few as five. It is clearly difficult to speak of a fully-fledged educational process. However the closure of such schools places the development of the entire village in question. In many cases a village fully exists only where it has a school and if this is closed the village is doomed to die out. This problem was highlighted by the Accounting Chamber in its conclusions regarding the dying out of villages.[6] No wonder that already at the beginning of 2008 legislative proposals appeared regarding a moratorium on the closure of village schools[7]

Despite certain positive steps in increasing teachers' pay, 2007 saw no breakthroughs. Teachers' salaries remain too low to guarantee a proper level of education which places in question not only the principles of acceptability and adaptability, but also availability, that is, the very existence of educational institutions. This is confirmed by the UN Committee on Economic, Social and Cultural Rights in their concluding observations on Ukraine.[8]

With respect to the principle of availability, one should note problems in higher education. These include shortcomings in the system of licensing and accreditation which do not promote observance of the principle of availability, especially with regard to the resources and staffing base for educational institutions. Assessment of higher institutes is mainly carried out on the basis of quantitative indicators which the institute can achieve by any means. For example, in order to report on the availability of space, unneeded and unsuitable premises are rented. In order to achieve certain results regarding the numbers of PhDs, associate professors, doctors of science and professors among the lecturing staff, any means are used to increase the number of such people. This is true first and foremost of new educational institutions created in the post-Soviet period. It is not the professional level or skills that determine how a person is treated and their status in a particular institute, but whether they have an academic title. They are not dismissed even if there are significant failings in their work, and corrupt behaviour is forgiven because without them the institute will not get accreditation. This ties the hands of the institute management when fighting corruption and promoting young talented people to top posts.

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[5] «State contract work needs to be changed» // Information on the website of the Accounting Chamber http://www.ac-rada.gov.ua/achamber/control/uk/publish/article/main?art_id=1056085&cat_id=411

[6] «The village is being helped to die out» // Report on the website of the Accounting Chamber » http://www.ac-rada.gov.ua/achamber/control/uk/publish/article/main?art_id=955131&cat_id=411

[7] «BYuT wants to introduce a moratorium on closures of village schools» // the Internet publication ProUA http://ua.proua.com/news/2008/03/20/092742.html

[8] UKRAINE Concluding Observations of the Committee on Economic, Social and Cultural Rights E/C.12/UKR/CO/5 23 November 2007 http://www2.ohchr.org/english/bodies/cescr/docs/cescr39/E.C.12.UKR.CO.5.pdf

This accreditation procedure is one of the reasons for the aging of the teaching staff which is of particular concern. At present half the doctors of science working in higher institutes are aged 60 or over. One in four is over 65, and only 14 percent are aged between 40 and 50. Almost a third of those with PhDs are 60 or over, the same percentage is between 40 and 49 and one in five is under 40. Moreover during the last two years there have been no government contracts to prepare for doctor of science level, and the efficiency of this system is decreasing (only one in ten doctoral candidates defends their thesis in the stipulated time period). Graduates of PhD courses are not renewing the departments of higher educational institutions.

One of the component elements for availability is a functioning network of libraries. Yet the system in Ukraine does not bear scrutiny. According to the Accounting Chamber's assessment, the number of libraries in the network fell by 515 from 2002-2006 and as of 1 January 2007 came to197 thousand. The number of library users is steadily falling. Most of the premises are in bad condition and the standards for looking after the collections, including rare and valuable publications, are not being observed. The collections are also not being renewed, with the number of books being removed outweighing the new intake by 1 to 3, which over the last 5 years has led to a reduction of 9 million items. At the same time, around 80 percent of material on socio-political themes from the last century is not in demand which has effectively turned public libraries into archives for holding these collections.[9]

The proper functioning of higher institutes is not possible without the necessary number of habitable hostels. Yet Ukrainian reality is such that as of 1 January 2008, of 3,010 hostels for higher educational institutes only 95 buildings (around 3 percent) fully met modern requirements, while out of 960 hostels for technical and vocational institutes, the analogous figure was 42 (or approximately 4 percent). Hostels are also extremely overcrowded, with the sanitary norms for providing their young inhabitants with living space and places of common use are systematically infringed. The hostels are largely in an extremely decrepit, and not infrequently, dangerous condition since major repairs were not carried out at the proper time.

At the same time it should be noted that in some higher educational institutes there have been cases where residential and non-residential premises of hostels have been used not as intended by letting them out to other State and private structures; by providing accommodation to students of private educational institutions, or people from outside; by joining together living space areas in order to create lecture halls, hotel-type apartments, etc. The requirements are also ignored regarding providing accommodation on a priority basis to first-year students. The bodies of student self-government of higher educational institutes are not brought into the process of providing accommodation in hostels.[10]

In 2006-2007 a large number of decisions were passed by the State authorities aimed at resolving the problems with student hostels however this was clearly insufficient since new hostels are still not being built.

Repairs to and reconstruction of existing student hostels are carried out in the main only at the expense of the specific institute, and in the majority of cases are of a cosmetic nature. Furthermore, as already noted, people are given accommodation in these hostels who are in no way connected with studies, specifically employees of housing and communal services departments, law enforcement agencies and other State structures.[11]

Development over recent years of vocational training raises questions in the first instance with regard to availability. Although the Cabinet of Ministers is doing some work in this sphere, the situation overall is critical. Over the last decade the number of vocational institutions has decreased by a third. The problem of renewing the technical and material base of such institutions is acute. One

[9] «Bad days for Ukrainian libraries» // Information on the website of the Accounting Chamber http://www.ac-rada.gov.ua/achamber/control/uk/publish/article/main?art_id=943340&cat_id=411

[10] Analytical reference note: «The state of student hostels in Ukraine» // website of the Students' Union «Students' Platform» http://gurtojitok.in.ua/docs/analitychna-dovidka

[11] «What needs to be done for systematic resolution of the problem of student hostels?» // website of the Students' Union «Students' Platform» http://gurtojitok.in.ua/article/chernih/

in three of them require major repairs and only 10 percent of the available equipment meets modern demands. The heating and plumbing systems need to be replaced.

Of concern is the level to which vocational institutions are provided with study tools, equipment, and textbooks and manuals. They are the least equipped with computer technology. There is a continuing exodus of well-qualified and experienced educational staff. In vocational institutions around 4 thousand industrial trainers are needed and 1,770 lecturers.

Attention should also be given to the issue of educational institutions founded by religious organizations. According to Article 11 of the Law «On freedom of conscience and religious organizations», all religious educational institutions are created and function as one of the forms of religious organizations. The problem lies in the fact that according to this law religious organizations do not have the right to found general education institutions, although this right is held by, say, civic organizations.. in order to resolve this problem draft laws were tabled for the consideration of the Verkhovna Rada by National Deputy V. Sretovych during 2006 and 2007, however not one of them has yet been passed.[12]

4. ACCESSIBILITY OF EDUCATION

There are problems with access to educational institutions in rural areas. This includes even the problem of physical accessibility of schools for village children.

The School Bus Programme which government bodies refer to when these closures are mentioned in practice only partially solves the problem

One can cite experience with implementing this programme in particular areas, for example, the Cherkasy region, as confirmation of this. For many school children and educational worker in the Cherkasy region the transport issue is very real. More than 9 thousand children and almost 2 thousand teachers living in rural areas do not live within walking distance of a school. Their transport problems were supposed to be resolved by the School Bus Programme which envisages the organization of regular free transportation of students and teachers from rural areas to their places of study and home again. However the fulfilment of this programme in 2006 and the first 2007 was found by the controlling inspection department for the Cherkasy region to leave a lot to be desired. Merely financial infringements were identified to the sum of 160 thousand UAH. It was also stated that the Cherkasy Regional Council had failed to finance this programme, and that the transport servicing was carried out inefficiently and cases had been found where the vehicles had not been used as intended.[13]

The difficulties in implementation of this programme in 2007 were noted by the President who stated that the Cabinet of Ministers was not taking measures in full to implement the School Bus Programme. He added that the information from the Cabinet of Ministers to a letter from the President dated 11 September 2007 on allocation by 1 October of money for implementing the programme contained only data regarding amounts planned in the State Budget and financing, but that no relevant measures for ensuring this income for the given programme had been allocated to the special fund of the State Budget. The President proposed that the Cabinet of Ministers again consider the issue of funding for the programme since the organization of regular and free transportation of students was an integral aspect of the State's safeguarding of the right of citizens to receive general secondary education.[14]

A lot of younger-age children are deprived of access to school education.

According to UNESCO figures published in the report «Education for all by 2015» in November 2007, in Ukraine around 300 thousand children of younger school age do not have access to education. It is not clear over what period these figures were calculated, although the majority of

[12] See further Y. Reshetnikov «Religious education in Ukraine and its legal situation» // Religious Information Service of Ukraine http://www.risu.org.ua/ukr/study/research_conference/education_yresh_0710/

[13] I.V. Khimchuk «Will the kids get to the village school?» // Education website, http://www.osvita.org.ua/articles/235.html

[14] «V. Yushchenko insists that the Cabinet of Ministers ensure financing for the State targeted School Bus Programme» // National Radio Company of Ukraine http://www.nrcu.gov.ua/index.php?id=4&listid=53417

figures in the report are as of 2005.[15] How these figures were refuted by the President's Secretariat which gave different information. Thus, according to figures from the Ministry of Education and Science and the State Committee of Statistics, as of 1 September 2006 there were 46,395 children from 6 to 18 who were not receiving a full general secondary education. Of these, 11,925 do not attend educational institutions due to the state of their health and 13,999 for other reasons.[16] The figures of the State authorities would appear to be considerably underestimated.

One of the reasons why children do not attend school is the refusal of school administrations to admit children in the absence of official registration of their parents. Millions of Ukrainians do not live at the address they are registered at due to the inadequate system of registration.»[17] The problem in 2007 was exacerbated by a strict position taken by the local authorities.

On 3 August at a meeting of the Kyiv City State Administration the Mayor Leonid Chernovetsky suggested that only children registered in Kyiv should be able to study in city schools. He instructed schools to establish within the space of two weeks how many children or their parents live in the capital but are not registered. The Mayor considered that their children create a «huge load» on the city's educational institutions..[18]

Another important aspect in ensuring accessibility of education concerns educational opportunities for particularly vulnerable groups of children.

For example, the prosecutor's office in Zhytomyr found a flagrant violation of the rights of a child with disabilities to unimpeded access to an educational institution. Anatoly Horshkalyov, who of his own choice decided to attend second grade classes together with other children encountered basic problems – how to get into the school since wheelchair access at the time had not been organized. He is carried into the school through the emergency exit which doesn't have normal steps.[19]

There is a serious problem of access to education for migrants, refuges and members of certain ethnic groups, for example, Roma.

The State does not finance vocational or higher education for refugees or people whose parents have applied for refugee status. Since the children of refugees are not Ukrainian nationals, their vocational or higher education is fee-paying, on the basis of an individual contract. It is therefore possible to see only individual cases where children of recognized refugees can gain such education while others are forced after school to find work.

There is also a problem of access to education for refugee children separated from their families. These are children who arrive in Ukraine without their parents and do not have relatives who can help them. At present there are no normative documents addressing this issue as a result of which these children do not even go to school. There are various reasons, of an economic, administrative and educational nature. In the vast majority of cases these are young people who have already reached the age of 16. They have no documents about their education or personal documents, and in the best instance have had 3 years of elementary education. Special attention therefore needs to be given to these young people and separate classes created where they can gain an education on intensive programmes and be able to become fully-fledged members of society.

The implementation of a system of independent external assessment is an important test for the Ukrainian system of education as regards the principle of access to education. Despite all the advantages of this system, it is important to note the obstacles which can arise in implementing the system. It should be noted that thus far the principle of non-discrimination of particularly vulnerable groups of the population has not been adhered to.

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[15] «In Ukraine 300 thousand children do not have access to education» // UHHRU website http://helsinki.org.ua.index.php?id=1196448561; «300 thousand children in Ukraine don't go to school.» // 1+1 NEWS, http://news.1plus1.ua/ukrayina/300-tisyach-ditei-v-ukrayini-ne-hodyat-do-shkoli.html#

[16] The President's Secretariat doesn't agree that 300 thousand children don't go to school // UHHRU website http://helsinki.org.ua.index.php?id=1196859876.

[17] See the section on Freedom of movement and to choose ones place of residence.

[18] «Chernovetsky deprives children from other cities of education // UHHRU website http://helsinki.org.ua.index.php?id=1186491948.

[19] «In the Zhytomyr region the prosecutor's office is standing up for the rights of the disabled // http://www.zhitomir.info/news_17121.html

For example, people with I and II group disability are at the present time deprived of the possibility of receiving a certificate attesting to independent external assessment since the State has not created the necessary conditions for this (by printing the tests in Braille, ensuring transportation for those in wheelchairs, etc). Their entry to higher institutes will be determined at interviews[20]

The problem of objective assessment is not new in the world, and research into methods has long been a separate field in pedagogical studies. In most countries there are State and private institutions for which assessment are the main form of activities. Educational institutions have become the users, and the controllers of the quality of these specific services, however it is difficult to imagine that American or European university would agree to recognize marks if they cannot be certain of their accuracy. It took decades of hard and responsible work to develop methods of assessment so that these confirm to educationalists and scientists the accuracy of the marks given and earn their trust. Institutions wishing to win the right to assess on a contractual basis the knowledge of specific educational institutions or the government must prove on the basis of tests that they can do this more accurately, cheaply and quickly than others. This entails a certain danger that a political decision to create a signal examining institution which is at the same time instructed to prepare the methods for assessment, carry it out and control the quality of its own work, could lead at first to the dictatorship of this body and then to corruption within it as this happens on many occasions when attempts are made to establish justice with the help of special bodies with exceptional powers.[21]

5. ACCEPTABILITY AND ADAPTABILITY OF EDUCATION

There is a difficult situation with providing educational institutions with textbooks which has a significant impact on observance of the principles of acceptability and adaptability.

There are problems with receiving official stamps for textbooks recognizing that the publications, learning means and equipment comply with State educational standards. This procedure can basically be considered a form of State censorship. The main shortcomings of this system include the following:

– Members of the subject commissions within the Scientific-Methodological Commission of the Ministry of Education and Science do not bear real, not merely declarative, responsibility. There is no specific legal field for relations between members of the commission, the head of the commission and authors or publishing houses;

– Subjectivity of the commissions – a manuscript can be rejected any number of times with the Commission refusing to grant is official seal of approval and at each new meeting of the committee ever new comments are made;

– The influence of representatives of the Ministry of Education and Science on the work of the subject commissions;

– Conflict of interests – the members of the commissions can have an interest in pushing some textbooks and stalling others;

– The lack of clear formalized and understandable indicators of the expert opinions and assessment of textbooks and lack of procedures for their use.

– Infringements of the procedure for taking decisions, procedural arbitrary rule. Instead of 2 months, the process can drag on for 5 or 6. Moreover, the reasons which are most often given: «no time», the holiday season – the commissions don't meet – are not stipulated in the procedure for assigning the official stamps;

– Shortcomings and lack of transparency of the expert assessment procedures;

– The lack of qualified experts;

– the appeal procedure is not defined;

[20] A. Bazhal: «External independent assessment – repletion is the mother of learning» // the newspaper «Weekly Mirror», № 7 (686) 23 — 29 February 2008 року, http://www.dt.ua/3000/3300/62126/

[21] V. Petriv: «Independent testing: have they once again gone «their own way»? // the newspaper «Weekly Mirror», № 10 (689) 15 — 21 March 2008, http://www.dt.ua/3000/3300/62355/.

– the lack of personal and institute liability for a low quality of assessments and failure to observe procedure;[22]

The situation in educational institutions is such that only around a third of students are assured textbooks. According to official data from the Central Control and Audit Department of Ukraine, the average percentage of textbooks reaching educational institutions is 67 % of the number required. Some of these arrive in numbers which mean that one textbook needs to be shared by 3 or 4 school students. It is also typical for textbooks or the main consignment of them to reach the school library in the middle of the academic year, i.e. when the course has long been running and students have already had to buy the textbooks themselves. The most interesting thing in this sense is the fact that one can freely buy textbooks which state that they are not on free.[23]

The system for testing teaching material is also far from perfect. One should note firstly the purely formal nature of the testing, the infringements of timeframes for receiving the textbooks for testing (or there simply not being the books stipulated in the order); the low level of methodological backup for the test; the lack of pay to the teachers trying out the textbooks; as well as the unreliability of test carried out at the expense of the publishers. Very often the problem is discussed of the lack of previous testing of textbooks which arrive in the schools on a tender basis in accordance with a move to new content, structure and term of studies.[24]

An important aspect in ensuring the right to education is the development of self-government in educational institutions. This is especially relevant in the context of safeguarding the principles of acceptability and adaptability in education. For example, student self-government enables the authorities, as well as the administration of a particular institution, to determine the specific needs of the student, the shortcomings of the educational system and what changes are needed to improve the situation. In other words, it helps the institution move and change with time, improve its work taking into account the rapid changes taking place in the world.

Despite the fact that student self-government is becoming more active and important, it also has significant problems. In 2007 these problems including:

– the lack of legislative regulation for student self-government stipulating the guarantees for its activities, independence from other structures, as well as material and technical autonomy;

– the lack of guaranteed funding. No normative acts nor provisions, nor the current law «On higher education» allows for any source of financing for bodies of student self-government and the implementation of its projects, this making student self-government highly dependent on the administration of the institute.

– pressure on free bodies of student self-government . At the present time there are a number of private higher institutes which covertly or openly oppose the activities or the very creation of bodies of student self-government fearing that these will uncover their own not entirely transparent and lawful policy.

– Interference in student self-government by the Ministry of Education and Science. The Ministry sometimes tries to forcibly impose its model on this or that body of student self-government , distorting the very foundation of self-government;

– Insufficient awareness among students of the institution of student self-government. In many higher institutes they often don't even suspect that there could be student self-government, let along its creation and activities.

Another aspect in the observance of the principles of acceptability and adaptability in education is ensuring that graduates of higher educational institutions have enough academic and work practice to gain the skills need to apply the knowledge received. The level of both academic and work practice at present is not adequate. Many students, for example, studying law subjects find

[22] «The system of educational publishing in Ukraine and the possibilities for change» // Ukraine – Netherlands project: the Civic Platform for Educational Reform in Ukraine, http://upper.org.ua/library/127.html

[23] «Parallel Report to the UN Committee on Economic, Social, and Cultural Rights by the Ukrainian Helsinki Human Rights Union and the International Renaissance Foundation regarding Ukraine's implementation of the International Covenant on Economic, Social and Cultural Rights // UHHRU website http://helsinki.org.ua.index.php?id=1193993286.

[24] «The system of educational publishing in Ukraine and the possibilities for change» // Ukraine – Netherlands project: the Civic Platform for Educational Reform in Ukraine http://upper.org.ua/library/127.html.

themselves in the courts but are occupied there in sticking stamps on envelopes and sending correspondence throughout their practice. Or there are simply visits to the place they are supposed to be doing their practice to have their name ticked off. This problem is typical for many higher educational institutes.

A system is gradually being introduced whereby graduates of a higher educational institute whose studies were paid for by the State, must after the end of their studies work for three years in their field at a working place designated by the State. The system has already been introduced in law and medical faculties. . These postings are in unpopular, sometimes outlying areas and badly-paid work. A person who refuses to accept them has to return the money paid by the State for his or her education. This effectively renders meaningless the rules about free higher education since the person incurs considerable material expense due to the obligation to work where sent.

In our view such practice is unlawful since it is not envisaged by any legislation. The law states that such situations where a person works for a particular period are possible where the student has signed an agreement with the educational institutions. This makes sense if the person has been sent to study by a public authority and they are able to enter the institute without competing for a place. However the practice over recent years has made such contracts compulsory for any person who is simply not admitted to an institute otherwise. We believe that this practice is unconstitutional since it deprives a person of the right to free higher education. Our assertion that such procedure is of questionable legality is confirmed by the fact that there are no known cases where graduates were forced to pay for their studies after refusing to work where sent.

3. RECOMMENDATIONS

1) Not simply increase public expenditure on education but ensure that the money is spent efficiently.

2) Increase the autonomy of the local authorities with regard to spending on education.

3) Encourage academic freedom in all higher educational institutes.

4) Improve the system of licensing and accreditation of higher educational institutes.

5) Carry out comprehensive reform in order to resolve the problems of rural education, in the first instance at the elementary level.

6) Gradually increase teachers' salaries.

7) Carry out a range of measures to improve library provisions for the public.

8) Resolve the situation of providing students with hostels in higher educational institutes.

9) Remove obstacles in the way of religious organizations founding educational institutions.

10) Ensure the constitutional chance to receive free higher education in Ukraine without any conditions and abolish the system where people have to work where sent if they study at the expense of the State.

11) Improve provision of educational institutions with textbooks, as well as the procedure for preparing such textbooks and getting them approved.

12) Resolve problems with the development of student self-government including through making changes to legislation.

13) Introduce human rights education in educational institutions.

XVII. THE RIGHT TO HEALTHCARE[1]

1. OVERVIEW

No reform of the healthcare system took place and it remains in a state of decline. Services are at a low level, the system is not accessible and inefficient with a high level of corruption. For many years financing of medical institutions and services has been clearly inadequate. The situation is particularly critical in rural areas and in small towns.

There is still no legislation clearly setting out patients' rights. Legislation is contradictory and uncoordinated leaving scope for its non-enforcement. The law, for example, does not properly stipulate such rights of patients as access to their medical records, the right to choose or reject a doctor or medical institution, the right to turn down medical intervention, etc.

There were some changes in legislation however these were in the main aimed at standardizing the norms of the Civil Code with those of other laws. Some amendments were made to the Law «On the fundamental principles of health care legislation in Ukraine»[2] with regard to protection of patients' rights. These included the addition of a norm on «the right of a patient being treated as an inpatient in a healthcare institution of access to him or her by other medical workers, members of his or her family, guardian, carer, notary or lawyers, as well as of a priest to conduct religious services or rituals».

Norms were also added to legislation regarding access to medical records as well as on confidentiality of such records. For example, there is now a norm in legislation making it illegal to inform employers about a person having sought medical care, their diagnosis or methods of treatment. UHHRU had previously used administrative court suits to get the subordinate normative acts revoked which had effectively established procedure which notified a person's workplace of their diagnosis via the system of medical certificates required.[3]

According to figures from human rights organizations, the level of discrimination against people living with HIV/AIDS, groups vulnerable to infection, for example, injecting drug users and sex workers, remains very high. It is seen mainly from the staff of law enforcement agencies, health care institutions and educational institutions. These are most often norms relating to the requirement for tests to be voluntary, to doctors' duty to keep information to themselves and confidentiality of medical records and generally the right to privacy. Personnel of law enforcement agencies threaten to prosecute people unless they take a test for HIV and information about positive results of such tests become known not only in health care establishments, but also in kindergartens or schools where the person infected is a child. There have been cases where people have been refused medical care, or its scale has been reduced. All of this contributes to an increase in the stigmatization and marginalization of people living with HIV/AIDS.

Confirmation can be seen in the growing number of cases where the right to medical confidentiality of people living with HIV/AIDS has been infringed, as well as their right to receive in-

[1] Prepared by Andriy Rokhansky, KHPG, Volodymyr Yavorsky, UHHRU and Maxim Shcherbatyuk, UHHRU
[2] Law No. 997 from 27 April 2007 «On amending or declaring void some legislative acts of Ukraine in connection with the adoption of the Civil Code», http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=997-16.
[3] More information in Human Rights in Ukraine – 2006 http://www.helsinki.org.ua/en/index.php?id=1187338505 and Vinnytsa Doctor's victory over three ministries http://khpg.org.ua/ru/index.php?id=1156207989.

formation about their diagnosis. We can give several examples. M. who was serving in the military in the Odessa region was not informed during a periodic medical check that she had HIV/AIDS which resulted in her placing the lives of her family and friends in danger. At the same time other people were immediately informed of her diagnosis which led to her dismissal and family problems. N. from Kryvy Rih was also not informed for a long time of his HIV/AIDS diagnosis. He was, furthermore, a blood donor for his wife, and she was found to have HIV/AIDS. Yet for a long time he was not informed of his illness.

In order to regulate clinical tests of new medication etc and protect the rights of patients taking part in these tests, back in 2006 a Ministry of Health Order No. 314 «Rules for conducting clinical tests of medical technology and products for medical purposes used in international practice» was drawn up and adopted.[4] This was an extremely important step towards stricter observance of a patient's rights regarding informed consent based on comprehensive and accessible information from medical personnel.

At the end of 2007 National Deputy Y. Karakai tabled in the Verkhovna Rada a draft law «On protection of patients' rights»[5]. This is a very interesting attempt to unite in one document all the various views on medical law in general. The attempt cannot be considered successful however it reflects a trend by specialists to establish material and procedural norms on the basis of which patients' rights are protected.

It is undoubtedly very important to pass a law on patients' rights which should include clear mechanisms for protecting these rights. However the draft law reflects the contradictions and lack of coordination healthcare legislation which is, unfortunately, hampering the development of this whole area.

Virtually each article of the draft law deals with a mysterious «specially authorized centre of executive power which is given unconstitutional rights with regard to the patient. A large number of articles fail to comply with the Constitution, legislation and international law.

In view of this, the adoption of the draft law is unacceptable since it is this law which would infringe patients' rights.

The model normative legal act which a Ukrainian law on the rights of the patient should be based on is the Fourteen Rights of the Patient which is part two of the European Charter of Patients' Rights. These rights are design to guarantee «a high level of human health protection»[6] and ensure a high quality of services provided by various national healthcare services.

There remains virtually no system for informing and educating doctors on patients' rights.

The system for funding the healthcare system is inadequate making it impossible to provide a decent level of free medical care.

The present mechanisms for funding reduce the efficiency of the health care system. The report by the Blue Ribbon Commission was blunt in its assessment: «Public funds are allocated, in essence, to support the costs of existing health care facilities and not to achieve health care results. Hospitals face little incentive to reduce the number of admissions, as financing is still based on bed capacity. This creates perverse incentives, resulting in a rise in unsubstantiated hospitalizations. Hospital stays in Ukraine are among the longest in Europe, at an average of 14.4 days. State and communal health care institutions continue to have the status of spending units with very limited rights and incentives to make management and financial decisions that would allow for more efficient use of resources. Allocation of budgetary funds is based on a list of permitted line items, with norms set by the Ministry of Health. Although financing is decentralized, with 80 percent of total funding allocated at the regional and local levels, health care administrators have little authority to deviate from rigid line-item budgets. Budgets are strictly itemized, and the volume of resources set aside for each budgetary item is strictly regulated.

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[4] Ethical Principles for Medical Research Involving Human Subjects, approved by the 18th World Medical Association General Assembly in Helsinki, June 1984, and the addendum to the Council Directive № 93/42/EEC concerning medical devices, European standards ISO 14155-1:2003 «Clinical tests on medical equipment used on humans»

[5] Draft Law № 1132 from 6 December 2007, available on the parliament website http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=30982.

[6] Article 35 of the Charter of Fundamental Rights.

4.92 UAH per day is allocated for each patient in hospital (for both treatment and meals). Even less is assigned for one visit to an outpatient clinic – 0.42 UAH. The budget for 2007 allocated a mere 100 million UAH for rural health care establishments despite an overall increase in funding of health care of more than 4 billion UAH. Such a pitiful amount of funding is manifestly inadequate to meet the needs of rural medicine. According to information from the Ministry of Health, at present there are almost 300 villages with populations of between 500 and 1,000 people which don't have hospitals at all.[7]

Another major problem is the neglected state of primary care. «Too much funding goes on expensive inpatient care, while less costly primary care is neglected. Ukraine has 5.94 hospitals per 100 thousand people, higher than the EU average of 3.2. Maintaining such a large number of inpatient facilities restricts funding for other purposes. The volume of specialized care exceeds that of primary care, turning the typical «heath care pyramid» upside down. Primary doctors constitute just 26 percent of all doctors, whereas in some European countries the share is as high as 50 percent. Ukraine has only 3,354 of the 33,000 general and family physicians it needs, so hospitals and ambulance services are used to provide routine medical assistance. By one estimate, nearly one third of hospital patients would qualify for outpatient care»[8]

An absolute majority, over 85 % of the population, are not able to receive medical care in private medical establishments because their income is too low. Since 1996 the percentage of individual payments which the population officially pays has risen from 18.8 % to 38.5 % of the overall spending on health care. If one adds the unofficial amounts of payment then this percentage will rise to 52 %. This means that in fact Ukrainians pay more than half of the cost of medical services from their own pocket. Most of this money goes on medicines. Widespread payments for health care make it less accessible for the poorer parts of society which infringes the principles of justice and equity. Charges make the poorer put off going to the doctor as a result of which they often only go when the need is already urgent when an illness that might have otherwise been curable has gone beyond that stage. This situation results in a considerable number of people effectively do not received medical care.

Informal payments in the area of health care foster corruption. Such informal payments commonly made for medical services are viewed by a lot of medical workers as justified compensation for their low salaries. The volume of these payments is large, and while on the one hand they keep medical workers from abandoning the profession, they do give preference to the wealthy and undermine the transparency of the system, which has a demoralizing effect. There are cases where doctors demand extra payment for treating their patients with proper care. This has become so habitual in many medical institutions that doctors don't even talk about it directly: the patient already knows from experience that if s/he doesn't pay up, this will be reflected in the treatment. There is believed to be particular corruption over any kinds of medical operations, services during childbirth and examinations using expensive equipment.

In November 2007 in Geneva, the UN Committee on Economic, Social and Cultural Rights considered the fifth periodic report of Ukraine on the implementation of the International Covenant on Economic, Social and Cultural Rights. Its Concluding Observations[9]: include the following:

«50. The Committee recommends that the State party increase its efforts to improve the quality and availability of health care in rural areas, by ensuring adequate funding and strengthening community-based and mobile health services.

51. The Committee recommends that the State party continue its efforts and take urgent measures to improve the accessibility and availability of HIV prevention to all the population and the treatment, care and support of persons living with HIV/AIDS, including in prisons and detention centres, combat discrimination against persons living with HIV/AIDS and high risk groups, ensure the confidentiality of

[7] Parallel Report to the UN Committee on Economic, Social, and Cultural Rights by the Ukrainian Helsinki Human Rights Union and the International Renaissance Foundation regarding Ukraine's implementation of the International Covenant on Economic, Social and Cultural Rights // available at www.helsinki.org.ua .

[8] The State and the Citizen: Delivering on Promises», Analysis of socio-economic policy carried out by the Blue Ribbon Commission in 2006.

[9] http://www.unhcr.org/refworld/publisher,CESCR,CONCOBSERVATIONS,UKR,478632472,0.html

information about a person's HIV status, and make drug substitution therapy and other HIV prevention services more accessible for drug users.

52. The Committee recommends that the State party take urgent measures to improve tuberculosis prevention and accessibility of specialized tuberculosis treatment and medication, in particular in prisons, detention centres and police stations, and reduce delays in screening detainees for tuberculosis.

Experience gained by the Public Advice Centre of the Kharkiv Human Rights Protection Group shows that people need independent legal consultation and professional assistance in standing up for their rights in this sphere. For example, in 2007 1,279 people approached KHPG on various subjects. 29 directly gave as their reason infringement of their rights in healthcare establishments, this being 2.26 % of the total number of complaints. 22 people complained of inadequate medical examinations; 3 – of a lack of sufficient information about their state of health; 4 – of inadequate treatment. However, in some cases where the main reason for making a complaint was, for example, the actions of the courts, penal institutions, educational institutions, there were additional complaints about poor medical treatment or inadequate medical examinations. There were 34 such additional complaints in 2007.

Most infringements were thus connected with the right to qualified medical care, both at primary, as well as secondary and tertiary levels. In second place came infringements of the duty to provide medical information and conditions for this.

2. THE RIGHT TO MEDICAL CARE IN PENAL INSTITUTIONS

People deprived of their liberty on whatever grounds have the same right to adequate medical care and treatment as any other citizens. They are patients just the same and their rights must be properly protected.

2.1. THE CASE OF KUCHERUK V. UKRAINE

The European Court of Human Rights passed judgment in this case (application No. 257004) on 6 September 2007. Among the violations found was that of Article 3 of the Convention in respect of the lack of adequate medical treatment and assistance.

1. The applicant submitted that he had not been provided with necessary medical treatment in the course of his detention in the SIZO from 16 April 2002 to 17 May 2002 and again from early June 2002 until 17 July 2002. The Government maintained that the applicant had received all necessary medical care and assistance while he was detained.

2. The Court recalls that the authorities are under an obligation to protect the health of persons deprived of liberty[10]. The lack of appropriate medical care may amount to treatment contrary to Article 3[11] In particular, the assessment of whether the treatment or punishment concerned is incompatible with the standards of Article 3 has, in the case of mentally ill persons, to take into consideration their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment[12].

3. It next notes its findings with regard to the applicant's solitary confinement and handcuffing,), which in themselves suggest that the domestic authorities did not provide appropriate medical treatment and assistance to the applicant while he was in disciplinary detention.

4. The Court also notes that after the applicant's first examination on admission on 16 April 2002, following which he was placed in the psychiatric ward of the SIZO, there was no subsequent reference to a psychiatrist until 17 May 2002, when the applicant was transferred to the Hospital for forensic examination.

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[10] (see *Hurtado v. Switzerland*, judgment of 28 January 1994, Series A no. 280-A, opinion of the Commission, pp. 15-16, § 79).

[11] (see *Эlhan v. Turkey* [GC], no. 22277/93, § 87, ECHR 2000-VII and *Sarban v. Moldova*, no. 3456/05, § 90, 4 October 2005).

[12] (see *Aerts v. Belgium*, judgment of 30 July 1998, Reports 1998-V, p. 1966, § 66).

5. The forensic report of 29 May 2002 recommended that the applicant be given treatment in a specialised hospital. However, this recommendation was not followed immediately and in early June 2002 the applicant was transferred back to the SIZO and placed in an ordinary cell. For a month after his readmission to the SIZO the applicant was examined by a psychiatrist only on one occasion and remained in an ordinary cell until after his assault on an inmate on 2 July 2002. In the Court's view, this cannot be deemed to be adequate and reasonable medical attention, given the applicant's serious mental condition.

6. In these circumstances, the Court considers that there has been a violation of Article 3 of the Convention as regards the lack of adequate medical treatment and assistance provided to the applicant while he was detained on remand, amounting to inhuman and degrading treatment.

2.3. THE CASE OF B.

In this case it was only the intervention of the European Court of Human Rights following an application from the Kharkiv Human Rights Protection Group which enabled B to receive the medical care needed.

In March 2007 B. was detained by police and charged with a crime under Articles 121 § 2 and 185 § 3 of the Criminal Code, and remanded in custody. The case was passed to the Zmiyivsky District Court in the Kharkiv region.

In April while held in SIZO [remand unit] No. 27 he was diagnosed as suffering from cancer (hyper-nephroma) of the left kidney with metastases in the lungs, and chronic liver cirrhosis

B's representative applied to the court on several occasions asking for another preventive measure rather than remand in custody to be chosen because of B's grave state of health, however none of the applications were allowed. B. was also forcibly brought to the court for hearings into his case (the court being 50 kilometres away from the SIZO) which caused him enormous physical and psychological suffering.

Both before being placed in the SIZO and while held there, B. constantly complained of pain, and it was difficult to move about and to breathe. The court hearings were particularly gruelling and he was not able to endure them. According to a report from the head of the SIZO medical unit, B. was treated for his symptoms, including through painkilling drugs, however he asserted that the amount of medication was insufficient given the advanced stage of his illness. There was, moreover, no oncology expert in SIZO No. 27.

The application to the European Court of Human Rights states that the failure to provide proper medical care is a violation of Article 3 of the Convention. It adds that the forced attendance of court hearings was causing B. pain and physical and psychological suffering which could be interpreted as torture in the understanding of Article 3 of the Convention.

Following the appeal to the European Court and to the appropriate State bodies, B. was placed in the regional oncology clinic where a malignant tumour was removed and where he received the proper post-operation treatment, radiation therapy, and so forth.

2.4. THE CASE OF YAKOVENKO

Yet another example of the situation as regards medical care in penal institutions is the **case of Oleg Yakovenko**[13].

In June 2003 Mr. Yakovenko, on probation following a conviction for burglary, was arrested and placed in police custody, again on suspicion of burglary. He alleged that he confessed to that crime after being subjected to ill-treatment in police custody and retracted his statements when on trial before Balaklavsky District Court. In November 2005 he was found guilty as charged and sentenced to three years and seven months' imprisonment, later reduced on appeal in October 2006 to three years and six months.

Awaiting that conviction Mr. Yakovenko was detained in the Simferopol Detention Centre (Simferopol SIZO). As the police, prosecution and judicial authorities who dealt with his case were based in Sevastopol, he was transferred each month to the Sevastopol Detention Centre (Sevastopol ITT). Between June 2003 and April 2006, he spent in total about one year in that facility.

[13] http://www.khpg.org.ua/en/index.php?id=1193420462&w=yakovenko.

The applicant claimed that Sevastopol ITT was constantly overcrowded: he was held in cells of 15 to 22 m2 with 25 to 30 inmates. To corroborate that claim, the applicant submitted a letter of 10 May 2005 from the Head of Sevastopol City Police Department which stated that 240 inmates were held in the detention centre, which was designed to hold a maximum of 82 detainees. The applicant further alleged that inmates had to take turns to sleep, that the lights in the cells, situated in the basement, were permanently on and that the ventilation system was often out of order.

Mr. Yakovenko alleged inhuman conditions of detention in Sevastopol ITT and when being transported to and from that facility; and, lack of medical care. The Court found that he had been held in seriously overcrowded conditions and that the sleeping conditions had also adversely affected his health. It also agreed that the lighting and ventilation had been inadequate.

During the remand period which lasted more than 3 years, Yakovenko was taken around 70 times a distance of 80 kilometres between Sevastopol where the court hearings were taking place and Simferopol where he was held in custody. The transportation took around 36 hours, during which he was given no food, and drinking water and use of the toilet were limited. They were transported in train carriages (with more than 100 men in the carriage) or police vans.

At the beginning of autumn 2005 Yakovenko's health seriously deteriorated. He lost weight (around 20 kilograms in 6 months). He had a temperature all the time. Numerous approaches to the medical unit of the Simferopol SIZO led to his being treated over 10 days in February 2006 with antibiotics in the SIZO hospital. Several chest x-rays were taken and he was tested for HIV. He was treated for bronchitis and according to the SIZO hospital – successfully (?!?) No tuberculosis was found. Yakovenko and his mother only learned of his positive test for HIV in April 2006 in response to an information request of the SIZO in Simferopol. The deputy head of the SIZO informed that the test had been positive and the head of the SIZO learned of this at the end of February 2006. This was not, however, placed on Yakovenko's medical records. Only a repeat test in May 2006 in the infectious diseases hospital in Sevastopol was recorded on his records and taken into consideration for determining treatment.

On 6 April 2006 Oleg's mother turned to the Sevastopol Human Rights Group. She said that her son was dying and that she could do nothing to help him. The main thing at that stage was to ensure a correct diagnosis and designate treatment. After numerous appeals, he was finally examined, and the doctors said that he should be hospitalized. This however was not done. After an application was made on 26 April 2006 to the European Court of Human Rights, the Ukrainian authorities placed Yakovenko in a hospital to receive the necessary care. Three days later he was moved to the infectious diseases hospital in Sevastopol. A year later, on 8 May 2007 Oleg Yavkovenko, aged 31, died in a Sevastopol anti-tuberculosis unit.

On 25 October 2007, the European Court of Human Rights issued its chamber judgment over the case of Oleg Yakovenko. It found that Ukraine had violated Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights because of the conditions Mr. Yakovenko was held in, the failure to provide proper medical care, and the way he was treated when being transported between two detention centres. The Court awarded his mother compensation amounting to 10,457 Euro.

During his remand, Oleg Yakovenko's mother had repeatedly applied to the courts to choose another preventive measure not entailing deprivation of liberty. The reason given was that he needed hospital treatment. Each such application was turned down.

2.5. THE CASE OF OLHA BILYAK[14]

Olha Bilyak, born in 1971, was arrested on suspicion of having committed a crime and remanded in custody in a Kyiv SIZO. She denied the crime and made many applications to be released from custody, pointing to the weak evidence, her alibi, as well as to the fact that she had Group 2 disability status and had a child needing her care. The illnesses which Ms Bilyak suffered from are in the list of those constituting grounds for releasing a person convicted of a crime of serving their

[14] The case of Olha Bilyak // http://khpg.org/index.php?id=1096566829&w=%D8%E5%E2%F7%E5%ED%EA%EE. The case was supported by the Fund for Professional Defence of Victims of Torture of the Kharkiv Human Rights Protection Group.

sentence. She was convicted by a first instance court, however the verdict was revoked at appeal level and the case returned for additional investigation.

While being held in the SIZO, Ms Bilyak contracted a severe form of pneumonia and did not receive adequate treatment. Her lawyer sent an application to the Head of the SIZO asking for Ms Bilyak to undergo a medical examination and be hospitalized, however received the response that her condition did not require hospital treatment. The Head of the SIZO says that he sent a letter to the investigator in which he informed that Ms Bilyak was seriously ill and could not take part in the investigation. The letter, however, did not say that her illness prevented her being held in a place of confinement.

On 30 January the investigator refused to allow the lawyer to see Ms Bilyak. On 2 February he told the lawyer that on 30 January he had sent the SIZO a decision to release her. The SIZO staff informed Ms Bilyak's parents that she had been released on 30 January. After long searching, Ms. Bilyak's body was found in a morgue to which the morgue attendants said it had been brought on 30 January 2004. The behaviour of the investigator and SIZO personnel give grounds for believing that they were trying to conceal what really happened. Ms Bilyak's mother addressed complaints to the Prosecutor General and the Minister of Internal Affairs explaining the circumstances in detail.

The lawyer, Zoya Shevchenko (Kyiv) who represented Ms Bilyak and her mother, complained to the prosecutors of the Shevchenkivsky and Solomensky districts, to the Head of SIZO No. 13 and to the Head of the State Department for the Execution of Sentences. At present she is continuing to seek to have a criminal investigation initiated into Ms Bilyak's death, in order to ascertain the reasons and circumstances of what happened and to ensure that those responsible are punished. The lawyer has also sent an application to the European Court of Human Rights alleging violations of Articles 2, 3, 5 and 6 of the European Convention on Human Rights.

2.6. THE CASE OF P.

We would cite one more example that of convicted prisoner P. who was serving his sentence in the Vinnytsa Penal Colony No. 1.

P. complained that he was not being provided with medical care by the head of the penal colony's medical unit. From the statement it is difficult to understand what his actual condition is since he only listed the complaints and the medication which his mother had sent him in a parcel. He complained of severe pain in the small of the back and lower, and skin eruptions. He had been sent painkillers and ointment for an allergy.

However the head of the medical unit T. refused to give him the medication sent claiming that there were no grounds. Even at this stage the actions of the doctor can not be considered adequate, since neither a rash on the skin nor pain in the small of the back is a diagnoses. Both could be caused by many illnesses, each requiring a different form of treatment.

The head of the medical unit in his refusal to allow the medicine sent by P's mother was not per se violating anything. However in not allowing the medication without a diagnosis, T. was obliged to admit P. to the medical unit and organize a serious medical examination involving not only a surgeon, but also a dermatologist and general doctor. Given P's complaints of pain, he should have also prescribed painkillers which would cause no damage in all possible cases. P. was virtually left without any medical assistance at all, causing him psychological and physical suffering.

The behaviour of the head of the medical unit T. demonstrates indicators of the crime under Article 139 § 1 of the Criminal Code (failure to provide medical assistance) and a violation of Article 3 of the European Convention on Human Rights.

3. PALLIATIVE CARE[15]

Palliative care refers to a range of medical, social, psychological and religious measures aimed at enhancing the quality of life of patients suffering from an incurable illness and not expected to

[15] This section is based on information provided by Larisa Sydelnyk and Denis Halavnev, the All-Ukrainian Council for the Protection of Patients' Rights and Safety.

live long, as well as members of their family. The main aims of such care are to relieve pain, remove or minimize difficulties in coping and other illness-related problems, providing care, psychological, social and spiritual assistance to the patient and his or her family either in hospices or at home.

Observance of patients' rights in the provision of palliative care is a highly specific and complex issue. A person suffering is extremely vulnerable with pain and awareness of imminent death making them dependent on doctors. They become easy to manipulate. There is a risk that their safety will be disregarded, that they could be included in clinical experiments with the necessary ethical standards being observed. In the case of people not expected to live long there is a heightened risk of abuse of their property rights, including by relatives. On the other hand, doctors run up against difficult dilemmas over telling such patients the truth and offering them choice and a role in decision making. Aspects regarding observance and especially defence of the rights of patients in palliative care are therefore an exceptionally difficult task in the system of healthcare and social protection.

85 percent of patients die at home alone, suffering from pain, depression, lack of proper care and other aspects of their illness. An incurable illness elicits various social problems for the person and his or her family linked with the need for care.

In some regions – Donetsk, Zaporizhya, Lviv, Luhansk, Ivano-Frankivsk, Kyiv, Kherson and Kharkiv – thanks to local initiatives or civic organizations, hospices or inpatient units of palliative care in healthcare institutions have been created. In all there are places for around 650 patients. This only satisfies about 10 % of the actual needs. These institutions do not ensure a social element in palliative care with the staff not including social workers, psychologists or legal consultants.

Legislation does not provide special normative legal acts to regulate and guarantee the right and access of palliative care.

It was only on 27 December 2007 that the Ministry of Health issued Order No. 866 «On approving sample regulations on hospices and palliative care units for people with HIV or AIDS». This is a vital first step in developing palliative care.

The lack of State policy and a national programme on palliative care is seriously hampering the development of the latter. There are no human resources, no methodological base, standards and medical protocols, nor is there a system for training or providing professional development training to medical and social workers providing palliative care. The departmental division of institutions of healthcare and social protection makes it difficult to form a range of necessary medical and social measures involved in palliative care and thus such a system altogether.

The problem of access to effective relief from pain and achievement of maximum comfort for the patient remain unresolved. Current State policy on fighting drug addiction and control over the use of narcotic substances considerably impedes the availability of opiate analgesics which are the most effective medication for pain relief. Numerous inadequacies in the normative legal base which regulates these issues restrict doctors' ability to prescribe such drugs in the necessary amounts and forms. This is especially the case for patients who are not suffering from oncological diseases, for use in inpatient institutions of the system of social protection, and at home.

At the present time due to the existence of a huge number of normative legal acts for regulating the use of opiate analgesics (around 30 legal acts), there are double-ups as well as legal collisions which complicate the use by doctors of such norms.

To receive opiate analgesics patents encounter a number of problems of both a legal and practical natures. These include the following.

1. The link with an administrative district. This is particularly difficult for rural areas due to the distance from the district centres where the necessary doctor sees patients;

2. The lack of a mechanism for transferring a patient and information about him/her from one healthcare institution to another. Often relatives take the patient to their home to ensure the necessary care. In such cases there is a problem in receiving opiate analgesics if the place where the person is registered as living does not coincide with the actual place of residence.

3. It is problematical to get to see a doctor, due to the latter's times for seeing people and huge queues;

4. Problems with writing prescriptions for opiate analgesics. In the case of people suffering from chronic pain, prescriptions of such drugs are also examined by a commission to determine whether their use is expedient.

5. The lack of norms binding the doctor to prescribe opiate analgesics. Doctors don't fall over themselves to write such prescriptions, since there are no clear legislative norms making prescription of such drugs compulsory where asked for by the patient without hesitation, consideration, calling a commission etc. Prescribing these drugs involves them in a lot of work because of the responsibility involved which leads to them not prescribing them in the majority of cases.

6. The problem of authorization of a prescription. The system is overloaded with stamps (the doctor and the healthcare institution), signatures (the doctor and the head of the institution), decisions (the commission on the expediency of prescribing opiate analgesics) and getting them agreed.

7. The link with an administrative district in actually getting the prescribed opiate analgesics, this adversely affecting the provision for these people with the drugs.

8. An inadequate number of chemists issuing opiate analgesics. The use of these drugs is excessively controlled by the State. Chemists, including private ones, have no interest in issuing opiate analgesics because it is linked with many specific features as regards receipt, storage, sale and record. Furthermore, constant checks by controlling bodies endeavouring to make capital out of infringements (even when there are none). This leads to people having to go far to find a chemist with the appropriate licence to issue opiate analgesics.

9. Problems where the pharmacist doesn't read the prescription for opiate analgesics correctly leading to wrong issue and considerable mix-ups.

10. The problem of use of opiate analgesics since according to Ministry of Health Order No. 356 this is up to medical personnel and even an oral dose should only be taken in the presence of medical staff. This means that a person or his/her relatives in the case of need cannot themselves apply them.

11. The lack of additional forms of opiate analgesics (plaster, syrup, etc) which makes it impossible for them to be applied without assistance.

We see that the right of patients to freely choose their doctor, healthcare institution and form of treatment are in no way observed.

To observe patients' rights and international norms of palliative care, a programme for such care needs to be drawn up and passed together with a single normative legal act to regulate the use of opiate analgesics.

On 23 February 2007 there was an extended meeting within the Ministry of Employment and Social Policy of the Inter-departmental working group on improving legislative acts on the development of palliative care.

The conceptual principles for the formation of a system of medical and social care and palliative care, including for the elderly, should, according to the former Minister of Employment and Social Policy M. Paliyev be as follows:

1) Medical and social care and palliative care should become a vital and integral part of the system of healthcare and social protection;

2) The financing of institutions providing medical and social care and palliative care should be adequate and the same regardless of their field or their form of ownership;

3) In all higher educational institutions courses in care and palliative care should be included in training not only of medical staff, but also for social workers.

4) Involvement of private structures, civic associations and volunteers in programmes of medical and social care and palliative care, is one of the necessary conditions for ensuring its accessibility, effectiveness and results. The government must support the work of such organizations where they concentrate their efforts on providing medical-social, psychological, legal assistance, as well as moral and spiritual support for patients and their families.

The following problems are among those hampering the development of medical and social care and palliative care:

Inadequate awareness by politicians and public officials of the scale of the problem with this getting worse;

The lack of formulated government policy on the development of medical and social care and palliative care, both for the elderly and young patients, as well as children with incurable diseases;

Insufficient integration and coordination of the work of institutions and structures of the Ministry of Health, Ministry of Employment and Social Policy, private structures and civic associations on issues regarding social and palliative care.

The lack of resources and use of outmoded and ineffective models of palliative care.[16]

4. RECOMMENDATIONS

1) Ensure a clear legal definition of «medical care», «medical services», «medical practice» and «auxiliary services in health care»

2) Set out a list of medical services and medicines and other products with a medical purpose, the cost of which is either not covered or is only partially covered by the State Budget; defining how patients can share a role in paying for such medical services, medicines and other products with a medical purpose

3) Set out standard conditions for the provision of medical services (the number of wards in a hospital, the level of comfort in standard wards, the provision of medication, inputting into a National List of main (vital) medicines and other products with a medical purpose, etc).

4) Improve regulation of the procedure for ensuring the right to freely choose ones doctor or health care establishment. Define clear procedure for free choice and change of primary care doctors.

5) Establish clear medical and legal criteria for hospitalization, refusing to hospitalize somebody; treatment and discharge from hospital.

6) Urgently improve Ukraine's legislation regarding the development of legal mechanisms for financing the system of health care.

7) In making amendments to the Constitution, change Article 49 in order to guarantee the right to court protection where infringements have occurred.

8) Define at legislative level a base model for organizing medical funding: i) funding from the State and local budgets; ii) mandatory social health insurance; and iii) medical insurance on a civil agreement basis..

9) Create a network of palliative care units and hospices in accordance with Ministry of Health Order No. 866 from 27 December 2007.

10) Introduce the necessary legislative amendments and pass subordinate acts regulating the work of hospices (Regulations on hospices, Regulations on the director of a hospice, regulations for nurses working in palliative care, etc) for all patients needing palliative care.

11) Create within the Public Councils of the Ministry of Internal Affairs, the Central Department and regional departments of the MIA working groups to investigation the level of medical care and observance of patients' rights in penal institutions and pre-trial detention centres (SIZO), draw up recommendations of ways of improving the level of healthcare and observance of the rights of those detained and where necessary make proposals on changes in legislation and departmental normative legal acts.

12) Create under the Central Departments of Health of Regional Administrations «ethics committees» including representatives of doctors' and patients' human rights organizations. The Regulations on the work of these committees should be drawn up taking into account world experience on regulation by the medical community of ethical issues in the medical sphere.

[16] Ministry of Employment and Social Policy: Extended meeting of the Inter-departmental working group on improving legislative acts on the development of palliative care Press release from 22 February 2007 http://www.mlsp.gov.ua/.

XVIII. ENVIRONMENTAL RIGHTS[1]

Environmental rights form an integral category linked with the natural human right to life and personal security. The concept encompasses different aspects of protection of the environment as humanity's only possible home. By environmental rights we understand the right to a safe environment; protection of health and life from harmful environmental factors; the right to compensation for damage caused health and property through violation of the right to environmental safety; the right to enjoy natural resources; the right to environmental information; public participation in decision-making and access to justice in environmental matters.

In 2002 UNESCO adopted the «Earth Charter», a declaration of fundamental principles for building a just global community in the twenty first century, which essentially recognizes the principles of environmental ethics. Among the key principles of the Earth Charter are the following: respect for nature, responsibility before the world community and future generations, acknowledgment of our duty to protect the Earth, its diversity and beauty. It is important that the focal centre of the Charter is the human community (Principle 1 of the Charter), and not the human being alone.

1. THE RIGHT TO A SAFE ENVIRONMENT

1.1. ENVIRONMENTAL SAFETY

For three years now, the unlawful practice has continued whereby the main official source of information on the basis of which one can make well-founded general statements about the state of environmental safety in the country – «National Report on the State of the Environment in Ukraine» has not been published. It is worth noting that the annual review by the Verkhovna Rada, the publication in a separate edition and the posting on the Internet of this National Report is a requirement set down in Article 251 of the Law «On protection of the natural environment». The last report submitted for review by the Verkhovna Rada was that for 2003. During 2007 the official website of the Ministry for Environmental Protection contained only a draft «National Report for 2004». As of March 2008 the Ministry has not drawn up and publicized reports for 2005-2007.

In response to an information request from the environmental organization «Zeleny Svit» [«Green World»] to the Ministry for Environmental Protection [MEP] from 5 January 2007 № 06-01 asking for an explanation as to why there had been no National Reports for so long, the Deputy Minister S. Kurulenko stated that in its plan of work for 2006, the Ministry had envisaged financing for a work of scholarly research «Preparation and publication of a National Report «On the State of the Natural Environment in Ukraine in 2004 and 2005». However all tender bids for this work were rejected by the Ministry. In 2007 financing had been planned for a National Report «On the State of the Natural Environment in Ukraine in 2005». Despite this, as of the beginning of April 2008 the latest report was not on the official website of the Ministry, and had not been presented to the Verkhovna Rada.

MEP Order No. 218 from 26 April 2007, implementing the Verkhovna Rada Resolution «On informing the public about issues concerning the environment» from 4 November 2004, approved

[1] By Oleksandr Stepanenko, member of the UHHRU Board

Regulations for preparing and posting environmental information on the Ministry's website and preparation and publication on their basis of a quarterly information and analysis review «The state of the environment in Ukraine». A box to press on with the words ««The state of the environment in Ukraine» did indeed appear on the official site, however pressing it brings up only the message «Sorry, the page has not been found».

Under such conditions the opportunities for the interested public to receive information about the state of environmental safety is generally restricted to access, by no means always free and simple, to some working documents of the Ministry for Environmental Protection and others involved in monitoring of the environment.

To a certain extent generalized information about the state of the environment was provided in the decision of an MEP panel from 1 February 2007.[2]. Here the Ministry states that overall the state of the environment cannot be considered safe for life and health. Environmental problems have accumulated over decades – in the past environmentally unwarranted build up of the scale of natural development of the economy and exhaustion of limited natural resources were brought about by the energy and resource structure of the economy resulting in an extremely high level of population and degradation of the environment. According to the MEP assessment, the manmade burden on the environment continued rising in 2006.. Approximately 15 % of the territory of the country with a population of over 11 million is in a critical environmental state.

Approximately 80 % of Ukraine's territory is in zones of heightened risk of emergencies. The manmade burden on the environment is 4-5 times in excess of the analogous figures for most developed countries. The main environmentally dangerous economic structures and manmade pollutants are those linked with the energy industry, heavy industry, transport and agriculture. The list of the most environmentally dangerous cities in the country in 2004 contained over 80 places, this including almost 80 % of all major cities. At present, as well as harmful industrial waste and emissions, other environmental problems are of mounting concern. These are, first and foremost, the extremely rapid increase in vehicles in city streets, as well as the overwhelming increase in the amount of domestic waste and number of new sites turning into unplanned rubbish dumps.[3]

In comparison with 2004, an increase in harmful emissions into the atmosphere was detected in 19 regions, however the most significant were in the Kyiv region (up by 34.9 thousand tonnes, or by 48 %), Poltava region (up by 24.7 thousand tonnes, or by 36 %), Kherson region (3.8 thousand tonnes, or by 35 %), Ivano-Frankivsk regions (65.1 thousand tonnes, or by 32 %) and Ternopil region (4.5 thousand tonnes, or by 31 % more).[4].

In 2006, from 11 thousand industrial enterprises placed by the MEP on their records, 4.8 million tonnes of harmful substances were released into the air (up 0.3 million tonnes, or 7.3 % more than in 2005). It is to be expected that the highest levels of air pollution are year in year out recorded in cities in the Donetsk – Dnipropetrovsk region, where the scale of industrial emissions is around 80 % of the total amount for all main industrial enterprises in the country. At present Ukraine Is one of the few countries still using marteniv furnaces which do not have any cleaning structures at all. There are 11 such furnaces in operation at the steel enterprise «Azovstal», and 6 at DMZ.

According to official statistics in 2006, there was a stockpile of 21 thousand tonnes of unsuitable or prohibited pesticides which, if stored without observing safety rules, can cause soil and ground water contamination, as well as poisoning people. 2.5 thousand tonnes of prohibited pesticides are kept outside in the Donetsk, Zaporizhya, Odessa, Kharkiv, Kherson regions and in the Crimea.[5].

An analysis of river water for hydro-chemical indicators suggests deterioration in their condition. Each river basis has its own particular features, however the negative tendency is observed in virtually all basins. According to official estimates from the State Committee of Ukraine on the Water Economy, around 80 % of the population use water from surface water supplies which have

[2] Decision of an extended session of the Panel of the Ministry for Environmental Protection from 01.02.07. «On summing up the work of the Ministry in 2006 and the main tasks for 2007».
[3] Draft of the «National Report on the State of the Environment in Ukraine in 2004», Kyiv: 2006.
[4] Expert report of the State Committee of Ukraine from 20.03.2007 № 66 «Emissions of harmful substances into the atmosphere from stationary sources of pollution in 2006».
[5] Decision of an extended session of the Panel of the Ministry for Environmental Protection from 01.02.07. «On summing up the work of the Ministry in 2006 and the main tasks for 2007»..

a high level of pollution (class 3 or 4 in terms of quality, these being «moderately polluted» and «polluted»)

The use of obsolete technology for preparation of drinking water, (for example, adding chlorine), aimed at bringing natural water to the quality of drinking water only in cases where the resulting water complies with first class cleanness, does not make it possible to ensure water for the population which is safe for health. After all, there is virtually no such class 1 clean water in Ukraine. A considerable percentage of the population therefore receives drinking water which deviates significantly from the norms required. In 14 regions, from both natural and manmade causes, 1,228 populated areas do not have guaranteed water sources, and their inhabitants are forced to use imported water. The unsatisfactory technical state of the water pipe networks leads to secondary pollution of water, a worsening of the situation with sanitation and epidemics, and flooding of the territory of populated areas.[6]

It is officially acknowledged that the situation with water supplies to the rural population is one of the worst among European countries. Despite the fact that in rural areas more that 55 thousand kilometres of water mains and over 70 thousand boreholes have been drilled, primarily for providing water supplies to livestock farms and agricultural enterprises, the percentage of rural buildings with built in water pipes and running water is 3 times lower in Ukraine than in Russia, and four times lower than in Belarus. In 2005 around 32 % of the water samples taken from rural wells and boreholes failed to comply with sanitary-chemical norms, and approximately 23 % had unacceptable sanitary-bacteriorological readings. There is constant nitrate contamination of subterraneous waters due to manmade activities. There are no effective methods for removing nitrates from the water given the decentralized water supply system. The contamination of water with nitrates is leading to water-nitrate haemoglobin anaemia among children, a general deterioration in the body's resistance which contributes to a general increase in disease, including infectious and oncological illnesses.

According to figures from the Ministry of Health, approximately 4 thousand general education institutions (20 % of the total number) are not connected to centralized water supplies. The largest percentage is found in the following regions: Lviv – 44 %; Ternopil – 39 %; Chernihiv – 36 % and Volyb – 35 %. 7.3 thousand schools (35 % of the total) do not have sewage systems.

Pollution is one of the factors for the medical and demographical crisis in the country. Against the background of negative population growth, infant mortality (in the first year of life) is on the rise. Whereas in 2004, 9 infants of every thousand newborn died, in 2005 the figure was 10 and in 2006 – 11. The increase in infant mortality is linked with a rise in the number of congenital defects which are recognized throughout the world as being a marker of environmental problems.[7].

In terms of level of danger for people, top place is held by air pollution. In cities with a high rate of air pollution, the number of people suffering from heart and vascular disorders, respiratory problems, disorders of the nervous system, malignant tumours, tuberculosis and other diseases are 20-40 % higher than the level in cities with low levels of air pollution. The problem is particularly acute for children whose organisms are more susceptible to unfavourable environmental factors. Immune deficiency is rising which is one of the causes for an increase in the number of infectious illnesses. The deterioration in children's health is typical for all ages. Since 1991 diseases of the endocrinal system and digestive disorders have tripled, the number of tumours is 2.7 times higher; blood disease – 2.6 times greater. The rates for skeletal or bone, urinary, and vascular disorders, as well as congenital defects, have all doubled.[8].

Reproductive issues are also giving grounds for concern with almost 68 % of births taking place with problems and the level of infertility among women of child-bearing age being around 7 %, with an ever greater number of men infertile.

It should be noted that the Ministries for Environmental Protection and of Health have virtually backed away from any analysis of links between the state of the environment and its impact

[6] «National report on the quality of drinking water and state of the drinking water supply system in 2005» – Rivne, 2006.
[7] «Study of policy and legislation in the area of control over chemical substances in Ukraine» – VEGO «MAMA-86» with the support of the International Chemical Secretariat (Sweden), Kyiv – 2006.
[8] Draft of the «National Report on the State of the Environment in Ukraine in 2004», Kyiv: 2006.

on indicators of public health. There is practically no information about specific influence of environmental problems on health in the last official reports of these ministries. It is far from always possible to receive information from Ministry of Health bodies about the impact of adverse environmental factors on people's state of health.

1.2. THE MOST PROMINENT EVENTS

1.2.1. Radioactive contamination of territory in the city of Kostianynivka

In April 2007 members of the Environmental Centre «Bakhmat» in Kostianynivka in the Donetsk region discovered a point of radioactive contamination. On the surface of the city rubbish dump, 750 metres from housing, the level of radiation reached 700 thousand microroentgen per year (against a background of 20 microroentgen). A state of emergency was declared on the territory contaminated by radionuclides of caesium-137. The prosecutor's office initiated a criminal investigation over soil contamination and unlawful treatment of radioactive substances. According to one of the investigators' versions, dangerous waste from the region's enterprises was brought to the Kostianynivka rubbish damp over a long period of time. According to another explanation, a radioactive source stolen from an enterprise and uncovered found its way to the dump. As this is being written, those responsible have not been found which is somewhat strange since it is not so difficult to identify the people who could have had radioactive substances at their disposal. Civic environmental organizations are demanding that the law enforcement agencies and controlling bodies get to the bottom of all the reasons and circumstances of the radioactive contamination in Kostianynivka, carry out intensive radiation monitoring of populated areas and make their results public.

2.2.2. Increased confrontation over the National Nature Park «Hutsulshchyna»

The National Nature Park «Hutsulshchyna» was organized in 2002 by Presidential Decree. It is a step towards fulfilling Ukraine's international commitments with regard to creating a network of environmentally protected areas and developing «green tourism» in accordance with provisions of the «Framework Convention on the Protection of the Environment and Sustainable Development of the Carpathians».

However, over several years the Park's development has run into deliberate opposition from the local authorities, structures of the State Committee for Forestry and individual business people with an interest in intensive use of the Carpathians' natural resources, firstly in increasing the scale of felling in the mountain forests. As a result, it has still not been possible to finally agree the borders of the park and receive a State act confirming the right to permanent use of the land.

In 2007 destructive activities of the enemies of the park aimed at eliminating it or significantly reducing its area intensified. Not only property of «Hutsulshchyna» was placed in jeopardy, but also the lives of the park's employees. At the end of 2006 there were arson attacks to the Starokutsky and Sheshorsky scientific research units of the park. On 11 January 2007 the «Hutsulshchyna» administrative building was set alight. A criminal investigation was initiated by the prosecutor's office, yet the investigation team has still not found the culprits.

On 17 January 2007 the Kosiv District Council adopted a decision scheduling for 4 March 2007 a local referendum at which residents of the district were supposed to decide on whether to pass State forests to «Hutsulshchyna» (this having been carried out 5 years ago by Presidential Decree). In spite of the fact that the Kosiv District Prosecutor appealed against this decision as being unlawful, the district council simply rejected the project. In order to stop the self-willed decisions of the majority in the Kosiv District Council, the prosecutor's office lodged an application with the court to have its decisions recognized as invalid. The administrative suit is at present under examination in the court. However, regardless of the fact that according to Article 21 of the Law «On the prosecutor's office», the very submission of a prosecutor's application to the court asking for a legal act to be declared unlawful, suspends the act's force, the district council still resorted to holding a local referendum and created district and precinct commissions which set about carrying out their functions. Information material and ballot papers were prepared, voting was held, together with a

vote count, and so forth. The local referendum held on 4 March failed to be accepted due to the low turnout of voters.[9]

The heightened confrontation over «Hutsulshchyna» elicited a wave of public concern throughout Ukraine. Civic organizations made a number of appeals to high-ranking public officials on this subject. One of these appeals was placed on the website «Maidan» for people to read and sign. Regrettably the appeals from the public have thus far not received an adequate response from the authorities.

On 17 November 2007 a working meeting took place in Kosiv between members of the civic organizations: the National Ecological Centre of Ukraine, the Ukrainian Environmental Association «Zeleny Svit» [«Green World»], the environmental and humanitarian association «Zeleny Svit», the OPORA network and others. It was agreed to begin a civic campaign «Hutsulshchyna» must survive![10] The aim of the campaign is to exercise the constitutional right to an environment which is safe for life and health, as well as the right to participate in the protection and use of Ukraine's natural reserve fund by promoting the development of the national nature park «Hutsulshchyna».

The members of the campaign «Hutsulshchyna» must survive!» have the following objectives:

- to force the authorities to carry out the provisions of the Presidential Decree «On creating the national natural park «Hutsulshchyna»;
- to demand from law enforcement agencies that an end be put to violations of environmental protection legislation on territory which falls within the national park;
- to achieve an end to unlawful pressure on the park personnel;
- to promote the combining of the possibilities of the authorities, scientific and educational institutions, organizations of civic society, the media and international institutions to promote the development of «Hutsulshchyna»;
- to actively advertise the advantages of the national reserve and matters and action plans for the activities of «Hutsulshchyna» in order to achieve the sustainable development of local communities.

1.2.3. Train derailment on the Lviv railways and release of toxic substances

2007 could with justification be called the year of catastrophes.

On 16 July 2007, at the junction Ozhydiv – Krasne a freight train carrying 15 cisterns of liquid «yellow» phosphorous derailed. The cisterns overturned, and air got in causing six of them to catch fire. The flames contaminated the environment around, mainly the air, with phosphorous and its oxides. 8 populated areas were affected: Turye, Hubysko-Turyanskt, Stovpyn, Perevolochne, Chapyk, Toporiv, Anhelivka and Lisove, and some of their residents temporarily evacuated. Monitoring carried out over several weeks by the Sanitary and Epidemiological Service and the State Environmental Inspectorate for the Lviv Region on the area around where the derailment took place showed a gradual normalization of the readings for phosphorus contamination of area, soil and water sources.[11]

The «phosphorus accident» demonstrated the inadequate professional training of fire fighting units and the Ministry for Emergencies for dealing with non-standard accidents. For example, in extinguishing the phosphorus fire during the first hours they used water which led to additional emissions of toxic substances and affected the health of those fighting the blaze. Official information about the environmental consequences of the accident released during the first days was extremely contradictory, from declaring something on the scale of a «second Chernobyl» to claiming that everything was absolutely fine. A few months after the accident, all news about it disappeared from the pages of the official website of the Ministry for Emergencies «News archive – emergencies»[12]

[9] Website of the environmental and humanitarian association «Zeleny svit» http://greenworld.org.ua/index.php?id=1194598134.

[10] Website of the environmental and humanitarian association «Zeleny svit»: http://www.greenworld.org.ua/index.php?id=1196534875

[11] News from the Ministry for Environmental Protection website «Contamination of the territory at the railway junction Ozbhydiv – Krasne http://www.menr.gov.ua/cgi-bin/go?node=1170.

[12] Ministry for Emergencies website: http://www.mns.gov.ua/news_arhiv.php?id=2&month=07&year=2007&bt_go=%CF%EE%EA%E0%E7%E0%F2%E8.

1.2.4. Forest fires in the South and East of Ukraine

Due to abnormally hot, dry and windy weather, July and August 2007 were marred by frequent forest fires which reached catastrophic proportions in mountain areas of the South of the Crimea, and in the Kherson, Mykolaiv, Luhansk, Donetsk and Dnipropetrovsk regions. August 2007 was one of the worst times since forest records have been kept with thousands of hectares of forest destroyed, human loss and the labours of almost half a century devastated.

Besides climatic anomalies, the following reasons for the fires are named: carelessness of holiday-makers; burning dry foliage at the edge of the forest; deliberate arson – including for the purpose of concealing illegal felling. Scientists also point to former mistakes when foresting steppe and barren landscapes with virtually only pines being planted.

In the Uch-Kosh Canyon which is part of the Crimean Natural Reserve under the State Department of Affairs under the President, a fire which started on 30 July spread over 80 hectares and within a few days had destroyed 150 hectares of reserve area forest.

In August on the territory of the Yalta Mountain and Forest Reserve and in the Baidar valley there were fires in pine forests and relic juniper registered in Ukraine's Red Book. Since its wood is used for preparing decorative craftwork and it gains value after drying out on the trunk, one cannot exclude the possibility that arson was involved. As a result of this fire, 70 hectares of forest burned down, and 300 hectares were engulfed by low-level flames which will lead to a significant change in the mountain ecosystem. A forest ranger from the Yalta Reserve Volodymyr Taryeyev and his wife Larissa died fighting the fire.

In total during August 2007 127 forest fires were recorded in the Southern Crimea[13]

On 11 – 12 August in the Stanychno-Luhansk district of the Luhansk region, 200 hectares of pine forest were destroyed by fire.

On 20 August, approximately 80 hectares of pine forest in the forest tract «Novopetrivske» in the Mykolaiv region burned down. In August there were also major fires in the regional landscape park «Kinburnska Kosa».

For almost a week, from 22 to 28 August fire fighters worked to extinguish a fire at the State Vasylkivsk forestry enterprise in the Dnipropetrovsk region. The Ministry for Emergencies estimates that around 300 hectares of forest and steppe land were destroyed.

20 August in the Holoprystansk district of the Kherson region marked the beginning of the biggest forest fire over the last decade. At first the fire engulfed pine forest over around 200 hectares. As a result of the high air temperature and a stronger wind, the fire spread at a speed of 60 km/hour. The Ministry for Emergencies says that by 21 August the flames had engulfed approximately 1,500 hectares of forest. On those same days, up to 200 hectares of Tsyurupinsk Forest burned down, while there were also major fires to plantations of Crimean pine at «Oleshkivski pisky»[14]

From 22 – 23 August the Ministry for Emergencies reported that the fires had been localized. However, as the final calculations showed, by the end of August fires in the Kherson region alone had destroyed around 8 thousand hectares of forest. Overall in 2007 there were 367 forest fires in the Kherson region.[15]

It should be noted that forest plantations in areas which are at risk of becoming desert fulfil ecological and restoration functions. The forest is invaluable for protecting the soil and water and as a climate regulating factor. The loss of a manmade forest on thousands of hectares of the moving Nyzhnyodniprovski sands is undoubtedly an environmental disaster.

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[13] «Forest fires are our common misfortune» // Report from the Press Secretary of the Republic Forest Committee of the Crimea from 9 August 2007 on the official sites of the State Forestry Committee of Ukraine http://dklg.kmu.gov.ua/forest/control/uk/publish/article?art_id=43215&cat_id=32888.

[14] «The fight against major forest fires continues in the Kherson regions // Ministry for Emergencies website http://www.mns.gov.ua/news_show.php?news_id=5776.

[15] «The desert is returning. This year forests burned 367 times in the Kherson region // the newspaper «Weekly Mirror», № 32 (661), 1 — 8 September 2007, http://www.dt.ua/1000/1550/60326.

1.2.5. Disaster in the Kerch Strait

During a storm in the Azov and Black Seas near Ukraine's shores on 11 November 2007 5 boats were shipwrecked. The Russian Volganeft-139 oil tanker split in half and spilled a huge amount of oil. As well as the Volganeft-139, the Russian cargo ships Volnogorsk, Nakhichevan, Kovel and the Georgian cargo ship Khach Ismail all sustained damage, and another Russian barge Don-2 sank on 12 November. 6 boats – one Ukrainian and two Turkish cargo ships, and three barges – broke anchor and ran aground. As a result more than 3 thousand tonnes of oil were spilt, as well as around 6.8 thousand tonnes of sulphur[16]

This disaster is with cause considered to have been the worst environmental disaster which Ukraine has experienced over recent years. 23 men died and more than 10 thousand waterfowl perished. The environmental crisis caused by the accidents brought massive damage to the environment of the Kerch Strait, the Azov Sea, the Taman Peninsula and Eastern Crimea, and will long continue to have an adverse effect on the nature of the region.[17]

One of the reasons for the disaster and the severity of its consequences was the lack of regulation of legal issues around establishing the Ukrainian – Russian sea border, protection of the environment and economic activities in that region.

For example, the Bucharest Convention (2002) on the Protection of the Black Sea from Pollution and other international documents on protecting the environment of the Black Sea and Azov Sea are hampered by the fact that Ukraine and Russia have not concluded the relevant procedures for implementing these international documents. Ukraine has not signed the Action Plan in Emergencies within the framework of the Bucharest Convention. Therefore this document too remains mere decoration and does not oblige the governments, relevant ministries and their territorial services to enforce it. Agreements on protection of the environment, shipping and fishing in this water area linked to the main Ukrainian – Russian agreement on the sea border have long awaited signing. All are together in one package.

The disaster in the Kerch Strait is in its essence not only environmental, but also socio-political. There is a transit centre functioning which is to a large degree criminalized, dangerous for society and ruinous for the natural environment and safety of the two countries. State controlling bodies for a long time «didn't notice» the numerous cases where loads right in the Strait avoided paying duty, where there was mass reloading from vessel to vessel of oil products, sulphur, mineral fertilizers, construction and other materials by both the Ukrainian and Russian side. As a result, there has constantly been pollution, for example, from oil and chemicals, of the strait, as well as of the adjoining water zones of the Black and Azov Seas. Bearing in mind the fact that the Kerch Strait has shallow waters with a complicated regime of currents and meteorological conditions, especially during autumn and winter, the threat of pollution becomes several times greater. Therefore the disaster was foreseeable and inevitable, and yet, as it turned out, nobody was prepared for it.[18]

In general the low priority given to environmental policy resulted in the authorities being incapable of confronting the elements and effectively eliminating the consequences of the disaster. The ports did not have contemporary technical means for cleaning up the spilt oil; the work of the Russian and Ukrainian rescue services was poorly coordinated; and there were often misunderstandings and mutual accusations of inaction. The authorities, not having reliable technical means for monitoring the environmental situation, resorted to deliberate misinformation. For example, in the first days after the accident with the ships Volnogorsk, Nakhichevan and Kovel which were carrying sulphur, the Russian and Ukrainian Ministers of the Ministry for Emergencies reported that the sulphur on boards was in hermetically sealed containers. They asserted that Ukrainian divers

[16] The European Commission: The scale of the catastrophe in the Kerch Strait has been overestimated // The site of the Crimean Republican Association «Ekologiya I mir», 17 December 2007, http://www.ekomir.crimea.ua/news/2007/12.17.shtml

[17] «Lessons from the environmental disaster in the Kerch Strait – President of the Crimean Republican Association «Ekologiya I mir» and President of the Crimean Academy of Science, Professor V.S. Tarasenko http://www.ekomir.crimea.ua/news/2007/12.03.shtml

[18] Statement from 60 Ukrainian civic environmental organizations from 29 December 2007 on the reasons and consequences of the disaster in the Kerch Strait // Website of the Environmental – Humanitarian Association «Zeleny Svit» http://www.greenworld.org.ua/index.php?id=1199783943

had examined the containers, that the lids were not damaged and that therefore there was no question of pollution to the area. However, on 19 November a report appeared on the Ministry for Environmental Protection website stating that according to the results of the divers' examination of the Kovel and Nakhchevan, the boats had been found to have holes, the roofs to the hold were ripped, the cargo had no packaging resulting in the sulphur being brought by the current into the sea environment.[19]

Aside from verbal statements from the Deputy Prosecutor General T. Kornyakova, there were no official commentaries regarding the criminal investigations initiated by the Prosecutor General's Office and the Environmental Protection Prosecutor over maritime pollution as a result of the disaster (Article 243 of the Criminal Code). Ukraine's Ministry of Foreign Affairs also refrained from any commentary on the results of their own request to the Russian MFA for information about the type and amount of dangerous substances being carried by the boats which sank.

Some official media outlets also ignored the disaster in the Strait, while the information available in November on the Ministry for the Environment website, as well as two information agencies – UNIAN and Interfax – Ukraine, was reasonably up-to-date, although without in-depth analysis of the situation. Some reports on the sites of the Ministry for Emergencies and Ministry for the Environment were contradictory.

Examples where the public were misinformed and attempts to obstruct the work of volunteers were seen during the clean-up efforts. After activists from the organization «Environmental Watch on the Northern Caucuses» and «Save Taman» made public information demonstrating criminal inaction over eliminating the consequences of the disaster (the work of cleaning the shore and saving birds was only carried out by Greenpeace), the Russian authorities imposed strict restrictions on access to the Taiman Peninsula in the area where there had been the worst oil pollution. This meant that not only members of environmental organizations were unable to get there, but also journalists[20]

In December 2007 60 Ukrainian environmental organizations addressed a collective statement to the President, Cabinet of Ministers, the National Security and Defence Council, the Prosecutor General's Office and the Security Service [SBU] regarding the reasons and consequences of the disaster in the Kerch Strait.[21]. The statement stresses the need to do the following:

- ensure financing and the technical means for eliminating the pollution residue in the sea and on the shore;
- create a special inter-departmental commission to investigate the cause of human death and pollution of the environment; to make prognoses about how the environmental situation will develop; assess losses and further expenditures; determine which public officials were responsible for the disaster and inadequate preparation for eliminating the consequences; as well as to establish the grounds for receiving compensation in keeping with the universally recognized environmental principle «the polluter pays»;
- speed up completion of procedure for delimiting the water area of the Azov Sea and Kerch Strait;
- carry out constant environmental and sanitary-epidemiological monitoring of maritime ecosystems and the coast;
- break down the criminal transport centre in the Kerch Strait, stop the practice of raider reloading in the Strait and carry out the necessary check of all Ukrainian ports, informing the public of the results of such checks;
- ban the transportation of dangerous cargo in accordance with the International Convention on Preventing Pollution from Ships (1973), to which Ukraine is a signatory;
- reject plans to build new maritime terminals (Tobechyk, Feodosia, Donuzlav, Sevastopol) as unnecessary and dangerous; modernize existing ports.

[19] On dealing with the emergency in the Kerch Strait and the results of environmental monitoring (as of 17-18.11.2007 // News from the Ministry for Environmental Protection website, http://www.menr.gov.ua/cgi-bin/go?node=1490
[20] The website «Environmental problems of the Black Sea»: http://www.blacksea.ewnc.org/kerch-katastrofa.
[21] Website of the environmental and humanitarian association «Zeleny svit»: http://www.greenworld.org.ua/index.php?id=1199783943

Russian environmental organizations addressed similar appeals to their authorities.

The disaster in the Kerch Strait was unfortunately not the only emergency in 2007 which involved sea pollution. During the summer, for example, more than 70 tonnes of oil spilt from holes in the body of the ship «Cma CEN Aegean» (under Liberian flag). Fortunately the bulk of the dangerous release was localized by the ship crew and port staff making it possible to avoid a major environmental disaster. The port management calculated the environmental damage caused and the court ordered the ship's owner to pay 24 million USD. The ship was seized pending payment under an order issued by the Prymorsky District Court in Odessa. As a result, the damages were paid in full. The owner also had to pay the port more than a million dollars for collecting and localizing the oil spill..[22]

1.2.6. Disasters at Donbas coal mines linked with methane explosions

On 18 November 2007 in Zasyadko Mine in Donetsk, at a depth of one kilometre, there was a gas explosion which caused a serious fire killing a hundred men. This was the worst disaster at a coal mine in the Donbas area for the last 50 years. Over the last decade, explosions of methane gas at the Zasyadko Mine have claimed the lifes of 208 miners, with another 177 injured. The disaster was the fifth since 1999.in the others on 24 May 1999 50 men died and 49 were injured; 19 August 2000 55 men died and 33 were injured; 31 July 2002 – 20 men died; 20 September 2006 – 13 men died and 62 were injured..[23]

The Zasyadko Mine is one of the largest in Ukraine. The men work at a level from 900 to 1320 metres. The conditions for extracting coal at the mine are extremely complex, with all layers at danger of methane release, while two are also dangerous in terms of self-combustion. This is even with the Zasyadko mine having the most powerful safety system of the mines and being the only Donetsk coal mine where there is a system of detecting methane and using it for energy.

For some time, therefore, the possibility of closure hung over the mine since its own coal supplies were exhausted. However the development of the Kalmiusk mine and new construction have, specialists estimate, increased the mine's lifetime by another 50 years. Despite the constant problems with the conditions for extracting coal as they went deeper down, the constant increase in mining pressure, high level of gas, and other adverse factors, the Zasyadko Mine's output increases each year.

Yefim Zyagilsky, the owner of the mine, told the newspaper «Weekly Mirror» that the expert commission had not reached a final conclusion about the cause of the explosion. He maintained that all requirements of normative documents regulating safety had been observed. The commission had, he said, not found any cause for criticism of the mine's management. He added that the explosion had probably been caused by the explosion of an as yet unknown combination of methane, ethylene, and heavy carbonates. The presence of these gases in a certain, as yet not established, proportion, leads to a reduction in the explosion threshold of the combination of gases in the air. Under normal conditions the critical concentration of methane is over 4.5 %. If gases the contents of which are not specified are added, the threshold can fall radically. The investigation into the specific features of the geological conditions at the mine is continuing.[24]

Yet the Ministry for the Mining Industry, the Ministry for Emergencies and the Ministry for Environmental Protection have none of them placed any official information on their websites about the environmental factors of the accidents at Donetsk mines. Unfortunately, the official results of the government commission on the reasons for the latest explosions at the mine have yet to be published

[22] «The Crushing of hopes», S. Ryabova, T. Opanasenko – the journal «Rhe Power of Money», December 2007 (№ 159).
[23] The Price of Zasyadko's «gold» or Money above life // KHPG website http://209.222.140.184/en/index.php?id=1195520492
[24] Life after the explosion // «Weekly Mirror» № 48 (677) 15 — 21 December 2007, http://www.dt.ua/1000/1550/61466/

The preliminary conclusions of the government commission were made public by the Prosecutor General's Office.[25] The accident was due to work being carried out where there was a dangerous build-up of methane, to inadequate control over its concentration and over explosion prevention with electrical equipment. The reasons for the recurring explosions were breaches of the procedure for extinguishing fires by the person in charge of this and those in charge of the rescue service. A criminal investigation has been initiated and is underway.

There have not been any specific steps taken to follow up statements by high-ranking public officials regarding the possibility of stopping or significantly reducing coalmining at that mine due to the particularly dangerous geological conditions.

The latest explosions at Donetsk mines drew attention to other issues of environmental safety linked with mining, for example, the activating of secondary manmade processes and the seeping of mine gases to the service. At present a considerable part of Donetsk and the territory of other mining cities are located right above mines. One sees more and more often earth subsidence and destruction of buildings. Methane and water seep into the basements of buildings. It is clear that just closing the mines will not solve these problems. Furthermore, at least on some of the mines at present attempts are being made to pump out mine gases and carry out geophysical monitoring. Stopping this suddenly could heighten the level of danger and create an entirely unpredictable situation.[26]

2. THE RIGHT OF ACCESS TO INFORMATION ON ENVIRONMENTAL MATTERS

Effective defence of environmental rights depends on a good level of established democratic traditions and development of civic society. It is these factors which ensure that each person has free access to information about the state of the environment, provide ways for people to take part in environmentally important decision-making and guarantee the effectiveness of court procedures for defending the right to a safe environment.

During 2007 a group of environmental and human rights organizations carried out monitoring of how the right of access to environmental information was being adhered to Around 300 information requests were sent to: the Cabinet of Ministers; the Verkhovna Rada; the Human Rights Ombudsperson; the Prosecutor General and regional prosecutor's offices, the Ministry for Environmental Protection [MEP], the Ministry of Health and their regional departments; regional councils and State administrations. Monitoring was also carried out of the media and official reports issued by the authorities.

The main conclusion reached was that violations of the right to environmental information in Ukraine are of a systemic nature with causes which go deep. These include: the failure of many normative legal acts to comply with international standards; inadequate practice in applying the law; the lack of a sense of responsibility to the public of those in authority; the generally low priority given to environmental issues in State policy; poor monitoring of the environmental, and others. The working group encountered enormous difficulties trying to receive information. In many cases there were problems obtaining specific information about the environmental impact of those enterprises deemed the worst polluters of the environment; the use of environmental protection funds; the impact of environmental accidents and problems of public health; observance of environmental legislation, and others. The quality of the responses with all but a few exceptions left a great deal to be desired. All too often one saw attempts with no legal justification to refuse to provide answers to information requests; to avoid giving answers; to not give substantive responses; to give partial information, and so forth.

The results of the monitoring show that the least forthcoming with environmental information are the prosecutor's offices. bodies of local self-government and Ministry of Health departments.

Yury Babinin, the head of «Public Watch» asked the Ministry of Health Department for the Zaporizhya region for data on the health of victims of the Chernobyl Disaster among residents of the region

[25] Information from the Prosecutor General's Office «On the level of lawfulness in the country in 2007», submitted to the Verkhovna Rada on 11.02.2008.

[26] «Exceptional» Donbas // «Weekly Mirror, № 47 (676) 8-14 December 2007, http://www.dt.ua/3000/3320/61377/.

registered in priority medical care groups. The Ministry of Health's department refused to provide the information, stating:

«According to Article 37 of the Law on Information, information is for official use only and cannot be used to exercise the rights and interests of a Ukrainian citizen and publishing beyond its boundaries, particularly with interpretation of the report on the observance of human rights in Ukraine [this does not appear to derive from the said law – translator]. According to Article 37 of the Law on Information, «All organisations collecting personal information relating to the person shall, prior to handling this information, have the relevant databases officially registered, in keeping with procedures established by the Cabinet of Ministers of Ukraine»

Yet according to the interpretation by the Constitutional Court of Articles of the Law on Information[27] confidential information includes information about a person (education, family status, religious believes, state of health, data and place of birth, property owned and other personal data. Clearly Mr. Babinin's aim was not to receive confidential information about the state of health of individual people which would indeed be an invasion of their privacy. He asked for depersonalized statistical data which would indicate any adverse impact of environmental factors on the public health. This information is on open access and must be provided in response to information requests.

Numerous examples of unwillingness to provide information were given by some regional councils and State administrations, the Ministry of Health and its regional divisions and the Ministry of Justice. More than half of the information requests were not properly met. The Cabinet of Ministers, the Presidential Administration, as well as regional State Administrations and councils usually passed information requests on to departments of the Ministry for Environmental Protection, although the questions were far from always under the jurisdiction of the latter.

The authorities clearly still have problems comprehending freedom of information and the need for openness in State policy and accountability to the public who have delegated them to this role. There remains a subconscious mistrust of independent civic activity and especially that aimed at ensuring transparent and controllable activities by the authorities. Another stereotype which is proving resilient to change is the idea some public officials have that they are entitled to decide themselves which information they will divulge and which they won't.

There is no section for environmental information on the websites of the Cabinet of Ministers or of any Regional State Administrations. Monitoring of general access State printed and electronic media outlets shows that the topic of protecting the environment, environmental rights and sustainable development is far from being a priority on them. In the majority of regions there are no State-run sources of environmental information.

Fortunately, there are some exceptions. The State Department for the Environment and Natural Resources for the Zaporizhya region publishes a reasonably decent level popular printed report on the state of the environment in the region «Land beyond the rapids».

Aside from the MEP website, printed publication and web pages of individual regional structures, there are no specialized sources of environmental information. The MEP website is poor from the point of view of information, and it would be hard to find a government site which is more inert and functionally inadequate. There are still no websites for the State Departments for the Environment and Natural Resources in the Volyn, Dnipropetrovsk, Zhytomyr, Odessa, Rivne, Kharkiv, Kherson and Chernihiv regions, as well as in Kyiv. For some months in 2007 the website published an MEP information bulletin however this was restricted to organizational issues of the functioning of the Ministry.

Virtually nothing has been done to create a nationwide computerized system for ensuring access to environmental information which according to Article 10 of the Law «On protection of the natural environment», the Law «On local self-government in Ukraine», and resolutions by the Verkhovna Rada and Cabinet of Ministers should have been functional as far back as 2005. It proved, moreover, impossible during the information request campaign, to find out how the process of creating this network was going, in fact whether it was happening at all and who was responsible

[27] Judgment of the Constitutional Court of Ukraine on the official interpretation of Articles 3,23,31,47 and 48 of the Law «On information» and Article 12 of the Law «On the prosecutor's office» from 30 October 1997

for it. And finally what this network would entail when there have been so many decisions passed yet nothing done.

Access to information regarding the change in climate and climate protecting projects is also unsatisfactory. According to the United Nations Framework Convention on Climate Change, Ukraine must provide annual inventories on greenhouse gas emissions in Ukraine, as well as national reports on climate changes in Ukraine. These are the main sources for informing the Ukrainian public and international community on estimates of how the Framework Conference is being implemented. Unfortunately over recent years these commitments have not been properly fulfilled.

Ukraine's international commitments with regard to project designs envisage a section on environmental impact assessment and another on the results of public hearings. Project designs being considered must be published 30 days in advance. We would note that the design documentation is published on the UNFCCC in English on registration on registration of the project designs with the Ministry for Environmental Protection.

The practice of publishing information about project designs according to Kyoto Protocol mechanisms has long been established in European countries. In Ukraine information was not provided even in response to numerous information requests from civic organizations during 2005-2007. The concealment of information contributed to the spread of corruption and approval of project designs which possibly do not meet all the necessary criteria. Environmental groups sent over 50 appeals in this connection to the highest bodies of government, including the Cabinet of Ministers, the Ministry for Environmental Protection, the National Security and Defence Council and the Prosecutor General.

In February 2008 the National Ecological Centre and the Environmental and Humanitarian Organization «Zeleny svit» sent yet another appeal to the MEP with regard to ensuring free access to environmental information about joint implementation project designs in accordance with Kyoto mechanisms. The appeal expresses concern over the fact that during 2006 and 2007 the management of the MEP failed to ensure free access to environmental information regarding joint implementation project designs giving as their reason (which we consider unacceptable) the technical shortcomings of their own official Internet page. The civic organizations stressed the need within a short period of time to create the conditions for full publication of information about joint implementation project designs on the MEP website. The appeal suggested that until such publication was ensured, the Ministry should refuse to provide letters of support for these project designs. The hope was expressed that the new leadership of the Ministry for Environment Protection would prove capable finally of organizing normal technical backup for the functioning of its own website. If for any reason in the near future that was impossible to achieve, then the Working group on climate change could offer their own site for placing the information http://www.climategroup.org.ua. If however, the MEP continues to shirk its duty to ensure to environmental information about joint implementation project designs, a complaint will be sent to the Secretariat of the UN Framework Convention on Climate Change.

The Ministry for Environmental Protection finally reacted to the public call. In March 2008 you could already read joint implementation project designs awaiting examination on their website.[28] Open access to information will give the chance for interested parties to check whether a particular project design complies with all necessary norms and, if an adverse impact on the environment is predicted, send commentaries or proposals to reject the project.

In 2007 the Lviv «Bureau of Environmental Investigations» received a copy of a formerly unknown MEP Order № 470 from 25.11.2004 «On brining into force a List of Confidential Information», passed in implementation of the Cabinet of Ministers Resolution № 1893 from 27.11.1998. «On approving instructions on procedure for recording, storing and using documents, cases, publications and other physical sources of information which contain confidential information in the possession of the State». The original List of Confidential Information was supplemented by an Order from 3.04.2006 № 158 «On amendments to Order of the Ministry for Environmental Protection from 25.11.2004.»

[28] List of Joint Implementation projects receiving letters approving them from the Ministry for Environmental Protection http://www.menr.gov.ua/cgi-bin/go?page=77&type=left.

It is interesting that up till then the texts of both Orders had not been available on the MEP website. It was impossible to find them using the search systems «Legislation» of the Verkhovna Rada and «League − Law». It transpired that the Orders had not been registered with the Ministry of Justice.

These MEP Orders make it possible to significantly limit access of the public to certain types of environmental information, including to:

- material from inspections (checks) of institutions, organizations and enterprises within the Ministry for Environmental Protection;
- information sent to law enforcement agencies on the results of such inspections (checks);
- information on dealing with environmental issues with trans-border rivers (the Danube Basin, the Western Bug, the Siversky Dinets), including with countries of the European Union;
- regulation of environmental issues concerning biologically active (poisonous, infectious) substances, genetically modified organisms which can be used as biological weapons;
- separate conclusions from State environmental impact assessments;
- information about the technical characteristics of hydro-technical structures;
- information concerning the functioning of the Russian Federation Black Sea Fleet on Ukrainian territory;

A request was sent to the Ministry of Justice that they examine whether these MEP Orders are in compliance with the provisions of the Constitution, laws and international conventions.[29]. The Ministry replied that according to Article 1 of Presidential Decree No. 493 from 3 October 1992 «On State registration of normative legal acts of ministries and other executive bodies», registration is required for normative legal acts issued by ministries, other executive bodies, bodies of economic management and control, which touch on the rights, freedoms and legitimate interests of citizens or which are of an inter-departmental nature. Paradoxically, taking this norm of the decree into consideration, the Ministry of Justice draws the conclusion that the Orders are not liable for State registration. Are those in charge at the Ministry of Justice unaware of the right of access to environmental information?

Many environmental organizations consider that the content of both MEP Orders are in breach of the Ukrainian Constitution (Article 50); the Aarhus Convention (Article 4), the laws «On the protection of the natural environment» (Articles 9, 10) and «On information» which guarantee each person the right to free access to information on environmental matters and information, the concealment of which could endanger life and health. The restriction of this right may only be imposed by law. In view of this, the above-mentioned MEP Orders must be revoked or considerably reviewed.

As we see, there are major problems in the development of a State system for providing environmental information and State safeguards of free access to environmental information. There are still no subdivisions within the authorities and bodies of local self-government for systematically and effectively implementing information policy on environmental matters. At the same time, in the process of endless restructuring of the Ministry for Environmental Protection, there has also been no institutional and resource development of precisely those subdivisions responsible for providing environmental information. MEP officials in many cases demonstrate a lack of understanding of European principles of freedom of information, an unwillingness to adhere to the spirit of the Aarhus Convention and their own inept simulation of implementation of the Convention in Ukraine.

Unfortunately the practice of applying to the courts, to bodies of the State Judicial Administration, the prosecutor's office and the Ministry of Internal Affairs (MIA) demonstrated the problems in gaining access to statistical information about violations of environmental rights and crimes against the environmental. It was virtually impossible to receive information in response to our formal requests regarding the number of criminal investigations initiated under the collection of Articles of the Criminal Code «Crimes against the environment», the number submitted to the courts, as well as regarding the number of cases where the prosecutor's office had appeared in court on the side of members of the public whose environmental rights had been infringed as the result

[29] Information request from O. Stepanenko to the Minister of Justice M.V. Onishchuk № 08-01 from 29.01.2008.

of the actions of inaction of the authorities. In the majority of cases the prosecutor's offices refused to provide information or referred those seeking the information to offices of the State Committee of Statistics.

However this information was partially published in the Report from the Prosecutor General's Office «On the level of lawfulness in the country in 2007», submitted to the Verkhovna Rada in accordance with Article 2 of the Law «On the prosecutor's office». The Prosecutor General's Office reported that during 2007 940 criminal files on environmental crimes had been submitted to the court. Over 23 thousand officials had been held to answer in connection with prosecutor's office responses, with compensation of nearly 182 UAH being paid. During 2007 the courts had examined 2,782 (against 3,444 in 2006) compensation claims for damages caused through infringements of legislation on protecting the environment. Of these 1,993 (against 1,480 the year before) had been allowed.[30]

According to figures from the State Judicial Administration (SJA), courts considered 1,061 cases under Article 236-254 of the Criminal Code, with sentences passed in 800 cases. The overwhelming majority were crimes involving unlawful felling of trees, hunting and fishing.

However we are forced to note the generally low level of the section of the information from the Prosecutor General's Office concerning protection of the environment. The numbers given in many cases are at variance with data published previously by the Ministry for the Environment. For example, the Prosecutor's Office states that in 2007 more than 22 million tonnes of toxic wastes (of class II level of danger) had accumulated. The Ministry for Environmental Protection, on the other hand, in its draft for the National Report on the State of the Environment for 2004 writes of 2.4 million tonnes of this class. It is unclear how one can explain the creation in three years of 20 million tonnes of toxic substances. To cite another example, the Prosecutor's figures estimate the percentage of emissions from vehicles to be 60 % of the overall amount of emissions into the atmosphere in Ukraine. In the above-mentioned report, MEP gives a percentage of 33 % for 2004. What is the reason for such glaring discrepancies in the estimates? And how confident can one be of the «professionalism» of such Prosecutor General's assessments as the following: «*excessive concentration in the atmosphere of carbon monoxide leads to the destruction of the Ozone Layer and increases the influence of radiation of the territory and illness among the population?*

Perhaps the only information request regarding access to this statistical information which can be considered to have been fully answered was a letter from a member of the environmental and humanitarian organization «Zeleny svit» to the State Department of Statistics. As a result information was obtained for 2006 processed on the basis of information from the Prosecutor General's Office, the MIA, and the State Judicial Administration[31]. According to SJA, in overseeing adherence to the laws on protection of rights and freedoms, the prosecutor's office initiated 1,593 criminal investigations on environmental matters and submitted to 873 criminal prosecutions to the court. The figures from the Prosecutor General's Office for 2006 give 4,774 applications from the public on environmental matters having been considered. However the number of those applications allowed was extremely small – a mere 568. There is no information at all about cases where prosecutor's offices have appeared in court on the side of members of the public whose environmental rights have been infringed as the result of the actions of inaction of the authorities.

The Verkhovna Rada, Cabinet of Ministers and Human Rights Ombudsperson have effectively distanced themselves from any role in overseeing the observance of citizens' environmental rights.

Since, pursuant to Article 28 of the Law «On information», the «State shall exercise control over information access modes <> and the Verkhovna Rada may request and receive from government establishments, ministries, and departments reports containing information about their activities to provide information to the concerned person», participants in the civic monitoring campaign sent an information request in January 2008 to the Speaker of the Verkhovna Rada. It asked for information, among other things, on the following:

[30] Information from the Prosecutor General's Office «On the level of lawfulness in the country in 2007», submitted to the Verkhovna Rada on 11.02.2008http://www.gp.gov.ua/ua/vlada.html?_m=publications&_t=rec&id=12985.
[31] Letter from the State Committee of Statistics from 20.11.2007 № 05/6-8/159

– which main measures of State control over ensuring access to information had been carried out by the Verkhovna Rada in 2006 and 2007;

– from which ministries in 2006 – 2007 had the Verkhovna Rada received reports containing information about their activities in ensuring access to information, where and how one can see these reports;

– which measures have been carried out or are planned by the Verkhovna Rada aimed at ensuring implementation within current legislation of the provisions of the Aarhus Convention, as well as control over its observance in the context of access to environmental information;

– when at long last will the Verkhovna Rada Resolution «On informing the public on environmental matters» be enforced with respect to the creation of a «nationwide computerized system for ensuring access to environmental information».

A letter was received from the Committee on Environmental Policy[32], which basically failed to answer any of the questions or twisted concepts. The letter states that «The Committee keeps the issue of access to environmental information under constant control and considers the state of affairs to be entirely satisfactory. It then reports that «the Ministry for Environmental Protection has provided the Committee with a report on its work in response to appeals from members of the public for 2006-2007. During 2007 1,233 written appeals on environmental matters were sent to the central offices of the Ministry, this being 25.7 percent more than in 2006. Each month the Ministry provides information on the results of work in response to appeals to then be placed on the website in the section «The Government and the public».

Our monitoring of this government website[33], however, found no trace of environmental information.

We can cite another example.

High-level government officials failed to respond appropriately to the open appeal from the leaders of 14 environmental and human rights organizations regarding inadequate implementation in Ukraine of provisions of the Aarhus Convention. The appeal was addressed to the President, the Speaker of the Verkhovna Rada, the Prime Minister, the Minister of Justice and the Minister for Environmental Protection and posted on the «Maidan» website and KHPG[34] The President's Secretariat and the Verkhovna Rada as usually passed it on to the Cabinet of Ministers and the latter – to the Ministry for Environmental Protection. As a result, formal responses were received which failed to address any of the fundamental comments and demands regarding Ukraine's implementation of the Convention.

The Human Rights Ombudsperson, in breach of the law, has not published annual reports for 2005-2007. In the previous reports, the right of access to environmental information was not given proper attention. In the second annual Report (2003), there is no section of observance of environmental rights. In the sections on freedom of speech and the right of access to information there is also no mention of access to environmental information. Nor is this addressed in the Ombudsperson's Bulletin. It should also be noted that the last issue of this Bulletin appeared back in 2003. Observance of environmental rights has not been mentioned in any way in official statements made by the Ombudsperson over recent years.

Despite the fine-sounding declaration that «defence of human rights to freedom of opinion, free expression of ones views and beliefs, freedom of assembly, gathering , storing, using and disseminating information are priority areas of the Human Rights Ombudsperson's work[35], the answers from the Ombudsperson's Secretariat to information requests and appeals from civic organizations can also not be considered satisfactory.

In response to an information request from the authors of this report, the Secretariat failed to notify which information or what assessment the Ombudsperson had given the National Report for 2007 on Implementing the Aarhus Convention in Ukraine. The Secretariat also avoided answering the question

[32] Letter from the Committee on Environmental Policy, use of nature and elimination of the consequences of the Chernobyl Disaster № 04-16/15-193from 14.02.2008 signed by the Chair of the Committee S. Seminoga.

[33] Cf. the section «The Government and the public» on the Government website http://www.kmu.gov.ua/control/uk/publish/article?&art_id=2277632&cat_id=958905

[34] See an account of the appeal here: Where is the Aarhus Convention? // http://www.khpg.org.ua/en/index.php?id=1201552824&w=Aarhus.

[35] The first annual report of the Human Rights Ombudsperson «On observance and protection of human rights and freedoms in Ukraine»: http://www.ombudsman.kiev.ua/d1_zm.htm.

as to why the Verkhovna Rada had not been presented with Reports of the Human Rights Ombudsperson for 2005 and 2006. Instead, in its response (22.01.2008. № 11-89/2562-07-14) it states that «at the present time work is underway on the Report of the Human Rights Ombudsperson «On observance and protection of human rights and freedoms in Ukraine» for 2005-2007, which are planned to be presented to the Ukrainian parliament in the first quarter of 2008. a separate section in this Report is devoted to environmental rights.

Thus, those carrying out the monitoring of access to environmental access are entitled to report the inadequacy of all parties, both those bodies who should be obtaining information and acting as communicators, and among those using the information. There is a vicious cycle in which the information flow surrounding the individual today do not form deep knowledge about the environment and the environmental consequences of the his or her own activities and reality, do not stimulate a culture of harmonious relations with the natural and social environment and do not determine an environmentally friendly and humane style of life. As a result, even the information collected in the course of our monitoring,, fragmentary as it may be, does not arouse interest in those directly concerned. In such conditions, people do not develop an awareness of their own right to a safe environment and readiness to defend this. All of these phenomena are in the final analysis factors indicating infringements of the right to an environment which is safe for life and health.

The need remains to lobby for a system of legal education on issues linked with the Aarhus Convention for civil servants, as well as representatives of other interested parties connected with the exchange of information and decision making on environmental matters.

New laws need to be drawn up, as well as amendments and additions to a number of current laws, improving modes for applying the law in order to ensure observance of standards of access to information on environmental matters enshrined in the Constitution, the Aarhus Convention and other international documents. The public and international organizations urge the Ukrainian authorities to achieve this. This requirement is, for example, stressed in the Parliamentary Assembly of the Council of Europe's Resolution «Honouring of commitments and obligations by Ukraine» from 5 October 2005 № 1466.

Finally, given the fact that the authorities are failing to demonstrate any systematic information policy on environmental matters, alternative possibilities need to be drawn up for civic networks of environmental information.

3. PUBLIC PARTICIPATION IN DECISION-MAKING ON ENVIRONMENTAL MATTERS

3.1. PUBLIC PARTICIPATION IN DRAWING UP A COMBINED NATIONAL REPORT FOR 2007 ON IMPLEMENTATION OF THE AARHUS CONVENTION IN UKRAINE

In June 2008 it will be 10 years since Ukraine signed the Convention on access to information, public participation in decision-making and access to justice in environmental matters (Aarhus Convention). Despite the fact that with the Verkhovna Rada's ratification in 1999, the Convention became a part of domestic legislation, one cannot speak of its provisions being properly implemented. Amendments have only been made to four laws, namely: «On protection of the natural environment»; «On environmental impact assessments»; «On local self-government in Ukraine» and to the Code of Administrative Offences. Changes clearly required to other laws, including the Law on Information have yet to be implemented.

The Second Meeting of the Parties to the Aarhus Convention in Almati (2005) found that Ukraine, together with Kazakhstan and Turkmenistan, were failing to adhere to the Convention[36]. Yet the critical conclusions of the United Nations Economic Commission for Europe (UNECE). and the Meeting of the Parties to the Aarhus Convention have been consistently concealed from the Ukrainian public by the leaders of previous governments and the Ministry for Environmental

[36] Decision 2/5b «Ukraine's observance of its commitments under the Aarhus Convention», adopted at the Second Meeting of the Parties to the Aarhus Convention in Almati, Kazakhstan 25-27.05.05 r. http://www.unece.org/env/documents/2005/pp/ece/ece.mp.pp.2005.2.add.8.r.pdf.

Protection. In June 2008 the Third Meeting of the Parties to the Aarhus Convention will be held in Riga. We would note that in the last two and a half years the Government has still not implemented the recommendations from the Second Meeting that Ukraine:

– bring its legislation and practice into line with the provisions of the Convention;

– no later than the end of 2005 present the UNECE Committee on Observance of the Convention with a Strategy Plan for integrating its provisions in domestic legislation, together with the relevant schedules, practical mechanisms and procedure for enforcing implementing legislation.

Work continued during 2007 within the Ministry for Environmental Protection on preparing a draft Combined National Report for 2007 on Implementation of the Aarhus Convention. This was also lacking in openness, genuine willingness to involve civic organizations and to give a critical assessment of the current state of affairs as regards observance of the Convention's provisions.

On 26 September 2007 notification appeared on the MEP website that «in order to consult with the public regarding the National Report for 2007 on Implementation of the Aarhus Convention in Ukraine a letter was sent by email in August 2007 inviting civic organizations with an environmental focus to put forward proposals». There was notification of the existence of MEP Order from 25 November 2004 № 469 «On preparing Ukraine's national report for the Second Meeting of the Parties to the Aarhus Convention», however the text of the Order was not available on the MEP website and it was not possible to find it through the Verkhovna Rada search machine «Legislation».

The Environmental and Humanitarian Organization «Zeleny Svit» for this reason twice sent information requests to the MEP[37]. They asked for information including the following:

- where and how one could read the documents and decisions in accordance with which the draft National Report was being prepared, including the above-mentioned MEP Order;
- how to find assessments of previous National Report for 2007 on Implementation of the Aarhus Convention in Ukraine by the UNECE Compliance Committee and the Meetings of the Parties to the Aarhus Convention;
- which organizations were sent the above-mentioned letter from the Ministry for Environmental Protection, and how;
- what stage the preparation of a National Strategy Plan for Implementation of the Convention is at.

Unfortunately the Ministry for Environmental Protection did not meet the request for information in full, justifying this in the following fashion: «in according with the Regulations on Provisions for Providing Environmental Information[38], a request for environmental information has no more than three questions on one environmental issue»[39]. As a result no substantive answer was provided for any of the above-mentioned questions.

Thus, with respect to drawing up a draft Report, it has not proved possible to overcome mutual distrust between officials of the Ministry for Environmental Protection and civic leaders. The majority of the latter are inclined to think that it would be better to prepare an alternative report on implementation of the Convention presented by organizations of civic society.

In January 2008 an open appeal from a group of environmental and human rights organizations regarding inadequate implementation in Ukraine of provisions of the Aarhus Convention, addressed to high-level government officials, was placed on the Maidan website.[40] The leaders of the 14 organizations which signed the appeal stressed the need for the following:

– Draw up within a short period Strategy and Action Plans on integrating the provisions of the Aarhus Convention into domestic legislation with this including practical mechanisms; procedure and measures for increasing application in law;

– The Cabinet of Ministers, Verkhovna Rada and Presidential Secretariat should thoroughly analyze the degree to which government bodies are adhering to legislation on access to information,

[37] Letters from O. Stepanenko to the Minister for Environmental Protection V.H. Dzharti, dated 3.10.07 and 10.11.07.

[38] Adopted by MEP Order 18.12.2003 № 169 and registered with the Ministry of Justice № 156/8755.

[39] MEP letter from 06.11.2007 № 11991/09/10-07

[40] See an account of the appeal here: Where is the Aarhus Convention? // http://www.khpg.org.ua/en/index.php?id=1201552824&w=Aarhus.

public participation in decision-making and access to justice in environmental matters, and inform the public about the results of such an analysis;

– Accelerate preparation of draft laws in keeping with modern principles of access to information, including a new version of the Law «On information»;

– accelerate preparation of Cabinet of Ministers resolutions establishing specific procedure for ensuring access to environmental information and public participation in decision-making;;

– make amendments or revoke current normative legal acts which do not comply with Aarhus Convention standards on access to environmental information, public participation in decision-making and access to justice in environmental matters

– For the purpose of general coordination, create a National Commission on Monitoring Adherence to the Aarhus Convention, involving representatives of civic organizations;

– Envisage the creation of infrastructure relevant for providing environmental information, as well as educational and awareness-raising activities, including those for public officials and officials from bodies of local self-government, judges, deputies and members of the public;

– Publish in Ukrainian in the official media channels the main documents of the UNECE Committee on Compliance with the Aarhus Convention, and the Meetings of the Parties, as well as all decisions concerning Ukraine.

3.2. PUBLIC PARTICIPATION IN DRAWING UP A STRATEGY PLAN FOR IMPLEMENTING THE AARHUS CONVENTION

As mentioned earlier, the Government ignored the suggestions from the Second Meeting of the Parties to the Aarhus Convention in Almati – that by the end of 2005 a Strategy Plan for integrating its provisions in domestic legislation finally be drawn up. With no conscious and systematic work being done on its preparation, and in fear of sanctions from the UNECE Compliance Committee, Ukrainian officialdom have resorted to an imitation of the process of strategic planning and to drawing up a quasi– Strategy Plan.

The process of decision-making on preparing the Strategy Plan is shrouded in a strange veil of secrecy. It is known that in June 2006 the Ministry for Environmental Protection informed the UNECE Compliance Committee[41] that the Ministry had «created a working group for developing a National Strategy for the implementation of the provisions of the Aarhus Convention in current Ukrainian environmental legislation». Nothing is known about any normative act for creating this working group, who is on it, whether representatives of NGOs are included, or whether the Ukrainian Government is aware of its existence, or what the working group is actually working on.

It is interesting that the issue of drawing up this Strategy Plan is not given attention in the Combined National Report for 2007 on Implementation of the Aarhus Convention in Ukraine.

During 2007 the author of this section twice sent information requests to MEP asking what stage the preparation of a National Strategy for the implementation of the provisions of the Aarhus Convention in current Ukrainian environmental legislation was at[42] In both cases the MEP failed to answer the question.

As mentioned already, the open letter from 14 environmental and human rights organizations suggested, among other measures, drawing up «Strategy and Action Plans on integrating the provisions of the Aarhus Convention into domestic legislation with this including practical mechanisms; procedure and measures for increasing application in law;». Answers were received from the MEP[43] and the Verkhovna Rada Committee[44] which in no way even mentioned drawing up a Strategy Plan.

However on 20 February 2008 MEP put out information about the holding of consultations with the public on a project for a «Strategy Plan for implementing Convention on access to in-

[41] MEP letter from 5 June 2006 № 4940/04-7.
[42] Information requests from O. Stepanenko to the Ministry for Environmental Protection V.H. Dzharty from 3 October and 10 Noveember 2007.
[43] MEP letter № 2306/09/10-08 from 25.02.2008 p.
[44] Letter from the Committee on Environmental Policy, use of nature and elimination of the consequences of the Chernobyl Disaster № 04-16/12-293 from 29.02.08 p.

formation, public participation in decision-making and access to justice in environmental matters (Aarhus Convention) in Ukraine. The message stated that the draft Strategy Plan had been posted on the MEP website[45], and that consultations with the public were being carried out by the civic organization «Ukrainian Section of the International Union «Ekologiya lyudyny» [«Ecology of Man»] which had supposedly won a tender to draw up a plan and organize consultations within the framework of an Internet conference.

It remains unknown who took the decision to hold specifically this form of consultations with the public; who published notification of the tender and when; who prepared the scope for the tendered services; who will take decisions, and in what way, based on the results of the Internet conference; why specifically an Internet conference was chosen, and not public hearings. It is also unclear whether high-level bodies represented by the Government, Verkhovna Rada, the Human Rights Ombudsperson, the Secretariat of the President, and the Supreme Court will be taking place. Why is the Ministry transferring all the responsibility from itself onto one individual civic organization, not wishing to hold public hearings in accordance with its own «Regulations on public participation in decision-making on environmental protection» (№ 168 from 18.12.2003)? At the end of the day, why will the Government not hold public hearings on the basis of its own Procedure for holding consultations with the public[46]? Most importantly, will a «Strategy», drawn up and passed according to such an almost conspiratorial scenario in any way bind the authorities to react?

Despite the fact that the Strategy drawn up by Ekologiya lyudyny» contains some good suggestions (for example, emphasis is placing on passing subordinate acts on implementation of the Convention, and specifically by the Ukrainian Government, and not the Ministry for Environmental Protection; creation of a coordination council under the Government on implementing the Convention, and others), in its format and content, the document cannot be considered a strategy plan. In general it creates the impression of a chaotic pile of good intentions. Even given this, the list of proposals on passing new laws and making amendments to current legislation seems incomplete. The section on improving access to justice is especially flawed.

Some proposals put by the authors of the draft seem incorrect from the legal point of view, for example, the adoption of a Cabinet of Ministers Resolution on approving «Provisions on access to justice where the public's rights have been infringed in cases envisaged by the Aarhus Convention». Some are unjustified as the proposal to introduce a National Environmental Protection Court. It is unclear what prevents the existing court structure from defending people's environmental rights and how the envisaged court would prove more effective.

Therefore with full justification, a large number of civic organizations («National Ecological Centre of Ukraine», «MAMA-86», the Ukrainian Environmental Association «Zeleny Svit», the environmental and humanitarian association «Zeleny Svit») declared their disagreement with the proposed format for drawing up the draft «Strategy Plan», and its content, and have therefore called for a boycott of it

4. THE RIGHT OF ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS

The Law «On protection of the natural environment» guarantees the right of access to justice in environmental matters, exercised through lodging compensation claims with the court for damage caused to their health and property as a result of adverse impact on the environment. Citizens may also appeal through the courts against the decisions, actions or inaction of the authorities and their officials if they believe these violate their environmental rights.

The best way of assessing the situation with access to justice is to look at current court cases.

The most prominent case in 2007 was the successful suit brought by A. Halkina and O. Malitsky against the Mykolaiv Regional Council calling for their decision on remove 27.72 hectares from the State-owned regional landscape park «Granite-Steppe Pobuzhya» and hand it over to Energoatom to be

[45] See the two latest lists on the MEP website: http://www.menr.gov.ua/cgi-bin/go?node=Proekty%20dokumentiv%202.
[46] «Procedure for carrying out consultations with the public on formulating and implementing State policy», approved by Cabinet of Ministers Resolution No. 1378 from 15 October 2004

flooded as part of the Tashlyk Hydro Accumulating Power Station. The claimants were represented by lawyer O. Melen and specialist on reserve lands O. Derkach. The Central District Court in Mykolaiv concluded that the Council's decision had not been legal, justified or sensible, and revoked it.

The Kyiv Environmental and Cultural Centre[47], together with the organization Ecopravo-Kyiv, demonstrated a number of successful court cases during the year.

The participants in the civic monitoring on access to environmental information also set several precedents for applying measures of administrative proceedings. Unfortunately, the courts far from always demonstrated willingness to uphold citizens' rights and recognize the unlawfulness of refusals to provide answers and bind officials to give information requested. In several cases the courts were selective in their application of procedures of administrative proceedings.

A member of the *environmental and humanitarian association «Zeleny Svit» in October and November 2007 lodged suits with the Chortkiv District Court over the failure by the Ternopil Mayor R. Zastavyny and the Environmental Protection Prosecutor for the Ternopil region O. Halytsky to provide answers to information requests. Both suits called for their inaction to be declared unlawful. The court only agreed to examine the suit against the Ternopil Mayor. Yet with the suit against the Prosecutor's office, citing Article 19 § 1 of the Code of the Administrative Justice, the court concluded that the case was not within the jurisdiction of the Chortkiv District Court and returned it, stating that the claimant should turn to the administrative court according to the location of the respondent, the Ternopil Inter-district Environmental Protection Prosecutor's office.*

However there were also court victories.

Activist from the organization M'ART [Youth Alternative] Serhiy Tanchak addressed an information request to the Zhytomyr Regional Prosecutor's Office. He asked for information about the number of applications made to the regional prosecutor's office on issues linked with defending their right to a safe environment; on the number of cases where the prosecutor's office had appeared in court on behalf of people who had turned to them; on the number of complaints alleging violations of environmental legislation, as well as the number of criminal investigations under Articles 236, 237, 238, 244, 253 of the Criminal Code (the section of crimes against the environment). The prosecutor's office refused to provide the information, stating that:

«According to Article 9 of the Law «On information», each citizen is guaranteed free access to information which relates to him or her personally, except in cases envisaged by Ukrainian laws. In your letter you do not indicate how this information concerns you personally, and therefore it is not possible to provide you with the information. In addition, according to Article 24 of the Law «On State statistics», statistical information of an inter-departmental nature does not need to be provided in response to information requests».

In Serhiy Tanchak's opinion, the prosecutor's office's refusal to provide information is unlawful. Each person has the constitutional right to freely gather, store, use and disperse information verbally, in written form or in any other way of their own choice (Article 34 § 2 of the Constitution). There is no requirement in Article 32 of the Law «On information» to explain how the information requested personally affects the person asking for it. All citizens therefore have the right to demand to see any document regardless of whether it concerns them personally, or not.

Serhiy Tanchak therefore lodged an administrative suit in which he called for the behaviour of the Zhytomyr Regional Prosecutor's Office unlawful and for it to be ordered to provide the information sought. On 16 January 2008 the Novozavodsky District Court in Chernihiv allowed his suit. However since then the prosecutor's office did not provide the information and appealed against the Novozavodsky Court ruling. Although the appeal was lodged with infringements of the time limit, the court of appeal agreed to examine it.

Experience of the monitoring project showed that sometimes there can be other means, besides the court, of defending the «right to know». These were widely used by the Lviv civic organization «Earth's Legion». On encountering inadequate response to his information request, the Legion's leader Volodymyr Prystula sent complaints to higher-level authorities, as well as to the prosecutor's office, asking that official enquiries be carried out into failures to provide information, that the be-

[47] «Humanitarian ecology and environmental ethics», Site of the Kyiv Environmental and Cultural Centre: http://www.ecoethics.ru/.

haviour of the officials involved be declared unlawful, that they face disciplinary or administrative liability, and that they finally be forced to provide the information. After receiving the prosecutor's letters, some of those who had refused to provide information, abandoned their far-fetched arguments and provided the answers sought.

However, what is most important is that neither the authorities nor the public understand to a sufficient degree that as manmade changes in nature become ever more rapid and the scale of environmental risks increases, so too does our responsibility, that of the authorities, of environmentalists, human rights activists and of the public. The authorities must demonstrate the political will to not only declare their commitment to legal standards, but on an everyday level scrupulously fulfil their commitments before the international community, and all those on Ukraine's land, living now and yet to be born.

5. RECOMMENDATIONS

1) Draw up within a short period Strategy and Action Plans on integrating the provisions of the Aarhus Convention into domestic legislation with this including the relevant timescale, practical mechanisms and procedure for bringing implementing legislation into force.

2) The Ministry for Environmental Protection should draw up, submit for review to the Verkhovna Rada and publish «National Reports on the state of the environment in Ukraine» for 2007-2008.

3) The Cabinet of Ministers should 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.

4) In implementation of the Verkhovna Rada Resolution «On informing the public about issues concerning the environment» from 4 November 2004, ensure the posting on the MEP website of a quarterly information and analysis review «The state of the environment in Ukraine.

5) MEP should submit for the consideration of the Cabinet of Ministers a draft Resolution on access to environmental information and public participation in decision-making on environmental matters. .

6) Bring into compliance with the Constitution (Article 50), the Aarhus Convention (Article 4), the Laws ««On protection of the natural environment» (Articles 9, 10), «On information», the content of the MEP Orders «On brining into force a List of Confidential Information». Ensure open access to environmental information contained in:

- the material of checks on institutions within the Ministry for Environmental Protection;
- information sent to law enforcement bodies on the results of checks;
- information on regulation of environmental issues concerning trans-border rivers;
- information on regulation of environmental issues involving biologically active (poisonous, infectious) substances, genetically modified organisms which can be used as biological weapons;
- results of State environmental impact assessments;
- environmental information on the functioning of the Russian Federation Black Sea Fleet on Ukraine's territory;

7) The Human Rights Ombudsperson should have a section on environmental rights in the next Report.

8) The State Departments for the Environment and Natural Resources in the Volyn, Dnipropetrovsk, Zhytomyr, Odessa, Rivne, Kharkiv, Kherson and Chernihiv regions, as well as in Kyiv, must issue annual reports on the state of the environment for 2006-2007.

9) Create websites for the State Departments for the Environment and Natural Resources in the Volyn, Dnipropetrovsk, Donetsk, Ivano-Frankivsk, Kherson and Khmelnytsky regions.

10) On the development of the National Nature Park «Hutsulshchyna»

- ensure full implementation of the Presidential Decree «On creating the national natural park «Hutsulshchyna»;

- to demand from law enforcement agencies that an end be put to violations of environmental protection legislation on territory which falls within the national park;
- achieve an end to unlawful pressure on the park personnel.

11) Ensure scientifically justified restoration of forest areas in the Black Sea region, the Crimea, Donbas destroyed by fires in 2007.

12) With regard to eliminating the consequences of the disaster in the Kerch Strait:.

- provide funding and the technical opportunities for dealing with the consequences;
- speed up completion of procedure for delimiting the water area of the Azov Sea and Kerch Strait;
- stop the practice of raider reloading in the Strait;
- ban the transportation of dangerous cargo in accordance with the International Convention on Preventing Pollution from Ships (1973), to which Ukraine is a signatory.

XIX. DOMESTIC VIOLENCE AS A VIOLATION OF HUMAN RIGHTS[1]

1. GENERAL OVERVIEW

The situation with prevention and countering violence in the family remained as difficult in 2007 as previously and did not safeguard the right to life, privacy, inviolability, the highest attainable level of health, freedom from physical or psychological punishment, moral and economic pressure, etc.

It should also be noted that the Council of Europe designated 2007 as the year against domestic violence and began a European Campaign to Stop Domestic Violence against Women, with this campaign continuing up till 2008. The idea to hold it arose at the Council of Europe summit in Warsaw where participants began demanding that urgent measures be taken to stop violence against women which had taken on frightening proportions in Europe. Governments, the appropriate State institutions, international and nongovernmental organizations, as well as the media and the public as a whole, should become involved in implementing this. The campaign is aimed at making the public aware of the scale of violence against women and promoting new laws and practice designed to put an end to the violence.[2]

The United Nations have also expressed concern over the situation with violence and have announced a decade for fighting this. On 25 February 2008 the UN began a campaign to fight violence against women and young girls. The campaign will last until 2015 which is also the final year for achieving the Millennium Objectives on overcoming poverty.[3].

The Ukrainian State as represented by government figures and structures effectively ignored this year, while marking it through one significant negative event, this being the eviction by court order from their premises and effective closure of the Kyiv City Centre for working with women (the court application was lodged by the Shevchenkivsky District Council in Kyiv). The process of «seizure» of real estate in Kyiv which is continuing has impinged upon organizational structures for protecting women's rights and preventing violence in the family.[4]. The capital thus provided an «example» for how to treat such institutions in other regions.

State policy on countering and preventing violence in the family can be said to have been unsatisfactory in 2007. Confirmation of this is found in the situation regarding the recommendations

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[1] By specialists from the International Women's Human Rights Centre «La Strada – Ukraine» K. Levchenko, O. Kalashnyk, K. Cherepakha, M. Lehenka and M.V. Yevsyukova. As well as the main sources of information about the prevalence of violence in the family which we used when preparing last year's report (data from parts of the Ministry of Internal Affairs, reports from civic organizations that work on prevention and countering domestic violence, including information received through help lines, sociological and criminological studies, information from the press), we would also add answers to deputy queries from National Deputies (MPs), official letters from the central authorities and regional State administrations.

[2] Website of the Office of the Council of Europe in the country «Stop domestic violence against women» http://www.coe.kiev.ua/Campain/domestic/Stop%20violence%20domestic%20pace.htm.

[3] U.N. campaign takes on violence against women // Reuters, Mon Feb 25, 2008 7:00pm EST: http://www.reuters.com/article/worldNews/idUSN2527640020080226?feedType=RSS&feedName=worldNews

[4] The Shevchenkivsky District Council in Kyiv is continuing its assault on civil rights» Thousands of Kyiv women may suffer! // Report on the website «La Strada – Ukraine» http://www.lastrada.org.ua/readnews.cgi?lng= ua&Id=1396.

made in last year's report[5] (see the section Recommendations made by human rights organizations in *Human Rights in Ukraine – 2005*, and the degree to which they have been implemented). Since last year's report also had a separate section devoted to violations of human rights in cases of domestic violence, there is no point in repeating provisions in the report for 2007 which have remained unchanged. There are things, phenomena and measures, the duration or significance of which goes beyond one year, and we will point these out, referring to the relevant pages. At the same time, the structure of this report has been left similar to that for last year to make it easier to compare figures and trends.

According to figures from the Ministry of Internal Affairs (MIA) on prevention and intervention by the police to stop cases of domestic violence, in 2007 there were 87,831 people on their preventive register who had committed acts of violence in the family. Of these, 77,664 were male, 9098 female and 1,069 children. In 2007 more than 65 thousand people were placed on the register, of which 37,728 were for physical violence; 24,382 – for psychological violence and 2,916 for economic coercion. 76,865 warnings were issued, as well as around 5,830 protection orders. Physical and psychological violence are most common with these accounting for 95 % of all cases.[6]

The State Social Service for Children, the Family and Youth keeps a database of crisis families. As of 1 January 2007 this contained approximately 113,681 families[7].

The National Help Line on Violence and Protection of Children's Rights 8 800 500 33 50, which is based at the «La Strada – Ukraine» Centre over the period from December 2004 to December 2007 received 1,059 calls, 367 in 2007.

According to figures from the Kyiv City Centre for Work with Women which provided free legal, psychological, information and medical and social support, during the period that it was functioning, around 39 thousand women and 3.5 thousand men received help needed. Each year around 60 women and 25 children receive shelter and protection in the refugee for victims of domestic violence. 446 rang the Centre's help line in 2007.

The Ministry for Family, Youth and Sport reports that in their centres of socio-psychological help over 9 months in 2007 255 members of staff and 28 extra employees provided the following assistance: for 1,349 people in 24-hour centres; one-off help – 2,876 people; help in a day centre – 891; consultations over a telephone advice line – 2,341.[8] During this period specialists at the centres provided 98,263 social services, including 14,785 psychological, 3,731 legal, 10,259 socio-pedagogical, 39,730 social and everyday; 8,383 information, 16,181 socio-economic and 5,194 socio-medical services.

Violence in the family is also expensive with the victims incurring considerable material losses. The average cost of an incident of domestic violence is 7,300 UAH, with the victims paying around 1,700 and the rest being at the expense of the taxpayer. Experts estimate that cases of domestic

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[5] Human Rights in Ukraine – 2006. Report of Human Rights Organizations // UHHRU, KHPG, Kharkiv: Prava lyudyny, 2007.

[6] More detailed information can be found on the MIA website http://www.mvs.gov.ua/mvs/control/main/uk/publish/article/53966;

[7] The categories of families in difficult circumstances are based on a Joint Order of the Ministry for Family, Youth and Sport, the Ministry of Health, the Ministry of Education and Science, the Ministry of Employment and Social Policy, the Ministry of Transport and Communications, the Ministry of Internal Affairs and the State Department for the Execution of Sentences from 14.06.2006 № 1983/388/452/221/556/596/106 «On approving Rules of Procedure for people engaged in social work with families in difficult circumstances». The list is as follows:

– families with children who find themselves in difficult circumstances and are unable to resolve the problem themselves due to disability of parents or children; forced migration; the drug or alcohol dependence of a member of the family; a member of the family being imprisoned; HIV-infection; violence in the family; neglected children; children being orphaned; lack of respect and negative relations within the family; one of the members of the family being unemployed if s/he is registered with a State employment service as looking for a job;

– families where a question has been raised as to whether to place a child in a children's home for orphans and children deprived of parental care;

– underage solo mothers (fathers) who need support;

– families whose members have been or are on State support .

[8] The results of the work of social service institutions during 9 months of 2007 // Report on the official website of the Ministry for Family, Youth and Sport from 14 November 2007 http://www.kmu.gov.ua/sport/control/uk/publish/article?art_id=83771&cat_id=66794.

violence cost Ukraine's budget approximately 158 464 540 UAH[9]. The calculation for one case of violence in the family included a number of elements, including:

- direct lost of property;
- health-related expenses;
- economic loss caused by the inability to work or of not having gone to work;
- expenses linked with the law enforcement agencies;
- court expenses;
- social services' expenses;
- expenses through being in shelters and crisis centres;
- expenses linked with the victim's children.

2. THE STATE'S RESPONSIBILITY FOR SAFEGUARDING THE RIGHT TO PROTECTION FROM VIOLENCE

It is worth repeating this year also the conclusions of civic and international organizations, including Amnesty International, that the Ukrainian authorities are not fulfilling their international obligations and are not applying in practice the principle of the State's due diligence in safeguarding the rights of women to equality, life, freedom, security and freedom from discrimination[10].

On 19 February 2007 a Cabinet of Ministers Resolution approved a Government Programme for Support of the Family up to 2010. It contains several items which pertain to the prevention of violence in the family.

For example, it states that implementation of this programme will make it possible, among other things, to: «improve the system for preventing violence in the family and creating an effective system for providing assistance to victims of violence, improve the system for helping families in difficulties, providing social accompaniment; there will be a reduction in the number of crimes linked with violence in the family. Separate provisions of the Action Plan for supporting the family relate specifically to overcoming violence in the family. This is for example, the State's duty to:

– Carry out monitoring of the effective implementation of the Law «On preventing violence in the family» and other normative legal acts in this area, and prepare if necessary proposals on making amendments to these (item 2);

– Prepare proposals regarding the extension of the time frame for protection orders envisaged by the Law «On preventing violence in the family» from 30 days to three months (item 3);

– Carry out wide-scale information and awareness-raising work by creating and circulating social advertising on prevention of violence in the family (television and radio programmes, printed matter, organize training courses and seminars in general and higher educational institutions on preventing and countering violence in the family (item 24);

– Hold an annual Nationwide action «16 days against violence» (item 25);

– Circulate methodological literature on the use of contemporary forms and methods of work with people responsible for violence in the family and their victims (item 26);

– Ensure that method guides are drawn up and applied in practice for identification, prophylactic work and socio-psychological rehabilitation for children who have suffered violence in the family (item 27);

– Include in the plans for training educational «junior specialists» and «specialists» a lecture course on aggression and victimology (item 28);

– Organize work on preparing and publishing methodological material on prevention of violence in the family, and on working with people prone to committing such acts of violence and with their victims (item 30);

[9] The «La Strada – Ukraine» website http://www.lastrada.org.ua/readnews.cgi?lng=ua&Id=1412.
[10] Amnesty International's report: «Domestic Violence – Blaming the victim», published on 19 July 2007, available from the AI website at: http://web.amnesty.org/library/Index/ENGEUR500052006?open&of=ENG-UKR

– Carry out scientific research on psychological assistance for children suffering from violence in the family, training courses and seminars for specialists on family issues regarding the use of measures for prevention of violence in the family (item 33);

– Include in the curriculum for training psychologists, social workers and other specialists in the field of education a course of lectures on rehabilitation of victims of violence in the family; introduce into postgraduate institutions for educational workers a course of lectures on prevention of violence in the family and providing assistance to the victims of such violence (item 34);

– Include in the curriculum in higher medical educational institutions a course of lectures on prevention of violence in the family and providing assistance to the victims of such violence; ensuring retraining and professional development for specialists on primary treatment and prophylactic aid, and other medical personnel working with the victims of violence in the family (item 35);

– Improve the system of departmental reporting and introduce State statistical reporting on prevention of violence in the family and on cases of ill-treatment of children (item 36).

In March 2007 the Verkhovna Rada finally approved the recommendations from the Parliamentary Hearings on «The situation with countering gender violence in Ukraine», held on 22 November 2006. The document approved was considerably reduced from the original draft prepared by participants in the hearings and the profile Verkhovna Rada Committee on Human Rights, National Minorities and Inter-ethnic relations.

On 5 March 2008 the profile committee held a meeting which heard reports on the implementation of the recommendations. It showed that there had been no determined and coordinated work among the various State structures in 2007 and that there was no integrated State policy on countering violence. Only the MIA had kept statistics. In the previous report attention was given to the provision of specialized medical assistance to victims of violence. Unfortunately the situation in this area which most concerns the rights of victims to assistance, to protection of their health, has remained entirely unchanged. Therefore all the provisions in the previous report remain relevant now.

As for improvement of legislative provisions, the draft law № 2539 «On amendments to some legislative acts of Ukraine on prevention of violence in the family» was passed in its first reading in February 2007. The draft law was prepared for its second reading in April 2007, however due to the dissolution of the Verkhovna Rada it was only submitted to the Committee for review on 16 January 2008. As of 7 April 2008 it had not been put to the vote in parliament.

The situation has not improved, and therefore all the conclusions from the previous report remain current regarding the basic violations of human rights, in the first instance the rights of women and children, both through violence and the lack of protection and punishment of those responsible.

3. RECOMMENDATIONS

We would add the following recommendations to those made last year:

– Investigate the possibility of changing the national help line number on prevention of domestic violence to a short (three-digit) number for ease of use;

– Organize and run training for employees of duty units on 02 telephones with regard to registering crimes involving domestic violence;

– Regularly carry out training of duty police inspectors and employees of the criminal police on juvenile matters on countering domestic violence and working with victims and the abused;

– Organize and run training of judges on countering violence in the family;

– Draw up and introduce amendments to the Criminal Code on criminalizing cases of domestic violence;

– Recreate at the regional level the work of consultative and advisory bodies on countering violence in the family;

– Continue work on creating institutions for victims of violence;

– Draw up and introduce programmes for working with the abused;

– Investigate the possibility of introducing into every district and city Department for Family, Youth and Sport a specialist responsible for work on preventing domestic violence.

– Carry out a comprehensive nationwide study of the problems of violence in the family;

– Prepare annual government reports on the situation with countering violence in the family;

– It would be wise for nongovernmental organizations to create a coalition of nongovernmental organizations against violence;

– Sharpen the attention of educational workers in educational institutions to the problems of children of labour migrants and their social milieu. By identifying these children, studying the conditions they are living in, informing the school administration, the psychological services and juvenile services about them, organize socio-pedagogical work with them and their social milieu and work on their upbringing.

XX. THE MAIN HUMAN RIGHTS VIOLATIONS LINKED WITH HUMAN TRAFFICKING[1]

Human trafficking remained no less of a burning issue in 2007 than in the previous year. The lack of coordinated and purposeful action by government bodies on carrying out State policy in this area remained a serious problem.

1. HUMAN TRAFFICKING: NEW TRENDS

The number of cases of internal trafficking is on the increase.[2]. The problem is not given sufficient attention and government structures lack experience in this area. It is difficult to assess the scale of the problem due to lack of information.

There is no single consolidated database providing statistics regarding the number of human trafficking victims. The law enforcement agencies have official figures about the number of victims whom they register in the course of criminal investigations however these figures do not include cases which were not documented. The International Organization for Migration (IOM) and those providing social services keep separate statistics for people given assistance who are not always recorded by the Ministry of Internal Affairs (MIA).

According to data from the MIA Department on Combating Human Trafficking, in 2005 446 trafficking victims were identified and returned to Ukraine, these including 39 children. In 2006 393 victims were recorded, with 52 of them children. During the first nine months of 2007, 337 victims of human trafficking had been identified and returned to Ukraine, including 52 children. At present the Department and its regional subdivisions are processing 600 investigations initiated over cases of human trafficking. Since 1998 there have been around 2,000 crimes of such a nature registered.

IOM statistics on assistance given to trafficking victims indicates that the main destination countries are Russia, Turkey, Poland, the Czech Republic, Italy and the United Arab Emirates. In total 937 people were helped in 2006 and 847 in the first nine months of 2007. In 2006 50 children taken out of the country were identified and returned to Ukraine, and 41 in the first nine months of 2007. In the main this was from Russia, Turkey and the United Arab Emirates.

«La Strada – Ukraine» Centre data also indicates the popularity of these countries.[3] In 2007 the Centre assisted 183 people (72 adults and 11 children).

From 2001 to October 2007 the civic movement «Faith, Hope, Love» in the Odessa region found 725 trafficking victims, 275 of whom were from Ukraine; 382 from Moldova; 22 from Kyrgyzstan; 7 from Kazakhstan; 19 from Uzbekistan, 16 from Russia, 3 from Belarus and 1 from Geor-

[1] By specialists from the International Women's Human Rights Centre «La Strada – Ukraine» K. Levchenko, O. Kalashnyk, K. Cherepakha, L. Kovalchuk, M. Lehenka and M.V. Yevsyukova,

[2] According to figures from IOM, in 2006 assistance was given to 17 people, and for the first nine months of 2007 – to 29. In 2006 there were 6 underage victims of human trafficking, while for the first nine months of 2007 this figure had increased to 12.

[3] Annual report of the «La Strada – Ukraine» Centre for 2007: http://www.lastrada.org.ua/content/doc/Annual%20report%20%202007.pdf.

gia. In 2005 148 victims were identified, in 2006 94 including 4 children. Over the first nine months of 2007 69 victims were identified.

2. STATE POLICY ON COMBATING HUMAN TRAFFICKING: A BRIEF OVERVIEW

The draft of the Government anti-trafficking programme for 2006–2010 was drawn up through the joint efforts of civic organizations, interested ministries and departments in the middle of 2005 however it was only passed by the Cabinet of Ministers on 7 March 2007. In the process of being agreed in the ministries, extremely important measures disappeared from the programme, especially in the part about government efforts on providing assistance to victims and monitoring work.

On 5 March 2007 the Cabinet of Ministers passed Resolution No. 1087 creating an Interdepartmental Council on the Family, Gender Equality, Demographic Development and Combating Human Trafficking.[4] The same resolution suspended the work of the previous Interdepartmental Coordination Council on Combating Human Trafficking set up by the Cabinet of Ministers in December 2002. The new council, headed by the Minister of the Family, Youth and Sport, was supposed to be a permanent consultative and advisory body under the auspices of the Cabinet of Ministers. A Cabinet of Ministers Resolution approved the makeup of the Council and allowed for the possibility of involving in its work leading scholars, practical specialists, representatives of enterprises, State institutions, nongovernmental organizations and various funds, including international ones.

Even the above-mentioned name of the consultative advisory body makes it clear that it is not capable of functioning. Just in 2007 its meeting demonstrated the lack of coordination of the activities of its members, the lack of any idea of the management as to adequate formats for its work, objectives, tasks and results. However the Cabinet of Ministers has not accepted such criticism and has ignored proposals from civic organizations on changes. To bring the system of coordination into line with standards of good governance, we need only the political will of the Cabinet of Ministers since the opinion of experts on the need for change is unanimous.

With the adoption of the Government Programme, the regions were also supposed to draw up (or review already existing) regional anti-trafficking programmes. Representatives of the Ministry on the Family, Youth and Sport in an interview stated that at present around 20 regional programmes had been adopted.[5].

A comprehensive approach to combating human trafficking allows for the prosecution of those who assist or commit such crimes, the prevention of human trafficking and defence of the rights of trafficking victims.[6]

We will consider in greater depth prevention of trafficking and protection of its victims.

3. PREVENTION OF HUMAN TRAFFICKING

The Ministry of Education and Science issued Order № 279 from 4 April 2007 «On implementing Cabinet of Ministers Resolution № 410 from 7 March 2007 «On approving the Government Anti-trafficking Programme up till 2010». However there are problems in following implementation, monitoring and recording all the work carried out at local level since in response to questions regarding implementation of the Government Programme, the Ministry of Education fails to provide comprehensive information about the activities of educational institutions and offices of the

[4] Cabinet of Ministers passed Resolution No. 1087 from 5 March 2007.

[5] For example, in the Chernihiv region the regional programme was adopted on 28 August 2007; in the Cherkasy region – on 31 August 2007. The Kyiv City Council passed its regional programme on 16 August, and the programme for the Lviv region was passed on 17 September. The first regional report for the Odessa region was passed in 2002, and reworked in 2007. In the Crimea adoption of a regional report has been awaited since the end of 2007. – From the report: Assessing the needs of a national referral mechanism in Ukraine. Draft of the Report 26 November 2007. Prepared by Andriy Syolkner..

[6] Cf. Decision № 557 of the OSCE Permanent Council. ОБСЄ Action Plan to Combat Trafficking in Human Beings, 2003 (PC.DEC/557)

Department of Education. Practical experience makes it possible to speak of considerably greater achievements of offices of the Department of Education and educational institutions.

3.1. WORK WITH CHILDREN OF LABOUR MIGRANTS

In 2006 the «La Strada – Ukraine» Centre organized a study entitled «The Problems of Children of Labour Migrants: an Analysis of the Situation». The study showed the need to work with this group of children.

«La Strada – Ukraine» therefore approached the Ministry of Education and Science [MES] to consolidate work in this sphere. The Ministry issued Order № 865 from 28 December 2008 «On socio-pedagogical and psychological work with children of labour migrants», and information material for holding regional seminars, monitoring the use of materials, and the organization of a national seminar on this subject. The work was continued as part of the next MES Order № 1176 from 25 December 2007 «On organizing and running socio-pedagogical work with children of labour migrants in 2008».

4. PROTECTION OF VICTIMS OF HUMAN TRAFFICKING

Provision of assistance to victims of human trafficking remains a serious problem. The difficulty with providing comprehensive assistance means that one organization is unable to do everything by itself. It is for this reason that international organizations, in the first instance, OSCE, recommend creating and developing national referral mechanisms (NRM) for victims which can play a vital role in ensuring proper defence of trafficking victims' rights. NRM are seen as a mechanism for cooperation within the framework of which State institutions fulfil their commitments to defend the rights of victims, as well as coordinating efforts in strategic partnership with civic society.[7]

This problem is very serious and demonstrates that human trafficking is not just a violation of human rights in itself, as we discussed in detail in last year's report, but also creates the conditions for violations of the rights of victims and, in some cases, members of their families. This involves the right to privacy, to healthcare, to defence and a fair examination of ones case, the right to freedom from violence and ill-treatment, and others.

The situation with assistance to trafficking victims is extremely poor. The problem is also that Ukraine is more and more frequently identified not only as a country of origin of victims of human trafficking, but also as a transit or destination country. The provisions of the Government Anti-trafficking Programme are focused on Ukrainian nationals, and there are no special provisions for procedure to repatriate or provide social inclusion for trafficking victims from other countries, providing for their requirements for protection and assistance while in Ukraine[8]. As a rule, it is people from Moldova or Uzbekistan who suffering from human trafficking in Ukraine.

The Law «On ensuring the safety of people taking part in criminal court proceedings» envisages the right of victims to enjoy safety measures if they are participating in the criminal process.[9]. In practice, however, such legal mechanisms are either not applied at all in the case of trafficking victims, or used extremely rarely.

4.1. PRELIMINARY IDENTIFICATION OF VICTIMS AT BORDER CROSSINGS

The identification of probably victims of human trafficking is the basis of any NRM, and the complex nature of the crime makes this a lengthy process. In Ukraine, likely victims of trafficking

[7] National Referral Mechanisms: Joining Efforts to Protect the Rights of Trafficked Persons. A Practical Handbook. OSCE-ODIHR, Warsaw, 2004

[8] See also: Trafficking in Persons: Global Patterns, UNODC report, April 2006. The UN places Ukraine in the middle of its rating of countries of destination. The last statistics from IOM also show that Ukraine has become a destination country.

[9] Article 7 of the law contains a general list of safety measures which can be applied, with these being described in more detail in Articles 8-16.

are in the first instance identified by law enforcement agencies, as well as those providing social services, including NGOs. In Chernivtsi, for example, only 5-7 % of trafficking victims identified by nongovernmental organizations turn to the law enforcement agencies.[10] Contact with likely trafficking victims is established as the result of a whole range of measures.

We can cite the example of the process of identifying trafficking victims among people deported via the sea port of Odessa. Law enforcement personnel in the Odessa region report that as a rule they receive lists of people deported from Turkey in advance. The Turkish migration institutions mark out separately the names of women deported for prostitution. A representative of the Regional Department of the SBU [Security Service] meets with these women. Likely victims of trafficking are referred to the Regional Anti-Trafficking Department of the MIA. If the SBU and police agree that the person is a victim of human trafficking, they send her to the NGO «Faith, Hope, Love». The next day the NGO informs the law enforcement agencies whether the person is willing to talk to the police. Most of the victims do not have registration in Odessa. However, if they are really to give evidence, this information is passed to the relevant Regional Department of the SBU. Among those deported there are people who have been trafficking victims in Turkey however the Turkish official authorities did not identify them as victims[11].

The present system for providing assistance to trafficking victims is mainly financed by international organizations, in particular the IOM. The network of social institutions takes virtually no part in this system. According to IOM figures, it finances approximately 95 % of all assistance programmes for trafficking victims in Ukraine.[12]. It would be difficult to overestimate the importance of the Kyiv Medical Rehabilitation Centre for Victims of Human Trafficking, founded and funded by IOM. According to representatives of NGOs, the Centre provides comprehensive and specialized medical assistance on the basis of confidentiality. This institution is the only one of its kind in Ukraine and accepts clients from all regions of the country.

In the Lviv region all institutions involved in combating human trafficking also refer identified victims to the NGO «Women's prospects» which can place them in their shelter. The shelter is intended for 6 women and 1 child. If necessary, the NGO can rent a flat for male victims, with the cost being covered by the IOM. The NGO can also send trafficking victims to other institutions, for example, the «Salyus» Centre.

In the Khmelnytsy region trafficking victims identified by the Employment Centre and Regional Anti-Trafficking Department are sent to the organization «Caritas».

4.2. THE PROBLEM OF COMPENSATION FOR VICTIMS OF HUMAN TRAFFICKING

Compensation for damages incurred by victims remains a difficult problem. Legislative provisions on compensation in accordance with Articles 22 and 23 of the Civil Code are only applied in the case of people declared victims of a crime in accordance with Article 49 of the Criminal Procedure Code (CPC). Pursuant to Article 28 of the CPC, victims of human trafficking can lodge a civil claim within the framework of an investigation into a criminal matter. If a person has not done this, s/he may lodge a claim under civil proceedings. . Representatives of the law enforcement agencies say that during the pre-trial investigation stage victims of trafficking are, as a rule, informed about their right to make a claim for moral or material compensation. Representatives of other departments, however, suggest that in the majority of cases they are not told of this possibility. There is a general problem with receiving qualified legal assistance since sometimes lawyers lack the time to give clients a good level of advice.

The reasons why compensation claims are not lodged include the inadequacy or total lack of legal assistance for victims, not being certain of ones chances for receiving compensation, or fear

[10] Assessing the needs of a national referral mechanism in Ukraine. Draft of the Report 26 November 2007. Prepared by Andriy Syolkner.
[11] Ibid.
[12] From 2000 to 2007 the IOM Mission in Kyiv provided direct assistance to more than 4,000 people. In 2001, around 65 % of victims received the necessary services, while in 2006 the urgent needs of almost 90 % of identified victims were successfully met. According to IOM figures, only 0.4 % of the recipients of their aid end up again in human trafficking situations.

of reprisals from the criminals. According to law enforcement officers, most human traffickers do not have the money or property registered in their name. Moral damages are also usually not paid since without assistance these are hard to estimate. Another problem is in the courts since the procedure for court examination takes too long and the investigators need to prove that the victims experienced moral damage and suffering. One can in general state that the current mechanisms for receiving compensation are excessively complicated.[13].

The Ministry of Justice attempted to draw up and submit to Parliament a draft law on compensation which proposed creating a compensation fund for victims of crimes linked with violence. The idea was that the victims would be able to get compensation in the form of State social assistance. However as of yet, this initiative has not come to fruition.

A joint project run by the American Association of Bar Lawyers and IOM (financed by the EU and the Swedish International Development Cooperation Agency) on «Confiscation of assets as the source of financing of assistance to victims of human trafficking and anti-trafficking work in Ukraine» was recently concluded. The project thoroughly investigated the possibility of creating an assistance fund for human trafficking victims or a compensation fund which could resolve the problem of paying compensation to victims, social assistance to traffic victims and finance an anti-trafficking programme. The fund would guarantee the right of victims to receive assistance from the State. The project suggested specific measures for improving legislation and compensation mechanisms including confiscation of assets.

Although the creation of such a fund would seem more an economic than a political problem, IOM nonetheless believes that a confiscation fund will be created in the next two or three years. However law enforcement officers are doubtful that such a fund can be successful since in practice it is virtually impossible to confiscate traffickers' assets.

Since 2004, the Supreme Court has been collecting data on all court cases involving human trafficking in order to gain a general picture and assessment of court practice. Such an assessment will be used to prepare a Resolution of the Supreme Court Plenary on generalized court practice in this field, recommendations for the courts, law enforcement agencies (the criminal investigation department and the prosecutor's office) on procedural issues in human trafficking cases and explanation of the relevant legislative provisions. Completion of a draft Resolution had been planned for November 2007, but thus far none has been adopted.

5. RECOMMENDATIONS ON IMPROVING ANTI-TRAFFICKING MEASURES[14]

5.1. TO THE VERKHOVNA RADA COMMITTEE ON LEGISLATIVE BACKUP FOR LAW ENFORCEMENT WORK

– Ensure as a matter of priority the preparation and tabling for Verkhovna Rada consideration of a draft law on amendments to the Criminal Code which would impose criminal liability for those who knowingly use the services which victims of human trafficking have been forced to provide;

– Carry out work on drafting a law on amendments to the Criminal Code imposing liability for the heads of legal entities which organize the provision of services by human trafficking victims;

– Initiate the preparation and tabling for Verkhovna Rada consideration of a draft law on amendments to the Criminal Code which would impose criminal liability for those involved in business who organize employment abroad or tourist trips where these are aimed at human trafficking;

[13] Assessing the needs of a national referral mechanism in Ukraine. Draft of the Report 26 November 2007. Prepared by Andriy Syolkner.

[14] The recommendations were drawn up taking into consideration discussion and proposals from a roundtable «Implementation of the Government Anti-trafficking Programme to 2010», organized by the Verkhovna Rada Committee on Legislative Backup for Law Enforcement Work, together with the International Women's Human Rights Centre «La Strada – Ukraine» on 27 February 2008, as well as recommendations prepared by the authors of the study «Assessing the needs of a national referral mechanism in Ukraine. Draft of the Report 26 November 2007». Prepared by Andriy Syolkner.

– Ensure consideration of issues around the preparation for ratification of the Council of Europe Convention on Action against Trafficking in Human Beings from 16 May 2005;

– Prepare and table for consideration by the Verkhovna Rada of a draft law on broadening the interpretation of such concepts as «recruitment», «transfer», «blackmail», «vulnerability», «concealment», receiving a person», «handing over or receiving a person», etc, in order to standardize their understanding, interpretation and application by law enforcement agencies;

– Consider and discuss at committee hearings drafts for a comprehensive law on combating human trafficking in Ukraine (during 2008);

– Draw up proposals and introduce amendments to the Criminal Code on imposing liability for the use of child pornography and receiving sexual services from children;

– Hold annual committee hearings on monitoring by the State of the Government Anti-trafficking Programme to 2010;

– Publish a transcript of the roundtable discussion and circulate this around all the departments involved in implementing the Government Anti-trafficking Programme to 2010;'

– Support the initiative of the Ministry on the Family, Youth and Sport regarding drafting a comprehensive law on combating human trafficking which would apply to all forms of human trafficking and would introduce a comprehensive system of protection and support for victims and witnesses of human trafficking, taking into consideration all aspects of national referral mechanisms to safeguard the rights of trafficking victims.

5.2. TO THE VERKHOVNA RADA COMMITTEE ON BUDGETARY ISSUES:

– Allow in the State Budget for the current and coming years of expenditure on providing for victims of human trafficking, receiving legal defence and accompaniment during criminal proceedings;

5.3. TO THE CABINET OF MINISTERS:

– Coordinate the process for introducing amendments to the Government Anti-trafficking Programme to 2010 in order to take into consideration all aspects of this work and bearing in mind these recommendations, make amendments to Cabinet of Ministers Resolution No. 410 from 7 March 2007 on approving the Government Anti-trafficking Programme to 2010;

– Allow in the draft Law «On amendments to the State Budget of Ukraine for 2008» allocation of funds for implementing the Government Anti-trafficking Programme to 2010;

– Abolish Resolution No. 1087 from 5 September 2007 on creating a single Council on demographic issues, family policy, children, gender equality and human trafficking and create a separate coordination council on combating human trafficking;

– Resolve the issue of creating the office of National Coordinator on combating human trafficking;

– Strengthen cooperation and coordination of efforts of the government and the public sector on combating human trafficking at the local, regional, national and international levels.

5.4. TO THE MINISTRY ON THE FAMILY, YOUTH AND SPORT

– Begin the process of identifying victims according to the principles and standards of the National Referral Mechanisms for victims of human trafficking;

– Draw up a national referral system with clear referral structures for each region.

– Inter-disciplinary groups should be formed with division of duties and powers in accordance with the relevant provisions on the institutions making up such groups. The regional authorities, together with local NGOs should be capable of properly protecting the rights and meeting the needs of trafficking victims, based on a structure which integrates the process of identification into defence and assistance programmes. If at the regional level there are no partner NGOs, the bodies in charge of the social sphere should be able to provide a sufficient degree of protection and support for trafficking victims. In the process of creating such a system, it would be advisable to apply the

Principles and Recommendations on Human Rights and Trafficking in Persons drawn up by the Office of the UN Human Rights Commissioner;

– Devise study programmes on combating human trafficking for all members of NGOs at the central and regional levels, together with institutions and organizations which have experience in preparing and running such programmes and / or are planning to do this in future, including international and regional organizations IOSCE, IOM, ILO, EU) and local NGOs, in order to avoid doubling up efforts;

– Draw up, introduce and ensure access of all members of NRMs to permanent study programmes, preferably of an inter-disciplinary nature, on identification, provision of assistance and support to trafficking victims. Specialized anti-trafficking modules should be included in current professional development courses in the relevant fields;

– Ensure the direction of each regional programme in support of a regional network of participants in a system of referral;

– Draw up criteria for identifying victims of human trafficking in order to give them victim status, and also assign a body authorized to grant this status and stipulate the list of possibilities which the granting of such status entails;

– Broaden the procedure for identification to all types of exploitation based on human trafficking, taking into consideration the aspects of internal and trans-border trafficking in the course of development of a methodology for identifying victims of human trafficking;

– Create effective procedures for swift identification of child victims of human trafficking;

– Introduce policy and special programmes of protection of the rights and interests of child victims of human trafficking. Rules on special measures to protect child victims of human trafficking should be incorporated into all components of NRM, especially with regard to the process of identification, provision of assistance and support, the procedure for return and reintegration, and safeguarding of access to justice. The State Social Service for the Family, Children and Youth, the Ministry of Education and Science, the Ministry of Health, regional state administrations, including services on children's affairs, should be made responsible for properly meeting the needs of child victims of human trafficking.

– Draw up and introduce programmes for comprehensive socio-psychological rehabilitation of victims of human trafficking;

– Guarantee equal access for all trafficking victims to specialized services (medical, psychological, legal assistance, education and vocational training, employment at all stages of the NRM, regardless of the place of residence / registration in Ukraine, gender, age, legal status, etc;

– Create and maintain a database on available social and other specialized services for trafficking victims in the State and non-State sectors in each region of Ukraine;

– Designate consultative centres in all regions which provide primary consultative services to likely trafficking victims; assess their social, medical and psychological needs and refer them to shelters and / or institutions for specialized services where necessary. These consultative centres can keep a database of available services in each region;

– Pay particular attention to the need for protection and assistance of child victims of human trafficking. Measures should be based on four general principles: considering the best interests of the child; the child's participation in decision-making; non-discrimination of the child; and the child's right to life and development;

– Introduce a mechanism for departmental control over adherence by the bodies of care and supervision to the demands of normative legal acts when carrying out proper checks of foreign nationals wishing to adopt Ukrainian children;

– Study the experience of foreign countries with regard to the creation and functioning of compensation funds for victims of trafficking in order to introduce a system of compensation for human trafficking victims at the national level;

– Draw up and introduce indicators for showing how widespread human trafficking is in the country and introduce a statistical database for victims;

– Draw up and introduce ways of assessing implementation of the Government Anti-trafficking Programme to 2010;

– Prepare annual reports on implementation of the Government Anti-trafficking Programme to 2010 and work on prevention and countering of such crimes;

– Coordinate the creation of mechanisms for monitoring and assessing the influence on adherence to human rights, legislation, politics, programmes and practical actions in combating human trafficking both at central, and at regional, levels;

– Draw up proposals on supplements to the Law «On social services» which allow for the inclusion of human trafficking victims and their close relations in the category of people entitled to receive social services.

5.5. TO THE MINISTRY OF INTERNAL AFFAIRS

– Begin keeping statistics on the gender, age, social and regional origin of human trafficking victims, as well as the gender, age and social background of those guild of human trafficking crimes;

– Introduce and keep statistics under Articles 301 and 303 of the Criminal Code;

– Permit the storage of personal data about trafficking victims only in cases of real need and only by those institutions which can take responsibility for observing European standards on personal data protection;

– Ensure that any activity connected with the gathering of personal data is in line with fundamental principles of confidentiality and standards for protection of data. Introduce strict demands with regard to sharing data in order to protect personal data;

– Guarantee that processing (compilation, recording, storing, changing, destroying or circulating) personal data takes place with observance of the rights of trafficking victims to confidentiality and with the consent of the individual concerned. This means that the individual has the right to know that information about him or her is being stored in a certain database, is entitled to know the content of this information and have the opportunity to correct it if necessary;

– Carry out a study of the scale, size and problems of internal human trafficking.

5.5. TO THE MINISTRY OF JUSTICE:

– Accelerate work on drafting a law to ratify the European Convention on Action against Trafficking in Human Beings (2005), introduce amendments to legislative acts bringing them into line with this, and table the draft law in the Verkhovna Rada;

– Draw up and submit to the Verkhovna Rada a draft law on compensation for damages caused victims of human trafficking. This would envisage, among other things, the creation of a compensation fund for victims of crimes. This State fund should ensure that victims can enjoy their right to compensation and provide them with access to services of social assistance and public integration;

– Prepare proposals on agreeing national legislation in the area of protection of information with European standards, in particular, creating a mechanism of access by trafficking victims to their personal data and correction of this data.

5.6. TO THE MINISTRY OF EMPLOYMENT AND SOCIAL POLICY

– Ensure information and explanatory work among the able-bodied population regarding social guarantees and the advantages of employment in Ukraine;

– Draw up and introduce programmes for informing adolescents about methodology in determining the professional orientation of employment, awareness of workers' rights, guaranteed State labour conditions and social guarantees;

– Increase activities to inform the public about the legal principles of labour migration abroad;

– Draw up government drafts of inter-State agreements on labour migration;

– Draw up a programme of measures on the development of the institute of licensing of economic activities with agents for employment of Ukrainian nationals abroad in order to stress their social projection and prevention of human trafficking

– Organize cooperation with unions in order to combat human trafficking.

5.7. TO THE MINISTRY OF FOREIGN AFFAIRS

– Ensure participation by representatives of State authorities in international anti-trafficking measures;

– Prepare and implement programmes for monitoring labour migration of Ukrainian nationals abroad in Ukraine's diplomatic and consular institutions ;

– Introduce a programme of cooperation between Ukraine's diplomatic and consular institutions and Ukrainian nationals working or studying abroad in order to provide the latter with information and legal assistance;

– Apply measures aimed at broadening an international contract and legal base in the areas of employment and social protection of Ukrainian nationals in countries where, for the sake of employment, there are a large number of our nationals, as well as at improving inter-State mechanisms for involving Ukrainian nationals in work abroad;

– Strengthen the mechanisms for checking and carry out supervision over adherence of the rights of adopted Ukrainian children abroad.

5.8. TO THE MINISTRY OF HEALTH

– Carry out an expert assessment of study plans and programmes and prepare methodology recommendations to include the topic «Prevention of human trafficking» in teaching curriculum and optional subjects;

– Promote an increase in the number of social pedagogues and practical psychologists in institutions according to the demands of current normative legal acts ;

– Include the topic «Prevention of human trafficking» and crimes connected with this in the educational programmes for children and young people as a base and variable part of the State component of the school curriculum;

– Increase attention of educational workers in educational institutions to the problem of children of labour migrants, their social milieu through the identification of such children, a study of the conditions of their life, information about the school management, psychological service, the service on juvenile matters, organization of socio-pedagogical work with them and with their social milieu. Carry out educational and awareness-running work;

– Introduce a system for monitoring and assessing the success of the organization and implementation of prophylactic measures against human trafficking carried out by departments of education in educational institutions.

5.9. TO THE SUPREME COURT

– In order to ensure a single approach in interpreting signs of human trafficking, accelerate review of generalized court practice in criminal cases of this category, and submission of this to the Supreme Court Plenary by the Ministry of Internal Affairs.

5.10. TO THE COLLEGIATE OF BAR LAWYERS OF UKRAINE

– Create a national network of qualified lawyers in order to provide legal assistance to victims of human practice and ensure that they receive effective protection of their rights and interests.

XXI. THE RIGHTS OF PEOPLE WITH DISABILITIES[1]

1. GENERAL OBSERVATIONS

The UN General Assembly in December 2006 adopted the Convention on the Rights of Persons with Disabilities which was opened for signatures on 30 March 2007. The Convention stipulates fundamental standards in ensuring and protecting the rights of people with disabilities. According to these standards, people with disabilities must be fully integrated into the general social process. The focal point should not be the disability, but the person with a disability who should be enabled, as far as possible, to lead an independent life within society. The Convention came into force on 3 May 2008.

Ukraine has yet to sign the Convention.

Timely internal reforms to fix into place the human rights mechanism proposed by the Convention could help resolve many of the problems of the 2.5 million people in Ukraine with some form of disability.[2]. Incidentally, there are grounds for believing that the official statistics do not reflect the real state of affairs. This is connected with the lack of reliable monitoring of the condition of people with disabilities, as well as the inability, or even reluctance of some people with such disabilities to receive disability status. The latter can be explained by the difficulties of going through medical commissions, as well as by lack of information and other factors. Another reason for the official statistics not giving a full picture is that a whole range of medical diagnoses which restrict people's abilities do not entitle them to disability status, for example: mental retardation, oncology, HIV, tuberculosis, etc. Also many people as a matter of conviction do not want to receive disability status despite there being a need for this. This is linked with a strong mental barrier in society as regards people with disabilities.

We can describe the current attitude of the State to people with disabilities as being more of an attitude to a «social problem». The main thing is seen as being ensuring certain social assistance (social protection) in order to resolve most of the problems experience by those with such disabilities.

The State unfortunately does not take an approach based on problems linked with observing human rights.

The main special law in this area «On the fundamental principles of social protection for the disabled in Ukraine» is focused on the «social protection» of people with disabilities (provision of targeted material assistance, ensuring special technical means, and others). There are however no mechanisms for socialization of a person with disabilities into society. For example, the Concept of Social Adaptation of People with Mental Retardation[3] states that «Improvement of social adaptation of people with mental retardation is a current task in the sphere of social protection».

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[1] Prepared by member of the UHHRU Board and Head of M'ART [Youth Initiative) Serhiy Burov; M'APT lawyer Roman Semeshko, Head of the Department for Organizational and Legal Work of the National Assembly for the Disabled in Ukraine, Larissa Baida; Executive Director of the National Assembly for the Disabled in Ukraine, Natalya Skrypka; and lawyer from the civic organization for blind lawyers, Kharkiv, Oleh Leletyuk

[2] According to statistics from the Pension Fund of Ukraine (www.pfu.gov.ua) As of 1 January 2008 there were over 2.5 million people in Ukraine who, due to physical or psychological difficulties needed special attention from the State. Over 168 thousand minors have received disability status.

[3] Passed by Cabinet of Ministers Instruction No. 619-I from 25 August.

This lack of mechanisms is confirmed by monitoring.[4]. We can cite as examples these thoughts from people with disabilities[5].

– «I think that the main basis is individual social assistance (pension, some benefits, etc), and ensuring equal possibilities gets very little attention (largely in the area of barrier-free access).

– «In Ukraine they don't' treat people with disabilities in any way, you're left alone with the problem of surviving».

The monitoring shows that for most people the idea of observing the rights of people with disabilities is associated with pensions, benefits, material assistance, free public transport, and so forth.

And such fundamental rights and freedoms like, for example, freedom of expression, the right to privacy are either not mentioned at all, or very rarely.

At the same time, among the key issues as far as people with disabilities are concerned which need to be resolved in the first instance (from a list provided) were the following.

– Finding a job and employment;
– Education;
– Social projection;
– Rehabilitation;
– Access of buildings and transport infrastructure

This highlights the declarative nature in many cases of that very social projection. The inclusion in the list of employment and education indicates that people with disabilities need the conditions to earn money themselves and live independently, rather than expecting State guarantees in the needed amount. Other problems named were:

– «Access of information for people with hearing impairments;»

– «for example, roads that you can't go on in a wheelchair. And the lack of lighting in some places».

With regard to general comments about observance of the rights of people with disabilities, we should mention the following:

There are no systematized principles of legislation on exercising and protecting the rights of the disabled. They need to be separately stipulated in a special law.

Legislation in the majority of cases uses such legal definitions as «is ensured», «carried out», and «provided». There is no concept of «duties of the State with regard to the disabled. For example, in the Law «On the fundamental principles of social protection for the disabled in Ukraine», the word «duty» is used only in Article «state bodies, enterprises, institutions and organizations (regardless of their form of ownership and management) are obliged to create the conditions for barrier-free disabled access to residential, public and industrial buildings, structures, public transport for free movement in populated areas».

The concept of «individual mobility» defining a maximum level of independence for people with disabilities is not present in legislation.

Legislation does not envisage the relevant mechanisms and procedure for the application of legal liability for failure to take the appropriate measures for ensuring equal access with others to the physical environment, transport, information and communication, including information and communication technology and systems, as well as to other areas and services open to the population.

There are no norms or provisions regarding situations of risk (armed conflict, natural disasters) and exceptional humanitarian situations, nor for the protection during these of people with disabilities.

There is no legislative backup for educational programmes for people with disabilities on issues of reproduction and family planning.

The subsistence minimum for non-able-bodied persons according to legislation is less than for able-bodied, although the needs of those unable to work are often greater (people with disabilities need special food, clothes, housing). For example, according to Article 58 of the Law «On the State

[4] Monitoring of the rights of people with disabilities, carried out by the National Assembly of the Disabled, together with partner organizations and with the support of the International Renaissance Foundation. Later in the text referred to as the monitoring.

[5] Comments are presented with minimum editing

Budget of Ukraine for 2008», the subsistence minimum for an able-bodied person from 1 April is 647 UAH per month, while for somebody unable to work the figure is 481 UAH.

There is no single system or programme for gathering and generalizing statistical data regarding the number of people with disabilities and their needs, which diminishes the effectiveness of social and other programmes.

The issue of observance of the rights of people with disabilities begins with the issue of equality of rights and non-discrimination. Here and later we are not dealing with some kind of special boons which should be provided to people with disabilities but the rights infringements they can experience and discrimination in areas vital for any person such as healthcare and finding a job, etc.

2. EQUALITY AND NON-DISCRIMINATION

The Constitution guarantees all equal constitutional rights and liberties, and equality before the law. Article 1 of the Law «On the fundamental principles of social protection for the disabled in Ukraine» states that: «people with disabilities in Ukraine enjoy the full range of socio-economic, political and person rights and freedoms». It also stipulates that «discrimination of people with disabilities is prohibited and is punishable by law». At the same time, the very concept of «discrimination» against people with disabilities is not defined in any legislative act.

In a civilized society it is common practice to adopt a policy of «positive discrimination» with relation to people from particular groups who for various reasons are more vulnerable than others. In Ukraine such a policy is substituted by a range of benefits which are obtained by going through procedure which is in itself extremely humiliating. Furthermore the constant fixing of a subsistence minimum for those unable to work as lower than for able-bodied citizens contradicts the principle of positive discrimination.

The overall policy of the State with relation to people with disabilities was described by one of the people who took part in the ongoing monitoring «Discrimination doesn't exist since society simply doesn't notice them.» The examples are legion.

Two main laws, namely «On the fundamental principles of social protection for the disabled in Ukraine» and «On the rehabilitation of the disabled» do not contain separate norms relating to women with disabilities.

During a focus group, the following information was received: «There is a list of rehabilitation services but it doesn't differentiate between men and women although women need special attention and have certain specific needs in receiving rehabilitation services. So does that mean that a disabled person is without gender?»

The Ministry for the Family, Youth and Sport, State Institute for the Development of the Family and Youth» prepare an annual report «On the position of young people in Ukraine». There is not a word in this, at least not in the report for 2006, about people with disabilities, as though there aren't young disabled people.

During the monitoring, surveys showed that there were fairly different answers from public officials of the local authorities and from experts representing specialist nongovernmental organizations and the media. For example, to the question: «Does the law provide equal protection for people with disabilities and those without?» 64 % of public officials said either «yes» (45 %) or «probably yes» (19 %). On the other hand 44 % of the experts representing specialist nongovernmental organizations and the media said «most likely no», and 13 % – said «no».

The results of the study into experts' opinions show that there are considerable obstacles in the way of people with disabilities becoming familiar with the norms of legislation.

The results of surveys of people with disabilities and a wider audience are similar. The overwhelming majority (77 %) of those surveyed point to the existence of discrimination against people with disabilities. 34 % consider this to be definite; 43 % answered that it probably exists. 17 % of the respondents said that it doesn't exist, while 6 % didn't know.

3. FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION

Freedom of expression and the right of access to information do not of course differ in substance for people with disabilities. However they can only exercise these rights through special efforts on the part of the State since people with disabilities need additional condition. Furthermore, the state of health of a person needs to be considered, the particular features of their illness, the existence and level of functional limitations, etc

There are no effective norms in legislation ensuring efficient access to information for people with disabilities. There is not enough State support for the media, publishing companies, enterprises and organizations which produce special literature, audio and video recordings for people with disabilities. In preparing, producing and installing means of communication and information, the question of whether they can be used by people with disabilities is not always taken into consideration.

Services with sign language are partially provided for people with hearing impediments.

Sign language and Braille and other available methods and forms of communication are virtually not used in official relations. It remains a task in the future to «promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures».[6]. There is a particular situation with sign language. While it is officially recognized, there is virtually no promotion or support for its use.

The Law «On Television and Radio Broadcasting» does not contain clear norms regarding liability for national television channels for the lack of sign language readers. This is applied by using administrative methods through the National Television and Radio Broadcasting Council.

4. INVIOLABILITY OF PRIVATE LIFE, RESPECT FOR PERSONAL AND PSYCHOLOGICAL INTEGRITY IN EQUALITY WITH OTHERS AND RESPECT FOR HOUSING AND THE FAMILY

Studying legislation, you can see that the State so defends public morality that it classifies sexual relations with people who have clear signs of disability as anomalous or deviant forms of sexual behaviour. You can really draw this conclusion if you read Part II «Representation of anomalous and deviant forms of sexual behaviour» of the chapter «Sexological criteria of pornography», Criteria for classifying printed, audiovisual, electronic and other production, including advertising, as well as messages and material passed on or received through communications lines as viewing pornographic or erotic production[7]: «...II. Representation of anomalous and deviant forms of sexual behaviour ... 3) Demonstration of sexual behaviour with people who have clear signs of disability, defects and anomalies, clearly suffer from somatic and / or psychological illnesses ...» Thus, even defending public morality, the State should be correct in its formulations.

We received the following comments from experts in response to the question: «Does the State take adequate measures to eliminate discrimination against people with disabilities in all issues concerning marriage, the family, motherhood, fatherhood, and personal relations?»

– «If the parents are disabled, they can put the child into the care of a grandmother not disabled ...»

– «There have been cases when they didn't want to register the marriage. They didn't allow a disabled woman to have a child, saying «You're disabled and need care yourself».

The experts also note that it is very hard for a family of people with disabilities to adopt a child.

The practice in important spheres such as, for example, education and healthcare, does not guarantee that a child will not be separated from his or her parents if either the child or one of the parents is disabled. We were given the following examples:

[6] UN Convention on the Rights of Persons with Disabilities.

[7] Approved by National Expert Commission of Ukraine on Protection of Public Morality from 20 February 2007, No. 1 № 1.

– «The mother had the child taken into a specialized home since she wasn't able to look after it: a) she didn't have enough money to feed the child properly; b) she couldn't carry the child up and down from their third-floor flat where there was no lift»;

– «Usually parents are forced to part with the child since the present system of education envisages that children with particular types of illness and state of health can only study in specialist school-orphanages»;

5. ACCESS TO JUSTICE

Legislation does not provide mechanisms for effective access of people with disabilities to the justice system. For example:

1. people with disabilities do not have state duty charges for examination of cases in court waived[8];

2. a lawyer is paid for in criminal cases by the State only if there is a special decision from the relevant detective inquiry, criminal investigation unit or court[9];

3. according to the Law «On the prosecutor's office», «... the prosecutor shall independently determine the grounds for representation in the courts, the form that this shall take and can carry out representation at any stage of the court proceedings according to procedure stipulated by procedural law».[10]. This law does not oblige the prosecutor to represent the interests of people with disabilities in court, and merely entitles them to do so, independently determining the grounds for such representation.

There remains a problem with lack of physical access to court buildings, as well as court hearings with the participation of people with disabilities in the absence of technical opportunities (for example, translation into sign language, provision of certain documents in Braille, and so forth).

6. THE RIGHT TO EDUCATION

One of the most burning issues is ensuring the right to education of people with disabilities. Without proper education, they are doomed to dependence on social protection and unable to fend for themselves.

Legislation has brought about a system where most secondary education for children with disabilities is in school-children's homes, which leads to children being isolated from their parents. The family faces a terrible choice – prioritize the possibility for the child to get an education, or be raised with the family. This is a very difficult moral choice. From the point of view of human rights, both options need to be guaranteed by the State.

Recently, at the initiative, in the main, of nongovernmental organizations, the question of inclusive education has been increasingly raised. . Monitoring showed that the term «inclusive education» is not widespread. Meagre commentary to the effect that «... the education system is not yet sufficiently adapted for including people with disabilities ... include a huge number of problems starting with physical access to educational institutions, the lack of proper educational programmes, trained specialists and so forth, and ending with the problem of society's readiness. Incidentally, with regard to the latter, the State is carrying out virtually no educational work which is perhaps the only way of doing something about this problem.

The following are some examples of problems encountered[11]:

[8] Article 4 of the Resolution of the Cabinet of Ministers «On State duty».
[9] Cabinet of Ministers Resolution No. 921 from 14.05.1993 «On approving Procedure of the remuneration of lawyers and provision of legal assistance in criminal cases at the State's expense.».
[10] Article 36-1 § 5 of the Law «On the prosecutor's office»
[11] Where it is not clear from the text whether the person is male or female, we say «she» since the word for person in Ukrainian is feminine (translator)

– «The person had a problem with trying to get into an institute because she'd studied at home and didn't have a grade from Computer Sciences. Because of that she couldn't get into the Vinnytsa Polytechnic».

– «No possibility of enrolling the disabled child in a kindergarten where they can look after her so that I could go out to work».

– «Because of being disabled they refused to accept my documents for applying to an institute».

– «The institute refused to accept my documents although I had a paper confirming that I was capable of studying in that institute. They strongly recommend «going to any other institute», they say that «there's no place for people like you here».

– «They won't take the child in any educational institution».

– «The child has a hearing impairment and cerebral palsy. They won't accept her in the kindergarten. There's nowhere where she can learn sign language.»

– «They won't admit our disabled child in any educational institution (school, nursery, kindergarten) where there are children without disabilities. We constantly have to collect lots of documents, commissions in various social institutions.»

– «There's no access to good and decent education, I feel discriminated against in access to visual information».

The following are obvious problems:

– the lack of mechanisms for developing and financing a system of inclusive education;

– the lack of educational State standards and programmes for mentally retarded children (except children with slight retardation)'

– opportunity for people with disabilities to exercise their right to higher education;

– the lack at legislative level of mechanisms of control over the observance by higher educational institutes of the requirements as regards access to the relevant infrastructure. Another obstacle is the existing list of medical contra-indicators, approved by the Ministry of Health;

– there being no system of training staff, and lack of adaptation of pre-school institutions despite the existence of norms which envisage the creation of special programmes in the field of pre-school education.

There are separate problems for children with psychological difficulties. These begin with not being admitted to pre-school institutions, while in specialized ones there are no specialists able to work with them. A glaring example is that of autism which is recognized by the Ministry of Health, yet there are no approved programmes for working with autistic children and special training for teachers and psychologists.

Access to higher educational institutes is in practice restricted due to the lack of special institutes for young people with such difficulties and a restricted quota of places set aside in ordinary institutes.

7. ACCESS

Legislation imposes the obligation to provide access for the disabled to various forms of infrastructure on the relevant authorities, enterprises and organizations, which:

– «are obliged to create»

– «must envisage»

– «should equip», and so forth

Yet there are no mechanisms for imposing liability if the infrastructure is not created or for ensuring such guarantees to people with disabilities.

For example, when drawing up and agreeing design documentation for construction and reconstruction of buildings and other structures, the architectural design scope stipulates that the needs of people with disabilities should be taken into consideration (with ramps, etc). Yet the end result is that 99 % of the constructions do not have such infrastructure.

Article 6 § 3 of the Law «On the fundamental principles of social protection for the disabled in Ukraine» stipulates that «people in official positions guilty of infringing the rights of people with disabilities defined by this Law shall bear legally established material, disciplinary, administrative and criminal liability». We were unable to find any examples where such liability for infringements had been imposed.

At the same time, the law does not envisage either individual or collective responsibility in this area.

At the legislative level norms are fixed on inclusion of people with disabilities into society and participation in the activities of the community. Yet services and public areas are designed for the population as a whole, and are not equally accessible for people with disabilities and do not meet all their requirements.

It should be noted that the State has over recent times been paying more attention to the problems of people with disabilities. This is primarily in creating conditions for barrier-free access to residential and public areas and transport infrastructure. Civic organizations have played a major role in heightening attention to the need for barrier-free conditions.

However one feels that the authorities far from always approach this task with an understanding of the actual problem. One of the participants in a focus group presented an example: «I arrive at the clinic. How am I supposed to get in? They say «Come next time, there'll be a ramp». I came. Yes, they'd put in a ramp. With the help of two doctors (!) I got up the ramp to the registration office, and what then? The doctor's on the second floor, the neuropathologist on the third...»

8. HEALTHCARE, CAPACITY BUILDING AND REHABILITATION

The State has the duty to apply all possible measures to ensure access of people with disabilities to healthcare services, taking into account gender-specific needs, including to rehabilitation linked with state of health. Discrimination is not permitted on the grounds of disability.

The most problematical are issues regarding a proper level of provision for people with disabilities of specific medical services which they need due to their disability. This includes services aimed at reducing the consequences to a minimum and at preventing further development of disabilities, including in the case of children or the elderly. It is especially important that these services be provided at the place where the people with disabilities live, including rural areas.

We should immediately point out one of the problems in legislation which in some issues does not envisage the principles of early diagnosis of conditions which lead to disability. There are no psychiatric diagnostic checks of children of pre-school and school age.

As of 1 January 2008 there were no norms of guaranteeing participation in using services in psychological healthcare, in drawing up policy and developing a legislative base, and planning services in this field.

In 2007 no subordinate legislation in the form of normative legal acts was passed stipulating norms for equipping hospitals with special means, and wards (individual) made suitable for people with disabilities.

There are considerable obstacles in the possibilities of rehabilitation which in turn make the possibility of exercising ones rights problematical. For example, according to the Law «On the fundamental principles of social protection for the disabled in Ukraine» there is a list of duties which the State has taken upon itself which are carried out bearing in mind and individual rehabilitation programme. This is stated in the following norms of the Law:

– Article 17 (the right to work at enterprises, institutions and organizations, as well as to engage in business or other work not prohibited by law;

– Article 30 («residential premises, occupied by the disabled or families where there are disabled people, stairwells of buildings where disabled people live must be equipped with special means and adapted for individual rehabilitation programmes, as well as with a telephone»;

– Article 37 «Types of necessary medical assistance for the disabled are determined by bodies making medical and social assessments, in individual rehabilitation programmes. Assistance is provided from the Fund of Social Protection for the Disabled»);

At the same time, according to statistics in 2007 126 thousand people were first assigned disability status, yet only 40 thousand were issued individual programmes. Overall, 2.5 million people with disabilities still do not have such a programme.[12].

According to figures from the Prosecutor General's Office, only 10 % of disabled children were included in comprehensive rehabilitation measures. The legal requirements on creating individual programmes for their rehabilitation were not implemented. For example, in the Donetsk and Transcarpathian regions 350 disabled children were able to have such programmes drawn up only after the prosecutor's office intervened[13].

Among other problems regarding healthcare for people with disabilities the following should be mentioned.

– The State has not supported or encouraged the transfer of psychological health services to the local level and deinstitutionalization;

– The criteria for sufficient funding for services for psychiatric assistance have not been set out in legislation. In the Law «On the State Budget for 2007» there was no separate item for this. Nationwide programmes for psychological healthcare have not been approved and there are no references to these in the law;

– The State has not stipulated aims, tasks and supplementary measures for protecting those with psychological illnesses. There is no extra-departmental control and the precedents of the European Court of Human Rights which equate compulsory hospitalization with deprivation of liberty have not been taken into consideration;

– Mechanisms have not been prepared for receiving access to medical insurance and the public and private sectors for people with psychological disorders.

– Legislation [14] envisages the development of beginner and further education for specialists and personnel who provide capacity-building and rehabilitation service, as well as the adoption of State social norms in the sphere of rehabilitation of disabled adults and children. Yet there are no such norms at present as there are also no mechanisms and programmes of study for the relevant specialists.

The practice for establishing and reviewing disability status is sometimes, unfortunately, unacceptable. Depending on the cause for designating disability status and type of illness, a person has to periodically appear before a review commission and have the status confirmed. This process involves hospital admission, treatment is not voluntary yet without it the person cannot prove their disability status.

Here is one example from our analysis of media publications: «My child has epilepsy and is on the register at the Yushchenko Hospital. He is being treated but there's no improvement. The illness isn't curable and they've given my son third degree disability status. That's status where you can work but nobody will give him a job with such an illness. Every year there is a review commission. He has attacks. And when I come with him to the commission they give us a pile of nonsense for a very long time. But if you put 100 dollars or 500 UAH in your passport, then all is well. When will it end?»[15]

The healthcare system undoubtedly needs to review the instructions, regulations and other subordinate legislation regulating the question of provision of healthcare services to people with

[12] V. Tursky, Trade Unions and the hope of the blind // the newspaper «Yurydychny visnyk Ukrainy» from 26.01.08, http://www.yurincom.com/ua/legal_bulletin_of_Ukraine/archive/?aid=2011&jid=257&print=1

[13] «Protection of the social and property rights of the disabled to constant monitoring from the prosecutor's office» // Website of the Prosecutor General's Office 03.12.2007 , http://www.gp.gov.ua/ua/news.html?_m=publications&_t=rec&_c=view&id=11806.

[14] For example the Sate Programme for Developing the system of rehabilitation and employment for people with limited physical possibilities, psychological illnesses and mental retardation for the period up till 2011 (approved by Cabinet of Ministers Resolution No. 716 from 12 May 2007)

[15] «And I collect my last kopecks» // The newspaper «33rd channel» (Vinnytsa) 23 April 2008 http://www.33channel.vinnitsa.com/2008/08-05-21.php

disabilities. Here is another example from our survey indicating a lack of real understanding of the problem. «My disabled child can't walk. Two times a year there is a medical examination – we go to the hospital and wait in big queues. The doctors don't come to my child.»

9. WORK AND EMPLOYMENT

Studies make it possible to conclude that it is perhaps over the issue of work and employment that there is the greatest divergence in views between the staff of the local authorities and non-governmental organizations, the media and the actual people with disabilities. While officials don't see particular problems in this area, people with disabilities cite examples which suggest limitations in the possibilities for earning a living through their chosen form of work however there are certain standards. Problems with observance of these were mentioned during the monitoring, as the following examples indicate.

– Insufficient measures on the part of the State aimed at employing people with disabilities in the public sector and creating incentives for employing them in the private sector.

– Insufficient measures on the part of the State aimed at providing people with disabilities with effective access to general programmes of technical and vocational orientation, employment services and vocational training;

– Insufficient measures on the part of the State aimed at ensuring that people with disabilities are reasonably suited to the job.

In terms of legislation, the following problems are of the greatest concern.

– No mechanisms have been designated for control over ensuring attestation of jobs for the disable. There are also no effective mechanisms for ensuring in practice that jobs for the disabled are set aside within the ratio of 4 % of the overall number of employees;.

– The system for providing tax incentives to enterprises of disabled organizations remains flawed opening the way for the possible use of corrupt setups;

Participants in the monitoring pointed frequently to problems linked with finding work, infringements of legislation on work for people with disabilities. It was stressed that «there is no real protection of home employment for people with disabilities and there are constantly cases where wages are not paid by private employers (for example, working as telephone operators from home phones). And this is with employers often imposing something like slave conditions of work (unrestricted working hours, no days of etc), then they often don't pay the wages. If the employer doesn't pay, it's useless approaching the police, since the minimal amount isn't enough to initiate a criminal investigation.»

Here is another example from participants in a focus group: «I've got 14 years work behind me, however fairly qualified work is a problem since it's difficult to get there. I was offered work. if you sit behind a computer at their end, there's one rate, if you do the same work at home it's a lot les. They offer work at home for 300-400 UAH. They say you work at home. That will be sufficient. For people with disabilities the rates are much lower. Why? The employers' whim? Cheap labour?

10. PROPER EDUCATIONAL AND AWARENESS-RAISING WORK ON THE PART OF THE STATE TO BEST INTEGRATE PEOPLE WITH DISABILITIES INTO SOCIETY

The State is not taking sufficient measures with regard to:

– increasing public awareness, including at the level of the family, of disabled issues and strengthening respect for the rights and dignity of the disabled.

– combating stereotypes, prejudice and bad habits with regard to people with disabilities, including on the basis of gender and age in all spheres of life;

– promote the potential and contribution of people with disabilities ;

Even at the level of legislation there are no norms for the authorized state bodies to carry out the relevant educational and awareness-raising work in society concerning the attitude to people with disabilities;

Educational work concerns only the disabled people themselves and entails various types of rehabilitation of people with physical or psychological health problems.[16].

It is civic organizations that have taken the necessary functions upon themselves.

In concluding, we would note that those who represent the State should understand that the main thing is not benefits, not temporary periodic attention during public holidays and demonstrations of their own charity in the media.

11. RECOMMENDATIONS

1. The best thing would be the inclusion in a special Law the definition of disability in accordance with the UN Convention on the Rights of Persons with Disabilities

2. Sigh and ratify the UN Convention on the Rights of Persons with Disabilities and the Optional Protocol to it.

3. Draw up and adopt amendments to legislation in order to bring it into line with the UN Convention on the Rights of Persons with Disabilities. Practical mechanisms are need to inculcate key standards in the sphere of protection of the rights of the disabled;

4. .A Law «On mandatory State social medical insurance is needed

5. Supplement the Code of Administrative Offences and the Criminal Code with norms which allow for the imposition of fines on the heads of enterprises, institutions and organizations, representatives of the authorities and bodies of local self-government who do not ensure implementation of the legally stipulated norms regarding social, legal and other protection for the disabled (for example, regarding creation of access to the necessary infrastructure, media resources and so forth)

6. Establish admissible standards for studying in the case of people with physical impairments or psychological disorders which will guarantee their level of development for participation in society.

7. Set a mandatory quota of places for people with disabilities in higher education institutes, introducing the relevant norms in the Laws «On education» and «On higher education».

8. Draw up State educational standards for children with learning difficulties, defining main criteria and categories of psychological disorders, and also adapt study programmes to them.

9. Allow for the creation in educational institutes of the relevant base for study for those with psychological disorders, sight or hearing impairments (material base, learning material, educational staffing)

10. Put forward for general discussion the question of revoking the restriction of services in territorial social centres for people with psychological disorders.

11. Put an end to the practice of restricting or stopping benefits for people with disabilities when adopting the State Budget for the current year in implementation of the judgment issued by the Constitutional Court.

12. Draw up measures for the Ministry of Health which will envisage incentive mechanisms, including of a financial nature for psycho-social and rehabilitation approaches in treating people with psychological disorders.

13. Draw up and approve a targeted State Programme on providing psychiatric assistance, envisaging:

– primary professional examinations by specialists in general education secondary schools;

– child psychiatrists in central district hospital;

– financing for free medicine for people with psychological illness at the same level as for all those registered as disabled.

14. Ensure control over compensation from the local budget for carrying out mandatory attestation of jobs for the disabled at enterprises, institutions, organizations within the legally established quota.

[16] Articles 17, 34,36 of the Law «On the rehabilitation of people with disabilities in Ukraine».

XXII. PRISONERS' RIGHTS[1]

1. MANAGEMENT OF THE PENAL SYSTEM

There were no changes in the subordination of the State Department for the Execution of Sentences [hereafter the Department] in 2007. The Department has existed as an autonomous body since 1998.[2] The commitments which Ukraine accepted on joining the Council of Europe in 1995 on subordinating the penal system to the Ministry of Justice have still not been fulfilled.

This situation has arisen as the result of consistent opposition from the management to this subordination. And whereas in 1998-1999 this position could be justified by the need to gradually prepared for the new subordination, with time statements began being heard from the management that by the very removal of the penal system from the Ministry of Internal Affairs (MIA), the commitments to the Council of Europe had been fulfilled which is not true.

The President previously ordered the authorities to resolve the issue of the Department's subordination by 1 April 2006 in fulfilment of the commitments to the Council of Europe. [3] Yet this instruction has still not been enforced.

The process of handing the penal system into the jurisdiction of the Ministry of Justice remains full of contradiction and inconsistent.

In April 2006, the Cabinet of Ministers determined[4] that the activities of the Department should be directed and coordinated by the Cabinet of Ministers via the Minister of Justice. From the content of the resolution it is not possible to reach any conclusions as to the meaning of «coordination of activities». The resolution is also a subordinate normative act and cannot contravene the Law «On the State Penal Service» which states that the Department is a central executive body with jurisdiction to head and manage the penal system. This means that a declaration regarding «coordination of the activities of the penal system by the Ministry of Justice has no juridical content or meaning and is impossible to enforce. There are no relations of subordination between the Ministry of Justice and the Department and hierarchically speaking, they are equal.

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[1] The report has been prepared by Oleksandr Bukalov, Head of the civic organization «Donetsk Memorial». The analysis of legislation on the opportunities for prisoners to appeal against the actions or inaction of the administrations of penal institutions was made by Mykhailo Minyaev (Zaporizhya). Iryna Yavkovets from Kharkiv took part In preparing sections of the report on legislation. The main sources were projects and studies within these projects, material from seiminars and conferences; the replies of penal institutions to formal information requests from Donetsk Memorial; publications in the media, including Internet outlets; letters and appeals from people presently in the system's institutions. A lot of material was taken from the study «Criminal Punishment in Ukraine» prepared and published with the support of the Swiss Agency for Development and Cooperation. The authors cannot, as previously, exclude that some of the facts cited here might not find corroboration, and certain conclusions are subject to debate. We would ask for understanding given the constraints with time and resources which prevented the study being fuller and more substantial. We are convinced, however, that such an assessment of the work of the penal system in the country is needed and beneficial.

[2] More details about the creation of the Department for the Execution of Sentences can be found in Human Rights in Ukraine – 2005

[3] Presidential Decree No. 39/2006 from 20 January 2006 «On an Action Plan for fulfilling Ukraine's duties and obligations arising from its membership of the Council of Europe»

[4] Cabinet of Ministers Resolution No. 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»

On 11 July 2007 the Cabinet of Ministers passed Resolution No. 916 which approved new Regulations on the Department. This document states that the head of the Department shall be appointed by the Cabinet of Ministers on the Prime Minister's submission in accordance with the proposal from the Minister of Justice. Through Decree № 667/2007 from 28 July 2007 the President suspended this Resolution. The Decree states that «through a normative legal acts the Cabinet of Ministers has defined the legal basis for the activities of the State Department for the Execution of Sentences which does not comply with the norms of Article 92 § 1.14 of the Constitution, according to which the organization and activities of penal bodies and institutions are determined solely by law.»

In spring 2007 a draft law was prepared setting out a greater degree of subordination to the Ministry of Justice however this did not receive consideration due to the dissolution of parliament.

Thus despite annual reminders from the Council of Europe about the transfer of the penal service to under the jurisdiction of the Ministry of Justice, this commitment has remained unfulfilled now for almost thirteen years.

As of the middle of 2007 the State Penal Service of Ukraine was made up of a central structure, its 25 territorial divisions, 183 institutions, 703 subdivisions of the Penal Inspectorate and educational institutions.

The law[5] stipulates that the total number of employees needed to ensure the normal functioning of penal institutions, SIZO [pre-trial detention centres] and treatment and labour preventive centres, should be fixed at 33 % of the total number of people held in the penal institutions. The personnel of the Penal Inspectorate should make up 5 % of the number of people on their register. Thus the number of staff paid for out of the State Budget should come to 61735 posts. In reality the figure is lower, and over recent years has stood at 72-75 % of the number needed. At the same time, the actual number of employees (where all positions are occupied) is usually even lower than the official number of positions by 5-9 %.

The personnel are made up of two main categories of employees – certificated personnel and people employed on a free hire basis. The trends in the number of penal staff are presented in Table 1.

Table 1. Rate of change in the number of staff within the Penal Service[6]

	1.1.1999	**1.1.2001**	**1.1.2002**	**1.1.2003**	**1.1.2005**	**1.1.2006**	**01.11.2006**
Staffing numbers (State budget and production)	54 787	48 011	48 315	48 074	47 767	49 185,5	52 336
% of the legally established staffing numbers	Даних немає	73 %	72,3 %		74 %	75 %	75,4 %
Including : – certificated – those without specific rank	29 571 25 216	35 586 12 425	36 468 11 847	36 413 11 661	35 791 11 976	37 061 12 124,5	38 980 13 356
The actual number of positions filled (the actual number of staff)	Даних немає	45 221	45 884		45 101,5	45 980	Близько 48 250
The shortfall / % of the staffing number	Даних немає	2790 / 5,8 %	2431 / 5,0 %		2665,5 / 5,6 %	3205,5 / 6,5 %	Близько 4 080 / 7,8 %

At the end of December 2007 the President spoke out in favour of improving the system of execution of sentences. «We need to radically change national policy in this area. At least one contemporary prison meeting modern requirements should appear in the country». Viktor Yushchenko added that there also needed to be reform of the attitude «to people who are guarded, and those

[5] The Law «On the general structure and size of the Penal System of Ukraine»
[6] «Criminal Punishment in Ukraine» // «Donetsk Memorial», 2007, p. 22.

who are guarding them». «Beginning from 2008 our policy on this issue must be different. It needs to demonstrate well-thought out, high-quality and humane policy as legislation demands.»[7]

2. STATE POLICY WITH REGARD TO THE PENAL SERVICE

A detailed analysis of penal legislation was given in the Report Human Rights in Ukraine – 2005. There have been no substantial changes since then.

Fulfilling its new function of directing and coordinating the work of the Penal Service, the Ministry of Justice has drawn up a draft Concept Strategy for Ukraine's State Policy on the Execution of Criminal Sentences». This envisages, for example, bringing the procedure and conditions for the execution of sentences into line with international standards, organizing an effective system of social adaptation for people who have served sentences of imprisonment and efficient modern training for the staff of the Penal Service.

The Department has prepared its own Development Strategy for the State Penal Service. This draft was discussed with experts from the Council of Europe, adopted at a meeting of the scientific and methodological Department Council and has been sent to the Coordination Committee of the Council of Europe on Reform of Ukraine's Penitentiary System for processing and the relevant recommendations.. The objectives of the Development Strategy are to improve legal regulation of Penal Service work; optimize the Service's structures and system of management, and to bring the conditions for convicted and remand prisoners into line with international standards. .

In September the President's Press Service issued information that the President was planning to approve the Department's Development Strategy. On 27 September UHHRU addressed an open appeal to the President calling on him to withdraw his support for this document. The main shortcomings of the Development Strategy, UHHRU stated, were:

– reliance on a faulty understanding of the purpose of punishment and accordingly of the role, function and powers of the Penal Service;

– the reluctance to fully move over to a civil, and not a law enforcement service;

– the lack of clear definition of the place of the State Penal Service among government bodies;

The Strategy Plan effectively preserves and entrenches the present state of the penal system which remains to a large extent a Soviet GULAG and the State Penal Service which is yet one more law enforcement authority.

There were other appeals to the President over this and he therefore decided not to approve the Development Strategy being proposed by the Department.

Funding for the Ukrainian Penal Service from the State Budget ha long been inadequate and on average comes to 25 – 45 percent of the normative requirement (2000 – 25,1 %, 2001. – 39,2 %, 2002 – 24,5 %, 2003. – 43,8 %, 2004. – 37,3 %, 2005. – 44,0 %, 2006. – 45,2 %).

The minimum calculated need in allocations from the general budget for the penal system in 2007 was, according to the Department's figures, set at 2663.5 million UAH, of which operational expenditure came to 576.7 million UAH, and capital spending of 567.7 million UAH. However the Ministry of Finance only allowed in the State Budget for 1410,9 million UAH in 2007, with this providing for 51 % of the department's needs., including remuneration – 79,4 %, food for remand and convicted prisoners –53,8 %, purchase of medicines 27,8 %, provision of other items – 5,4 %, and communal services and energy – 80,7 %. For expenditure on reforming the Penal Service, including improvements of the conditions for convicted and remand prisoners the Budget set out only 4.5 % of the actual requirement

Yet each year partial funding is set out on a mandatory basis at the expense of the work of industrial enterprises of the penal colonies. In 2002 income of 60 million UAH, or around 12 million USD was anticipated. Furthermore, the cost of holding convicted prisoners is partly paid for by those prisoners who work at the enterprises or who have money in their accounts.

[7] «The President needs fresh blood and at least one modern prison» // the Internet publication «Ukrainska Pravda», 24.12.2007, http://pravda.com.ua/news/2007/12/24/68973.htm.

It should be stressed that this source of income is fairly unreliable since the Department's enterprises are experiencing great difficulties in providing people with work. According to specialist on penitentiary matters O. Betsa, «the requirements in modern legislation on providing prisoners with work are not being met. At present only about 21 % of able-bodied prisoners are taken to paid work (although in previous years, considerably worse from the economic point of view, 30-40 % of prisoners had full-time work.)»[8]

According to the Department's own data, «in penal institutions in the Donetsk region, there are 13,968 people effectively without work; in the Lviv region this figure is 4045 (83.2 %); the Sumy region – 2697 (87 %); and Kherson region – 2647 (86.5 %)». According to a government commission, these figures are even higher: 15,762 people (92.8 %) were without work in the Donetsk region; in the Lviv region – 4704 people (93.7 %); the Sumy region – 3062 (95.9 %); and Kherson region – 3019 (89.2 %). Furthermore production is often not able to compete and sells badly. To a large extent this is due to the excessively outmoded equipment in most enterprises and the lack of economic incentives. A considerable percentage of prisoners are not provided with work which causes considerable difficulty both for the prisoners themselves, and for the colony administration.[9]

In January 2005 the Ministry of Employment and Social Policy was made responsible for work on organizing and coordinating social protection for people released from places of confinement. The Ministry is supposed to promote the development of a system of social adaptation for the homeless and those released, as well as the creation and development of the relevant institutions. The Ministry drew up an «Action Plan on ensuring adaptation for people who have served terms of imprisonment, to 2009», however the plan is presently awaiting approval by the Cabinet of Ministers. It envisages the creation of an infrastructure of institutions facilitating social adaptation and providing assistance, both while people are serving their sentence, and after their release. It also allows for the training of relevant staff of the social services.

The norm-creating work of the Department also poses certain problems. Despite recommendations from human rights groups[10] regarding «the need to change priorities in norm creation, giving the preference to humanitarian values over problems pertaining to the technical functioning of the Department, and to heighten attention to human rights observance, respect for the human dignity both of prisoners and of penal institution staff» the Department continued even to a greater extent its practice of issuing normative documents which violate human rights.

For example the Head of the Department V. Koshchynets with Order № 3/4-2329 Kn from 30 May 2007 approved Instructions on standardized procedure for visiting penal institutions and SIZO [pre-trial detention centres]. This procedure restricted access by civic organizations and journalists to penal institutions to a few hours a week – only on Saturdays and Sundays at strictly designated times, with prior permission. In September the Order was revoked by the Prosecutor General.

Departmental documents continue to be drawn up without public participation which leads, in particular, to a low legal level and to numerous human rights infringements. The Department also fails to observe the requirements of legislation regarding the adoption of departmental normative acts pertaining to observance of human rights, and when the attention of the Department's management is turned to such examples, it resorts to pretence of public consultation. For example, to comments that the plan for the «Instructions on visiting penal institutions and SIZO» had not been agreed with the Public Council under the President, one of the heads of the Department asserted that it had been agreed. Yet during that period there had not been any meetings of the Public Council. It is worth noting the approaches implemented by the Department in preparing the «In-

[8] O. Betsa: «Where is Ukraine's prison system heading?» // Prison Website, http://www.ukrprison.org.ua/index.php?id=1205905886.

[9] «Report on removing shortcomings in the work of the State Department of Ukraine for the Execution of Sentences, set out in an act based on the results of a check conducted by an inter-departmental government commission from 17-28 September 2007 // Prison Website. http://www.ukrprison.org.ua/index.php?id=1205905687. Figures as of the middle of 2007

[10] See the sections on prisoners' rights in «Human Rights in Ukraine – 2005» and «Human Rights in Ukraine – 2006», available at www.helsinki.org.ua and www.khpg.org.ua.

structions on visiting penal institutions and SIZO». Clearly in itself the preparation of a normative document regulating procedure for visiting penal institutions is a positive step. It should at the same time be remembered that no normative document may narrow the scope of rights recognized in law. Furthermore such a document must base itself on international documents on human rights protection, has to comply with international human rights standards, and must under no circumstances run counter to them.

Bearing in mind these provisos, specialists from Donetsk Memorial and the Ukrainian Penitentiary Society analyzed the draft «Instructions».

The analysis showed that the normative act had been drawn up with a number of infringements of the law and of the Constitution. In addition, the document fails to take into consideration the rights and interests of visitors, and often its norms allow for the possibility of infringement, i.e. the document is not balanced. It was suggested that the Department considerably review the Instructions taking the requirements of the European Penitentiary Rules into consideration. It seems that, having been submitted to the Ministry of Justice, the draft Instructions were returned to the Department for reworking.

An important and typical element in the norm-forming work of the Department is the procedure for determining the type of penal colony in which a prisoner will serve his or her sentence. An important and characteristic element of the Department's norm creating pertains to procedure for stipulating the type of penal colony in which a prisoner will serve his or her sentence. It is on this that the range of legal restrictions applied against prisoners when serving their sentences depends. Previously – from 1960 to the passing of the new Criminal Code in 2001, it was exclusively the court which determined the type of penal institution. Since 2001 this function has been passed to the Department and it is carried out on the basis of the «Instructions on the procedure for assigning, referring and transferring people sentenced to imprisonment in order to serve their sentence»[11].

The decision as to which type of penal colony a prisoner will be assigned to is made by a Regional Commission, attached to each pre-trial detention centre. These are made up of representatives of the institutions and regional divisions of the Department. Similar commissions exist in many countries, however their functional purpose and procedure of work is very different from their counterparts in Ukraine. The main shortcoming in the work of the Regional Commissions is that they have been given functions which they are unsuited for. In determining the type of colony, Ukrainian commissions are guided first and foremost by formal legal grounds, and do not take into account information about a convicted prisoner's personality, his or her willingness to cooperate with the administration of the penal institution, the level of danger s/he poses to other prisoners and staff, etc. Attention is given to the circumstances of the criminal case which extenuate or aggravate guilt (once again exclusively basing this on the presence in the sentence of this or that Article of the Criminal Code). These commissions thus carry out the role of quasi-judicial bodies and effectively assume for themselves the functions of the justice system. The lack of publication of normative acts on determining the type of penal colony as well as in cases where a person is transferred from one colony to another, and also the taking of such decisions in the absence of the prisoners themselves, create additional problems with regard to observance of human rights.

This situation is exacerbated by the complicated procedure for appealing against the decisions of Regional Commissions, as well as of the Appeal Commissions which have the right to review their decisions. This procedure runs counter to current legislation since it does not envisage the possibility of an applicant's appeal to the courts, changing this to the possibility of making appeals solely to officials of the system. It should be pointed out that it is such shortcomings in the work of the commissions which existed up to 1960 which were the reason for their abolition and transfer of their authority to designate the form of penal regime to the courts.

Public control over observance of prisoners' rights may only be carried out by supervisory commissions which are created by local authorities. They work according to «Regulations on

[11] Approved by Department Order No. 261 from 16 December 2003.

supervisory commissions»[12] (hereafter the Regulations). Some studies carried out by civic organizations in different regions of Ukraine have shown that in the majority of cases supervisory commissions function in a purely formal manner. The duties are carried out by their members, who are, as a rule, employees of State bodies, as an «unpaid public load», without the necessary motivation or will to take part in the given work. Norms of the Regulations clearly need to be improved.

Donetsk Memorial initiated the preparation of a new version of the Regulations on Supervisory Commissions, involving leading specialists in the task. These draft Regulations are presently with the Ministry of Justice for consideration. They envisage a stronger role for the supervisory commissions in carrying out public control and more clearly define their functions, tasks, powers, as well as the procedure for their formation and cooperation with the authorities. Progress with this updated version of the Regulations is being hampered by difficulties in resolving the issue of partial financing of its activities.

The main form of participation of the public in the reform and re-socialization of juvenile prisoners is work on the boards of trustees. These are created for each juvenile educational colony and work in accordance with the «Regulations on boards of trustees attached to special penal educational institutions». It is impossible to give an objective assessment of the work of boards of trustees due to the lack of studies regarding their work. At the same time, individual surveys of prisoners carried out by civic organizations suggest that in most cases these structures serve a merely formal function.

3. CONTROL OVER THE ACTIVITIES OF THE DEPARTMENT

As always noted, public monitoring of the activities of the Department is virtually impossible since the public do not have permitted mechanisms for this.

During 2007 the Department was checked by State institutions which identified certain infringements.

Over the last three years penal institutions and SIZO [pre-trial detention centres] have been checked by prosecutor's offices, representatives of the Human Rights Ombudsperson, the Head of the Control and Audit Department and other controlling bodies 8,604 times, including 3,081 times in 2007. On average each institution was checked 16 times a year, for a period of 27 days. The most checks by various State bodies in 2007 were carried out in the following regions: Sumy (on average 49 checks of one institution per year); Dnipropetrovsk (37); Rivne (34); Odessa (25); Mykolaiv (22); Khmelnytsky (21); Kherson (20) and Kharkiv and Donetsk (18 each).

Investigation into State-funded purchases made by the Department or its subordinate corrective institutions which the Ukrainian Tender Committee carried out identified flagrant infringements of current legislation amounting to 217,98 million UAH.

The prosecutor's office also carried out legally envisaged control. It should be noted that checks by the prosecutor's office often end with assertions that no infringements were found. This reaction is particularly common where complaints from prisoners are concerned. While in a certain number of cases this may well be the case, however the prosecutor's office draws the same conclusions in situations where there are fairly serious grounds for believing that human rights infringements did take place. On the other hand, checks by the prosecutor's office do sometimes identify infringements by the Department. There is reason to believe that in some cases close attention from human rights groups and the public is a contributory factor.

For example, according to the results of a check by the Prosecutor General's Office, initiated by a civic human rights organization, the instruction restricting visits to penal institutions by civic organizations and journalists was pronounced unlawful and revoked.

According to Cabinet of Ministers Instruction № 38745/4/1-07 from 11 September 2007, an inter-departmental commission of the Cabinet of Ministers checked the work of the Department. Numerous infringements were identified, and soon the Department issued a «Report on the

[12] Approved by Cabinet of Ministers Resolution No. 429 from 1 April 2004.

elimination of shortcomings in the work of the State Department of Ukraine for the Execution of Sentences, set out in an act following the results of a check carried out by an inter-departmental government commission from 17-28 September (hereafter the Report). This provides either explanations or denials of the infringements identified.

The check found that «during the first six months of 2007 264 criminal investigations were launched in the Department's penal colonies against 218 during the same period the previous year, or 21 % more. The level of crime calculated per thousand prisoners had accordingly risen by 29.8 % and came to 2.17 (against 1.67 in the first half of 2006). The Department did not dispute these figures.

Corruption is widespread among Department staff. In the first six months of 2007 20 corrupt dealings by employees of the Department were identified and stopped by special units of the SBU [Security Service] alone. In all, 33 employees of the State Penal Service faced criminal charges in the courts over corruption in 2007. Corruption was typical of a wide spectrum of officials from the Department, from junior inspector to the head of a penal colony and deputy head of a department. This data was also not denied.

A representative of the civic organizations Donetsk Memorial and the Ukrainian Penitentiary Society was included on the inter-departmental commission. In his conclusions, he states: «Representatives of the Department did not provide any information during the check about cooperation with civic organizations which raise the subject of human rights observance in the system, report likely human rights violations, make critical comments and assessments of the Department's work and stress existing problems. The Department effectively avoids cooperation with human rights organizations which are critical in their assessment of its activities with regard to observance of f human rights and avoids carrying out independent studies into the problems of the system.

The Department disputes some of these conclusions in its Report: «From 2005-2007 there were no complaints from civic organizations about obstructions to their carrying out their activities as per their articles of association regarding participation in the process of reform and resocialization of prisoners».

This denial is yet another example of how the Department issues incorrect information since during that period it received complaints from Donetsk Memorial over the adoption of the relevant instruction, and there were also complaints regarding obstruction of the work of civic organizations by the management of the Volyn Regional Division of the Department.

The Government commission concluded that there was a need «to consider the issue of applying measures of disciplinary influence, and perhaps consider the proposal to dismiss the Head of the State Department for the Execution of Sentences V.V. Koshchynets.»

This conclusion coincides with the proposal of leading human rights organizations made public at a press conference on 22 February 2008 in Kyiv, in an Open Letter to the President, Prime Minister and Speak of the Verkhovna Rada regarding numerous significant infringements in the Department's work.[13]

4. REMAND AND CONVICTED PRISONERS IN DEPARTMENT INSTITUTIONS

In the system's institutions as of 1 January 2008 149 690 people were held (against 160,725 on 01.01.2007), including 32 110 (against 32 619) in 33 SIZO [pre-trial detention centres] and 115,393 (against 125.6 thousand) convicted prisoners in 138 penal institutions. Of these, 6,882 are women (against 7.6 thousand), while 1,902 minors (against 2.2 thousand) are held in 10 educational colonies for juvenile offenders and 285 people (the same number a year earlier) were in treatment and labour prophylactic units.

[13] Open letter to Ukraine's leaders over serious problems in the penal system http://www.khpg.org/en/index.php?id=1203683848.

Table 2. The number of people serving sentences on 1 January 2008[14]

Type of penal institution	No. of institutions	Number of places	In fact holding	+/− to the place	Increase (drop) in numbers	
					For a month	Since the beginning of the year
Penal institutions: total	138	117925	115393	2532	-901	-10212
In corrective centres (CC)	20	5025	5000	25	59	89
Educational colonies (EC)	11	2914	1902	1012	-42	-313
SIZO	33	36992	32110	4882	-314	-509
CC + EC + SIZO	181	157831	149 405	8 426	− 1 257	− 11034
Temporary holding facilities	2	885	285	600	− 3	-1
Total for Ukraine	**183**	**158716**	**149690**	**9026**	**-1260**	**-11035**

5,000 people are being held in 20 corrective centres who have received restriction of liberty sentences. There are also 285 serving custodial arrest sentences in arrest facilities, usually attached to some SIZO. In the middle of 2007 there were 1463 life prisoners, including 14 women. For every 100 thousand head of population, around 340 people are imprisoned, as opposed to 400 several years ago. For comparison, in the USA this figure is over 700, and in Russia it recently reached almost 650.

An analysis of figures on mortality and illness in penal institutions shows (cf. Table 3) that in 2007 the number of people who died in penal institutions and number of those with an active form of tuberculosis fell in 2007, while the number of people committing suicide and people with HIV rose. Bearing in mind that the overall number of people in places of confinement fell by 7 %, then in ratio to one thousand people the number of people dying rose by 5.6 %. The number of cases of suicide per thousand head of possible rose by 33 %, and the number of people infected with HIV by 15 %.

Against the critical comments in the Report of the Inter-departmental Commission regarding illness and the death rate in penal institutions, the Department's Report provides optimistic information that «it has been possible to reduce the number of deaths in Department institutions over the last 5 years by almost 25 % (2003 − 957; 2006 − 716)».

The Department is yet again manipulating statistics. The number of prisoners since 2003 has fallen considerably and it would be correct to calculate the death rate per thousand prisoners. In 2003, bearing in mind the numbers then, the death rate was 4.84 and in 2006 − 4.61, i.e. the reduction is by a mere 4.75 %, and not 25 % as they claim. And according to data, in 2007 it actually exceeded the level of 2003 by half a percentage.

In response to the request to provide their method for calculating the figures of mortality and illness, the Department effectively refused, not indicating the essence of the method, this only strengthening doubts about the accuracy of the information which it publishes.

Table 3. Illness and deaths in the Department's institutions[15]

Indicators	1.1.2004	1.1.2005	1.1.2006	1.1.2007	1.1.2008
The number of people in penal institutions	191 677	188 465	170 923	160 725	149 690
Deaths	824	808	868	741	729
Per thousand prisoners	4,30	4,29	5,08	4,61	4,87 / + 5,6 %
Cases of suicide	41	44	40	44	54

[14] Report on the number of people serving sentences in penal institutions in Ukraine as of 01.01.2008. Department website http://www.kvs.gov.ua/punish/control/uk/publish/article?art_id=59402&cat_id=45687.

[15] Criminal Punishment in Ukraine» // «Donetsk Memorial», 2007. According to figures for 2007 sent in a letter from the Department № 17-692/Ip dated 4 Febraury 2008.

Per thousand prisoners	0,21	0,23	0, 23	0,27	0,36 / +33 %
Suffering from an active form of tuberculosis	9 080	10 198	9 020	Approximately 7,6 thousand	6 195
Per thousand prisoners	47,37	54,1	52,77	47,28	41,4 / – 12 %
HIV-infected	1 917	3 568	4 058	4 695	5 017
Per thousand prisoners	10,0	18,93	23,7	29,2	33,5 / + 15 %

Based on figures posted on the Department's official website, the main indicators for people serving terms of imprisonment in 2007: ability to work; crimes; social background, as well as other characteristics are given in Table 4. It should be noted that the last column of the table giving information about people without citizenship in Department statistics for 2007 has for some reason disappeared.

Table 4. Main indicators of people serving sentences in the form of deprivation of liberty in 2007[16]

				Total	**Including institutions holding women**
The number of penal institutions				136	12
The number of listed prisoners as of 01.01.2007				126365	7 597
The total number of prisoners arriving during 2007				92204	4 778
Including	those previously imprisoned			43237	2 768
	those with previous convictions			23 578	803
	others			48967	2 010
Total number who left institutions during 2007				102400	5 493
Including	Total number released			49 120	3 215
		Of whom	Completed their sentence	13 411	813
			Early conditional release, change of punishment	30 583	1394
			Pardoned	300	71
			People suffering a serious illness	765	75
			On amnesty	1 667	180
			On other grounds	2 403	129
	Total sent away			53 271	2 278
		including	Moved from a maximum to medium security institution	725	2
			Moved from a medium to a maximum security institution	185	0
			deceased	605	19
Number on the list at the end of the reporting period				116 169	6 882
Of the total number of people convicted	Convicted of		Crimes against national security	20	1
			murder	19 678	1 340
			Deliberately causing serious bodily injuries	12 324	629
			rape	2 711	14
			Robbery with violence	14 738	356
			robbery	15 043	487
			theft	30 471	1 363
			Appropriating, squandering or seizing property through abuse of official position	875	126
			hooliganism	2 463	66
			Military crimes	59	0

[16] Site of the Department for the Execution of Sentences http://www.kvs.gov.ua/punish/control/uk/publish/article?art_id=59085&cat_id=45806.

Of the total number of people convicted	Imprisoned	For the first time	58 406	4 396
		More than once	57 763	2 486
	Work status	Able-bodied	112 3364	6 539
		3rd group disability status	2 888	264
		1st and 2nd group disability status	917	79
	social group	Manual workers	20 954	729
		Office workers	3 181	229
		Agricultural workers	9 038	397
		Military servicemen	109	0
		students	3 303	239
		Able-bodied people neither working nor studying	74 461	3 676
		others	5 123	1 612
	Convicted prisoners whose death sentence was commuted to imprisonment		98	6
	Convicted prisoners ordered by the court to undergo compulsory treatment (Article.96 of the Criminal Code)		3 641	134
	Including	alcoholics	2 293	72
		Drug addicts	1 348	62
	Foreign nationals		2 454	115
	Including	More distant countries	72	1
		CIS area	2 382	114
	Stateless persons (figures for 2006)		1515	90

5. ACCESS TO THE COURT AND THE RIGHT TO APPEAL AGAINST THE ACTIONS OF PENAL ADMINISTRATIONS

At the present time there is no real effective mechanism for safeguarding the rights of prisoners to turn to the court to protect their violated rights and legitimate interests. This is reflected in the fact that neither penal, nor procedural, legislation contain special norms which, taking into account the specific legal and actual position of people sentenced to imprisonment, establish procedure for applications to the court and examination by the court of complaints from prisoners over the decisions, actions or inaction of those in authority.

The Penal Code does not directly contain clear and detailed procedure for applications and examination of complaints from prisoners, and it also fails to set out guarantees for safeguarding the principle of «equality of arms».

We would add that the departmental procedure of complaining against the behaviour of the administration is absolutely ineffective since the Department does not even have an independent system for investigating such complaints.

The declarative nature of the right of prisoners to approach the court is reflected in the fact that according to Article 113 § 3 of the Penal Code, correspondence which prisoners receive or send to the courts is subject to scrutiny by the penal administration. Yet this is, at very least, illogical since the conditions are created in which an appeal to the prosecutor's office is not subject to scrutiny, while an appeal to the court (a part of the justice system!) is.

Thus, such correspondence can be censored by the administration, and the prisoners themselves placed under pressure to decide against seeking protection of their rights from the court. The range of methods of pressure is broad, from persuasion and intimidation to beating, the use of disciplinary penalties and initiating of new criminal investigations.

The fact that the legislators and Department «forgot» to regulate this issue demonstrates, in our view, that the government do not take seriously the need to ensure that prisoners can exercise their right to turn to the court and do not in practice expect such appeals. Clearly this attitude

is explained by many years experience in the past which has formulated the according mentality both in the people serving their sentences, and among penal staff. This mentality does not include the courts in the range of bodies which can reinstate the violated rights and legitimate interests of prisoners.

It should also be noted that penal legislation does not bind the administration of penal institutions to inform prisoners of the possibility of appealing against their decisions, actions or inaction in the courts, or to explain the procedure for such complaints or at least provide the relevant normative base, give the address and other necessary details of the courts etc.

According to Item 36.3 of the «Standard Minimum Rules for the Treatment of Prisoners», «Every prisoner shall be allowed to make a request or complaint, without censorship as to substance but in proper form, to the central prison administration, the judicial authority or other proper authorities through approved channels.»

In accordance with Principle 33 of the «Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment», a detained or imprisoned person or his counsel must be able to approach the court with regard to treatment by penal administration staff.

In light of this, one can conclude that the present state of legislation regulating the right of convicted prisoners to approach the court fails to fully comply not only with Ukraine's Constitution, but with norms of international law which Ukraine has committed itself to observe.

The facts and examples in this section demonstrate that the existing mechanisms for submitting complaints are not working, the personnel of the penal institutions find various ways to ensure that the prisoners do not have the real possibility to defend their rights. One of the results of such unacceptable practice is a considerable increase in the number of incidents in penal institutions, hunger strikes or cases of self-mutilation as attempts to draw public attention to violations of their rights and the lack of possibility to submit complaints to independent institutions.

6. ACCESS TO INFORMATION

The main statistical information about the penal system is posted on the official website www.kvs.gov.ua . However certain pages on the site are not often updated. For example, in October 2007 the latest figures on the number of prisoners in penal institutions were from 1 November 2006.

The degree to which the Department complies with written requests for information has somewhat improved, and in many cases the information is provided. At the same time, there are still refusals to provide information, especially from some territorial divisions of the Department.

Refusals to give information are usually in cases where the information sought pertains to human rights observance. Donetsk Memorial has approached the management several times over numerous infringements of the demands of legislation on information, however has received no response. Only after the organization turned to the Ministry of Justice and the Ministry's letter addressed to the Head of the Department, did the latter issue Instruction № 1/1 -1198/Kn, dated 23 March 2007, this ordering territorial bodies of the Department to:

- «ensure unfailing adherence to the demands of legislation on information when informing the public and civic organizations about the work of penal structures and institutions, including when providing information in response to information requests.
- take measures to properly process applications and information requests and provide well-founded responses within the legally-established periods.»

However after this some heads of territorial divisions saw fit to not provide information and there remained no real reaction from the Department to these infringements.

In order to receive information from territorial divisions refusing to provide it, a Donetsk Memorial representative approached the court. The courts found the failure to provide information requested by the heads of the Department's divisions in the Sumy, Mykolaiv, Chernihiv, Kyiv and Vinnytsa regions unlawful and they were ordered to provide the information.

Yet even after this the Head of the Chernihiv Division V.I. Lopatin did not comply with the court ruling and did not provide the information. It was only after turning to the prosecutor's

office and the threat of initiating a criminal investigation over the failure to obey a court ruling that the Chernihiv Division in January 2008 provided the information requested initially back in July 2006.

It has become more common for the Head of the Department Vasyl Koshchynets to not provide information. At the end of 2007 a law suit was lodged over his refusal to provide information regarding the transferral of prisoners from the Izyaslav Colony No. 31 after the events in January 2007. There are serious grounds for doubting that this move took place without large-scale and serious human rights violations. Yet the Department has refused to provide information which could shed light on whether legal requirements were observed regarding the formal processing and implementation of the transfer.

There have been cases where the management of the Volyn Regional Division of the Department refused to provide information. Despite an order from the prosecutor's office the management failed to provide the information.

There remain problems in carrying out various types of studies. In the absence of a specialized scientific research structure within the Department carrying out studies into various aspects of the system's work, the initiatives of civic organizations and some researchers are of particular importance.

In 2006 after more than six months of letter-writing, Donetsk Memorial was refused permission to conduct a study. In 2007 at the request of the Ukrainian Penitentiary Society for permission to carry out a study in one of the penal colonies in the Chernihiv region, the head of one of the Department's divisions S. Skokov responded that a study was already underway in that colony and that the Department was «ready to consider the methods for the scientific research and scholarly work of V. Badyra at a meeting of the scientific and methodological Department Council.» This tactic for numerous cases of agreeing things and artificial obstructions are used by the Department to effectively turn such proposals down.

Virtually no monitoring is carried out. The monitoring by the Ukrainian-American Human Rights Bureau in 2006 was maybe the only such study permitted by the Department over the last six years. The efficiency of this monitoring is difficult to assess since after it was carried out, not one of the Department's reports has mentioned what measures were taken as a result of the monitoring and whether the work of the Department has changed as a consequence.

A broad study of various aspects of the work of institutions was carried out by the Department itself in 2006. 87 thousand convicted and remand prisoners were involved, as well as over 15 thousand members of staff of the penal institutions. However no results of the study are available and it is used solely by the Department itself. In response to a request to provide at least the main results of this study, the head of one of the Department's divisions S.Skokov sent conclusions along the lines of «For some regions dissatisfaction by prisoners with the level of medical service was typical. The highest levels of dissatisfaction with this aspect were in the Kirovohrad, Rivne, Odessa and Cherkasy regions. A proper level of organization of leisure was noted in the Luhansk, Poltava and Mykolaiv regions».

The lack of serious and systematic study makes it impossible to make a sufficiently objective assessment of the real state of the system and whether human rights are observed in penal institutions. Instances where the Department has reported inaccurate information only strengthen doubts as to the trustworthiness of the data it provides.

The formal and meaningless nature of the Department's answers was also demonstrated with Donetsk Memorial's attempt to find out how the mortality figures which the Department provides are calculated. The Head of a Department Division S.B. Zhivago informed that «In calculating figures for mortality, the number of people suffering from tuberculosis, methods recommended by the Department of Social Hygiene of medical universities which are taught to students».

The lack of reliable information and independent studies effectively promotes concealment of the real human rights situation in penal institutions and the Department's use of general ignorance about the real situation to manipulate public opinion.

7. REPORTS OF VIOLATIONS OF PRISONERS' RIGHTS

In 2007 numerous incidents in penal institutions were reported. As a rule information was received via informal channels.

In spite of declarations about the system's openness, the Department's management assiduously conceals the circumstances and causes of many events, often denies things that it is then soon forced to admit. Careful analysis of the information received from various sources identifies far from isolated cases where incorrect information was issued.

Below we give a number of reports about incidents which make it possible to gain some idea about the nature of such incidents and about the context of the reports of them.

Among the most prominent events were the disturbances in the Izyaslav Colony No. 31 in the Khmelnytsky region.

On 14 January 2007, virtually all prisoners at the Izyaslav Penal Colony No 31 (more than 1,200 men) declared a hunger strike. They were protesting against alleged arbitrary punishments, beatings and degrading treatment by staff, as well as the bad quality of food and medical care. One of the prisoners' demands was the removal of the head of the colony, his deputy and another member of management. On the same day a commission from the Department arrived at the colony, and by evening the hunger strike had been abandoned.

Then on 22 January a special unit was brought into the colony, with men in masks and military gear. Human rights organizations report that they brutally beat around 40 prisoners who had been specially brought to the headquarters for this – those who had told the commission about the prisoners' demands. By the time the beating was over, the prisoners had broken ribs, bones, noses, other bodily injuries, teeth knocked out, etc. Immediately following this they were divided into two groups and taken to the Rivne and Khmelnytsky SIZO, literally in the clothes they had on, with all their things left in the penal colony. In the SIZO they were again brutally beaten. They were later taken to other penal colonies to continue serving their sentences.

A detailed investigation into the situation was carried out by the Kharkiv Human Rights Protection Group. It prepared its own analysis of the events in which it states the following:[17]

«(Reporting the prisoners' accounts): Then Andriy Bozhko became Acting Head. That was when the beatings, insults and unwarranted punishments started. In the eighth unit barrack for 160 prisoners there were two wash basins in working order, and at dinner there was nowhere to wash your hands. The shop has food items beyond their sell-by date. There were even glass jars with preserves from 1979. The medical unit has out-of-date medicine and medical care was not given promptly. The prisoners remembered one prisoner who lost his eyesight because he got some metal shavings in one eye which got infected. The Inflammation spread to the other eye and they didn't treat it in time. Another prisoner got frostbite and ended up with both feet amputated because he didn't get medical help quickly enough. It is difficult to verify these stories since the people themselves were then moved to other institutions.

The prisoners assert that they tried to send complaints to the Khmelnytsky Regional Division of the Department for the Execution of Sentences, to the Department in Kyiv, to prosecutor's offices at different levels and other authorities, but that their complaints never left the colony.

The Department explains the events at No. 31 from 14 – 21 January differently. They say that the young head of the institution Andriy Bozkho was unable to cope with the problems of the colony, and «the informal management of the colony» got out of hand and wanted to determine themselves who would manage the institution and what the rules of behaviour would be. They therefore organized the protest action. Supposedly it was no hunger strike since none of the prisoners wrote a personal statement refusing to eat. Such behaviour was a threat to order in the colony and the organizers of the action needed to be punished»

However one of the prisoners asserts:[18] «*The search was carried out with beating. After that they put handcuffs on behind our backs and dragged us passed the row of men with batons. I again lost*

[17] Yevhen Zakharov: Brutal beating of prisoners in the Izyaslav Penal Colony № 31 (Preliminary analysis) 28.07.2007, http://www.khpg.org/ru/index.php?id=1185723862.
[18] Ibid

consciousness. I came to in the van. There were already about 20 prisoners there. They were all beaten, covered in blood, a lot without shoes and not dressed. We were thrown out of the car and pushed past the row (the same people beat us with the same batons). Then they shoved us into a van and took us to the Khmelnytsky SIZO. We were pushed down a row several times, getting brutally beaten with batons and then thrown into a transit cell. For a week they took us out individually 3-4 times a day to a SIZO office where the swift response unit brutally beat us. They put wet towels onto our faces so that we couldn't breathe; they beat us with batons on the heels, palms, buttocks, back, legs and head. I fainted from the beating. They used physical and moral pressure to get me to make a statement that I had no grievances against the administration of Colony No. 31 or the Khmelnytsky Division of the Department, that nobody had used physical means to influence me».

Department personnel deny assertions about the hunger strike and beating and say that the 40 prisoners were moved to other colonies since No. 31 was overcrowded. Complaints from prisoners and their families to the prosecutor's office and other authorities have elicited responses that the actions of the Department personnel were lawful.

Yet at the beginning the Department gave the following information in response to information requests from civic organizations: «during a general search, special devices and measures of physical influence were not applied.» At the same time, replying to an information request from Donetsk Memorial, the Prosecutor General's Office stated that «in carrying out a search, in accordance with Article 106 of the Penal Code, measures of physical influence and special devices (batons, handcuffs) were applied against 8 prisoners who demonstrated physical resistance.» Later the Department also acknowledged this fact and later informed that as a result of their check into the events at the Izyaslav Colony the following measures had been taken: «By Order No. 24 of the Acting Head of Izyaslav Penal Colony No 31 from 22 January 2007, as well as Order No. 4 to the Heads of the Regional Division of the Department from 24 January 2007, 24 officials faced disciplinary charges. Of these 2 were issued a warning of non-full professional suitability; 2 received strict reprimands; 13 received reprimands. With respect of two employees a decision was taken to limit previously imposed penalties, while two employees did not have disciplinary proceedings brought against them since they had not occupied their positions long «Yet it remains unclear what exactly they were punished for. Were they punished for unlawful use of force?

Despite Donetsk Memorial's insistence, the Department refused to provide copies of the protocol of the Appeal Commission which should outline all the reasons for the transfer of the 40 prisoners to other penal colonies. At present a civil suit is continuing against the Head of the Department over the failure to provide information.

A special unit was also deployed at the Buchansk Penal Colony No. 85 (Kyiv region).

«According to information received from various sources, each of which is highly trustworthy, on 7 June 2007 close to evening, a special unit of men in mask-helmets and the appropriate military gear was deployed in the heightened security zone of Buchansk Penal Colony No. 85. During the day from early morning several dozen prisoners for various formal reasons were placed as a disciplinary penalty in cell-type premises. Some of these prisoners had been reckless enough to officially complain about the conditions they were being held in and violations of their rights. Approximately between 18.00 and 20.00 on 7 June the special unit officers, mainly in cell No. 4, carried out such intensive educational measures that many of the prisoners on the territory of the colony could hear and understand perfect what was happening to their mates. At around 20.00 that same day, approximately 20 prisoners arrived at the colony's medical unit with serious bodily injuries. Some were brought on stretchers since they couldn't walk by themselves. According to a source, some of the prisoners, unable to endure the beating and humiliation, attempted to slash themselves in various ways. «[19]

However human rights defenders stated that after the incident became known, the colony management did everything to intimidate or persuade the prisoners to keep silent. The most active and worst beaten were transferred to other colonies, and those who remained were promised less severe conditions, and all were trapped since they were told that if even one of them said anything, all of them would get it.

[19] Anton Motovilov: Mask shows from the GULAG forever?» http://maidan.org.ua/static/mai/1181314230.html

After this some journalists and members of the public were allowed into the colony, and of course all the prisoners were silent and no violations were identified.[20]

In response to an information request from KHPG, the Prosecutor General's Office answered that «a special purpose unit was brought into Buchansk Penal Colony No. 85 in the Kyiv region. During the search a considerable number of prohibited items were found and removed. No physical force or special means were applied. On the basis of the check, the actions of the special purpose unit and of personnel of Buchansk Penal Colony No. 85 in bringing in the unit and the carrying out of the search are declared to comply with current legislation.»

The Prosecutor General's Office thus acknowledged that a special unit had been deployed in the Buchansk Colony but did not wish to investigate the mass beating.[21]

Cases of ill-treatment in the Vinnytsa Penal Colony No. 1 should be pointed out. At a press conference in Kyiv on 25 June to mark International Day against Torture, the mothers of two prisoners Serhiy B. and Oleksy P., serving sentences in Colony No. 1, spoke of brutal beatings their sons had been subjected to in March – April 2007. Serhiy was beaten for not being ready for work on time, while Oleksy fell into disfavour because of a complaint which his mother wrote to a higher authority calling for an end to the ill-treatment of the prisoners.

Ti check the information given in the complaints from Serhiy and Oleksy's parents, then National Deputy and President of the International Women's Human Rights Centre «La Strada – Ukraine», Kateryna Levchenko visited Colony No. 1 at the end of April. At the same time, Department representative General Mykola Iltyai arrived at the colony.

Kateryna Levchenko told the press conference: «During a meeting with Serhiy B. and Oleksy P, we saw bruises from the waist to the knees. And although the information given in the complaints was confirmed, I received a reply from the Department management claiming that all was fine and that nothing of the sort had taken place, and General Iltyai is denying what he himself saw.»

However information alleging the brutal beating of another prisoner R. did not receive substantiation. A number of deaths in the Kyiv SIZO in 2007 (more than 20 as of the beginning of 2007) attracted media attention to the conditions in the SIZO and the causes of these deaths. The Human Rights Ombudsperson also took this on. As her press service reported, together with a group of specialists from her Secretariat and representatives of the media, she carried out another check of the Kyiv SIZO on 27 July 2007. The monitoring of the rights of remand prisoners was carried out as a «visit without warning.» All blocks where minors, women, remand prisoners, as well life prisoners. A thorough study was made of the conditions, material and everyday supplies, the provision of medical care, the situation with aw and order in the institution, the treatment of inmates, etc.

The Ombudsperson stated that since her last check there had been some positive changes. For example, in the majority of cells the sanitary conditions had improved, the toilets were partitioned off, it had become cleaner and tidier, and there were radio points everywhere. With the help of inmates' relatives, televisions had been installed where possible; there were no problems or restrictions with receiving parcels and visits. Overall, she said, the SIZO was becoming more open for society, the media and representatives of religious organizations.

At the same time, she stressed a number a infringements of the rights of remand prisoners at the SIZO who with justification complain of degrading treatment because of unsuitable conditions. This is first and foremost connected with the crowded conditions. More than 200 people are not provided with the legally established amount of living space per person. Some cells hold as many as 40 people and in certain cells instead of the legally stipulated 2.5 spare metres per prisoner, there is less than one square metre of living space. It is extremely difficult for prisoners to endure the intolerable heat in the old «Katerynsky» block. There remains a burning problem with the spread of tuberculosis among prisoners, personnel and even lawyers and criminal investigators. At present these figures in the Kyiv and other SIZO are double those in penal colonies. Unfortunately, as previously, in the capital's SIZO they admit people with active forms of tuberculosis, while they cannot receive full treatment there.

[20] «Prosecutor General again looks the wrong way over the likely beating of prisoners». http://www.khpg.org.ua/en/index.php?id=1184182110

[21] Ibid

The Ombudsperson is convinced that one of the reasons and conditions for the lack of compliance of the real state of affairs in SIZO with international standards is linked with difficulties in selecting and training penal staff, their legal and social protection and the low level of prestige of this job among the public. For these reasons the SIZO has an almost 20 % shortfall in staff. The salary in the Kyiv (Lukyanivsk) SIZO for the junior and middle management staff comes to only 700 UAH per month (around 140 USD – translator).

These and other shortcomings are leading also to problems with the operational situation in the SIZO, tension among prisoners resulting in the incidents in July 2007 (two killings of prisoners by their cellmates)[22]

According to the results of checks carried out by the Prosecutor General's Office and the Kyiv Prosecutor in 2007 over two killings and other deaths in the Kyiv SIZO in the second half of the year, 5 documents of prosecutor's response were issued. 23 officials had disciplinary proceedings brought against them, with two of the officials being dismissed. The Kyiv Prosecutor's Office initiated a criminal investigation against the Deputy Assistant Head of the SIZO and this was sent to the Shevchenkivsky District Court in Kyiv.

There was a prominent case involving a special unit in the Slovyanoserbska Colony No. 60 in the Luhansk region.

In this colony where 75 prisoners are serving life sentences, on 10 November three life prisoners at around 4.30 in the morning attempt a break-out, injuring the officer on duty. The head of the Luhansk Regional Division of the Department arrived on the scene soon after, as well as the Deputy Prosecutor and the head of the civic organization «Cascade» which deals with problems faced by prisoners and those released. It was the head of «Cascade» whom one of the escapees informed of his conditions that journalists from leading television channels be called. However for some reason he did not wait for their arrival and set off one of the grenades which injured a spetsnaz (Special Forces) officer (by that stage a spetsnaz unit had arrived at the colony). Arms were used against the escapees and one was fatally wounded.

A press release was posted on the official website of the State Department for the Execution of Sentences which gave some details about the escape attempt and about the person killed. However there was not one word about the deployment of a spetsnaz unit.

During the press conference in Luhansk on 14 November, the First Deputy to the Head of the Department General Iltyai also denied the information suggesting that force had been used against prisoners of the colony. He said that the prisoners had written statements to the Prosecutor's investigation unit saying that nobody had beaten them.[23]

Donetsk Memorial soon afterwards asked the head of «Cascade» to provide information about the events, but to no avail.

On 13 November the Prosecutor General declared the actions of officers of an interregional special purpose division in the Luhansk region in freeing hostages to have been lawful, thus confirming that a spetsnaz unit had been deployed. According to the Prosecutor General's conclusions, no confirmation was found for the reports of beatings of prisoners by spetsnaz officers and cases of self-inflicted injuries by prisoners being held in the life sentence sector and in prison-type cells. The Prosecutor General's Press Service stated that «questioning of prisoners and a check carried out by staff of the regional forensic medical office had not found any injuries. Between 10 and 12 November there were no reports from prisoners claiming that measures to exert physical or psychological influence had been applied. Only two individuals were found to have scratches on their body which they explained they had caused themselves accidentally.»

The KHPG statement on 15 November reads that «on 10 November, after an attempted escape by prisoners in Penal Colony No. 60 (Luhansk) resulted in one death, a spetsnaz unit was brought in. It is reported that they began beating prisoners en masse. In protest at this violence, 30 prisoners

[22] «Nina Karpachova spent 48 hours in the SIZO» // official site of the Human Rights Ombudsperson 27 July 2007 http://www.ombudsman.kiev.ua/pres/releases/rel_07_07_27_4.htm

[23] «So did a spetsnaz unit beat prisoners of Penal Colony No. 60? Statement from the Kharkiv Human Rights Protection Group 15.11.2007 http://www.khpg.org/en/index.php?id=1195154641

resorted to self-injury. Given the lack of communication from the State Department for the Execution of Sentences we are unable to verify this information.»

Human rights organizations also received unconfirmed reports that there were photographs of the beating, but that negotiations are continuing between the prisoners and administration and the prisoners are not in a hurry to either hand over the photographs or give the names of the prisoners who suffered the beatings.

How reliable information from the Department is can be judged by the fact that in response to an information request from Donetsk Memorial, General Iltyai asserted that «to prevent crimes of a terrorist nature the Special Forces unit was deployed on 10 November 2007 in the Slovyanoserbska Colony No. 60 in the Luhansk region.»

Yet following an information request to the Luhansk Regional Department of the SBU [Security Service], Donetsk Memorial received response № 63/5-2/51 dated 7 February 2008 which states that: «due to the lack of conditions for conducting an anti-terrorist operation, a decision to carry one out on 10 November 2007 in Slovyanoserbska Colony No. 60 was not taken and no anti-terrorist operation was conducted.»

We would stress that three months later, in February 2008 in the newspaper «Ukraina moloda», the Head of the Department V. Koshchynets asserted: «Thank God there has not been one case during my time when it (the Special Forces unit) was used against prisoners.[24] This yet again places the statements of the Department in doubt.

Often reports of ill-treatment are of a contradictory nature.

For example, «On 3 December an unknown prisoner arrived at the Kharkiv SIZO No. 27, brought from Penal Colony No. 85. Witnesses claim that he was in a terrible physical state on his arrival with all his body showing the marks of brutal beating. Having been placed in a normal cell for convoyed prisoners, and having received another refusal to provide him with medical care, the unknown prisoner who had not even managed to tell anybody his name suddenly slashed an artery and died soon after.

The Head of the Kharkiv Division of the Department Oleksandr Kipim confirmed the death of the man brought from Colony No. 85 and even gave his name. However the Head of the SIZO in a special communiquй in his own name reported: «On 3 December Yury F, born in 1961, was brought to Kharkiv SIZO from Buchansk Penal Colony No. 85 in order to be sent on to a place of treatment for tuberculosis. While in the admission section he did not make any complaints regarding his state of health. At 18.33 hours, while in the corridor of the admission section for being taken to the medical unit cell, his health suddenly deteriorated, blood began flowing from his mouth and nose, and an emergency signal was given and resuscitation measures were applied which were not successful. At 18.36 the doctors from the medical unit declared him clinically dead – he had stopped breathing, his heart had stopped beating, there was no pulse and he had lost approximately 2-3 litres of blood. The preliminary assessment as to the cause of death – a profuse lung haemorrhage». We would nevertheless place in well-founded question the answer from the Department's official spokesperson and are not at all able to exclude the possibility that the death of the prisoner was due to his having been driven to suicide due to the ill-treatment he suffered and systematic degradation (Article 120 of the Criminal Code). Not, that is, as the result of an advanced form of tuberculosis but as the result of criminally liable suicide which they are trying in such a way to conceal from us.

A report on the «Maidan» website points out that this is not the first case in recent times of a «natural» death of a person transferred from Buchansk Penal Colony No. 85.»[25]

On 17 Decembers 2007 human rights defenders reported that a group of prisoners (around 200) held in the so-called «Monastery» of Izyaslav Penal Colony No. 58 had gone on hunger strike.

«The reasons given are that, according to the prisoners, the cells in «Monastery» are damp and cold, with water running down the walls; there is no ventilation ; the cells are not probably heated or insulated; there are single panes in the windows, with cracks in some of them; water is provided

[24] «Beyond the «zone» of duty // «Ukraina moloda» 28 February 2008.
[25] The «Maidan» website http://www.maidan.org.ua, 04-12-2007.

only three times a day for 40-50 minutes; there are rats; the quarantine unit is in premises with virtually no heating (it was used by the monastery to store bodies before burial), with the temperature almost the same as that on the street. Prisoners are held there for 14 days, those with tuberculosis together with the other prisoners. There is no medical treatment or medicine, and prisoners who have tuberculosis or are HIV-positive do not even receive vitamins, let alone specialized treatment. Nor are they allowed the requisite extra hour's walk per day. The prison shop sells food 1.5-2 times higher than market prices although quite often the products are off.

Prisoners also complain that the administration personnel are arbitrary in their handing out of administrative penalties and that there is no possibility of sending complaints outside the colony. Any attempt to express disgruntlement with unlawful actions of the administration or the bad conditions and lack of medical care leads to disciplinary penalties on any pretext and on the basis of falsified material. They also allege that the administration does not pay them for the work they do and they are made to do physically gruelling work supposedly «for the improvement of the colony», this meaning as a rule, having to drag 30-kilogram loads of fuel for the boiler.

They claim that over the last four years, not one of them has been moved to a more lenient regime.

They plan to continue their hunger strike until they receive civilized conditions and until the other problems are resolved. They are aware that the State Department for the Execution of Sentences could apply their usual tactic and bring in a special purpose unit. They stress that their protest is peaceful and non-violent.[26]

There was reaction to the events in the penal colony in the outside world.

«On 20 December around 20 people, mainly parents of prisoners being held at the Izyaslav Penal Colony No. 58 held a protest outside the State Department for the Execution of Sentences. They came to defend their children and held banners reading «Prisoners are also people». The parents handed the management of the Department complaints against the Izyaslav penal administration and the demand that they remove from his post the head of the establishment X. On 17 December prisoners held in Colony No. 58 declared an indefinite hunger strike in protest over the terrible conditions, about the arbitrary behaviour of the colony administration and ill-treatment[27]

During the protest action the picketers were joined by the relatives of prisoners being held in other penal colonies. Among them was Andriy B. whose brother, he said, had been brutally beaten in No. 1 Penal Colony (Vinnytsa region), and then transferred to the Rivne region. Andriy came to the protest action to report a mass beating by men in masks of prisoners in Colony No. 96 (in the village of Horodyshche in the Rivne region) which had taken place on 18 December at 6 in the morning.

Since nobody came out to speak to the picketers, it was unfortunately not possible to ascertain the circumstances in these colonies or at least receive some comment from the Department management.

Another example of an event about which there is conflicting information was the incident at Donetsk Penal Colony No. 124.

The Internet publication «Ostriv» informed on 25 January 2008 that in an inter-regional hospital on the territory of Donetsk Penal Colony No. 124 where prisoners receive treatment, three prisoners had made a suicide attempt in protest against beatings by penal staff.

Donetsk lawyer Serhiy Salov reported that the prisoners had handed him a statement alleging inhuman conditions in the colony, torture and beatings of prisoners, the lack of hygiene and normal medical services.

The Donetsk Regional Division of the Department denied that there had been a group suicide attempt in Colony No. 124. According to the head of the Penal Unit' department for social and educational work, Mykhailo Matanhin: «There was nothing of the sort. We don't know who is circulating these rumours»

However «Ostriv» soon afterwards reported that «In the ward the conditions are inhuman, with no walks, bedbugs, fleas, two-storey bunks. The food is poor and prepared for pigs and not for peo-

[26] «Hunger strike in Izyaslav Penal Colony» http://www.khpg.org.ua/en/index.php?id=1197927534
[27] Ibid.

ple, it's simply impossible to get to visit a doctor. At the end of each statement there are threats to go on hunger strike or to attempt suicide.»[28]

The Head of Donetsk Memorial visited the colony on 31 January and met with the staff and the prisoners who were said to have attempted suicide. The newspaper «Donbas» published his impression that while the injury inflicted was hardly that of a person calling it quits with life, it was exactly right for drawing attention. He said that the fact that the prisoner had not done this for the first time showed that he knew very well what he was doing. [29]

On the other hand, the actions of the management of the regional division of the Department hardly seem justified. Instead of providing comprehensive information about what was actually happening in the colony, they confined themselves to statements that reports of suicide were untrue. Such excessively limited information without explanations or argumentation only heightens suspicions that something serious is afoot in the colony.

The check into the supposed suicide attempt in Colony No. 124 demonstrated that a fair number of complaints from prisoners which have gained publicity are not the consequence of deliberate ill-treatment by the staff, but the result of general problems. There are also a fair number of such problems outside the colony, for example, the need to buy certain medicine at your own expense. However some reports from prisoners about beatings needed thorough investigation and such a check was carried out by the local prosecutor's office.

This case and many other conflicting reports demonstrate the urgent need to introduce effective mechanisms or procedure for checking allegations of ill-treatment of prisoners with the participation of independent structures, for example, journalists and civic organizations. The lack of such proper checks leads to a situation where a certain percentage of such allegations are exaggerated and aimed in the first instance at drawing attention at any price. Unfortunately the management of the Department disregards any such proposals.

There are on fairly rare occasions public accounts from prisoners themselves. At a press conference on 22 February 2008 one former prisoner who had been released a little less than a year shared his recollections. Pavlo Panych served a sentence from 2001 to 2007 in Penal Colony No. 25 in the Kharkiv region. In his words: «There isn't anyone there who hasn't been beaten? What were they beaten for? Ashamed to say, people worked in two shifts, you get up at six, lights out at 1 a.m., you don't even have time to shave. And if a person says, I want to complain, you're violating my rights, God forbid, that's a death sentence»

When it became impossible to endure it anymore, the prisoner secretly connected up to the administration's telephone network and phoned his mother by the city line, asking that she wrote letters to Oleksandr Moroz and Yulia Tymoshenko calling on them to help. «I broke the law, but nobody noticed and there was no other way out. I couldn't turn to them officially or incognito since I knew that that wouldn't have any legal force.»

On 14 June 2004 a reply came from Yulia Tymoshenko, then four days the prisoner who'd dared to complain was put in the punishment isolation cell for 15 days. He claims that a week later they used «handcuffs». «That's when two officers have your hands in the handcuffs pressed to your back and then squeeze so that they cut into the flesh». This happened three years ago, but the former musician says that he still doesn't have feeling in his hands and can't play a musical instrument.

During 2007 human rights organizations on dozens of occasion pointed out likely serious violations of human rights in penal institutions, holding press conferences, and publishing open letters to the leaders of the Department.

One of such occasions was at a press conference near the end of June on International Day against Torture. The human rights defenders stated that «Beatings and torture are everyday in Ukrainian prisons, and the public have little way of finding out what is happening. Prisoners who have suffered torture or arbitrary brutality have difficulty proving what they went through since Ukraine lacks an independent system for investigating such crimes.»

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[28] The reference in the text is http://ostro.org/shownews_tema.php?id=1254 Much the same information is available in English here: Conflicting stories over three cases of self-mutilation in a penal colony http://www.khpg.org.ua/en/index.php?id=1201264242

[29] http://www.donbass.dn.ua/showtext.php?mat=6597&rubr=7

Human rights defenders say that the Ukrainian penal system is extremely secret and victims of torture are intimidated. A delegation from the Council of Europe's Committee for the Prevention of Torture carried out a visit in 2005 and published its report in Strasbourg last week. They spoke of «asphyxiation using a gas mask and of being beaten while handcuffed, with hands and feet tied or maintained in a hyperextended position, or of a stick being inserted into the anus». All of this the Council of Europe representatives named torture.[30]

The UN Committee against Torture in its Conclusions and Recommendations on its review of Ukraine's Fifth Periodic Report stated that it «is 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» and directly stated 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.»[31]

However as information received demonstrates, the Department is continuing its practice of using spetsnaz [Special Forces] units to intimidate prisoners in violation of Ukraine's international commitments. Human rights organizations consider that the Department uses these units for a number of purposes: actual and preventive punishment of those infringing prison regime, and even more so those seeking the truth and people who complain; a demonstration of their total impunity and of their ability to do what ever they please.

It should be noted that the Ministry of Justice on 27 December 2007 cancelled the registration of Order No. 167 from 10 October 2005 in the Single Register of Normative-Legal Acts. This Order allowed for a special anti-terrorist unit within the Department used for carrying out searches of prisoners and penal institutions and pre-trial detention centres, and effectively for intimidating those deprived of their liberty

The cancellation of its registration meant that Order No. 167 ceased to be in force. However the special units have been deployed since then. Department employees claim that these are so called «combined» units formed where needed from operations and other staff of various penal institutions to maintain order in the institutions where conflict arises between prisoners and staff. The type of behaviour of these units, judging by reports received at the end of 2007 and in the first months of 2008 does not different from that of the special anti-terrorist units.

According to Yevhen Zakharov (KHPG) «violence in penal colonies is mainly aimed at those who try to stand up for their rights and complain. They get punished, put into punishment cells, on the most nonsensical pretext, like not making their bunk up properly, or not being dressed in uniform. They pile on a whole lot of such infringements and then increase the sentence for persistently failing to comply with orders under Article 391 of the Criminal Code.»

Yet the Department has not reacted at all to the proposal by the Head of Donetsk Memorial O. Bukalov to seek a joint algorithm for responding to reports of ill-treatment which could more swiftly distinguish real cases of torture and human rights violations from the simulations which do indeed occur. Such interaction and conscientious cooperation would considerably raise the level of trust in the Department. However as of the beginning of February 2008 there has been no positive reaction from the Department's management.

Oleksandr Betsa, a specialist on penitentiary issues, is convinced that the fault is in a badly though-out staffing policy beginning with the appointment of the Head of the Department Vasyl Koshchynets down to total staffing rotations which have led to managerial positions, especially in the regions, being given very often to outsiders understanding little as regards the specific work of the department and coming from quite unrelated departments, police officers, the traffic police or Ministry for Emergencies. He says that for the first time since Independence there have been cases where penal employees – in the Lviv SIZO, the Irpin Penal Colony – have come out against the management. He points also to the huge divide between the pitiful salaries of those at the bottom, with the pay of management in the Department which can be more than thirty times higher. Low pay often leads ordinary-level personnel to stoop to unlawful behaviour, this leading to rampant use

[30] «Torture continues in Ukraine's prisons http://www.khpg.org.ua/en/index.php?id=1182894592.
[31] Yevhen Zakharov: Brutal beating of prisoners in the Izyaslav Penal Colony № 31 (Preliminary analysis) 28.07.2007, http://www.khpg.org/ru/index.php?id=1185723862.

of blackmail, selling of privileges, smuggling in of drugs and alcohol. «The public cannot bring order into the system since these abuses are hidden in the name of the President and by the law».[32]

8. THE DEPARTMENT'S COOPERATION WITH NGOS

Despite declarations about all-sided partnership with civic organizations, the management of the Department avoids working with leading human rights organizations. This position exacerbates the lack of openness to public scrutiny and makes it impossible to assess the real situation with human rights. it clearly also fosters mass infringements of prisoners' rights.

They give various reasons for this position. Often they claim that human rights groups have nothing to do with investigations into exceptional incidents. The Deputy Head of the Department's Kyiv and Kyiv Region Division, Oleksandr Pavlov maintains «They're not authorized to carry out investigations. It's the Prosecutor General, the SBU [Security Service] and Ministry of Internal Affairs. If any infringements have really occurred, this immediately becomes known to the public.»[33]. Or they accuse them of being in conspiracy with the criminal world without providing any evidence. For this they circulate rumours that in fact human rights defenders are lobbying the interests of bandits. «They're paid by the criminal bosses. The present leadership of the Department is trying to build a system without corruption and they (the bandits – author) don't like that», one of the picketers outside the press conference held in the UNIAN agency on 22 February 2008 claimed.

The attempt to restrict public access to places of confinement was demonstrated by the Order of the Head of the Department № 3/4-2329 Kn from 30 May 2007 on single procedure for visiting penal institutions. The new procedure limited access to penal institutions by civic organizations and journalists to certain strictly stipulated times at the weekend with prior permission needed.

Such restrictions seriously hamper work with prisoners being carried out by civic organizations in providing legal, psychological and other assistance. For those members of the media and civic organizations who work a normal week, this means that they are also forced to work at the weekend. Restricting visiting hours to the weekends according to the Department-imposed timetable visiting regulations rendered meaningless the already minimal opportunities for the public to monitor penal institutions.

The appeal from Donetsk Memorial to the Head of the Department to cancel the unlawful instruction led nowhere. The Department justified the appearance of the instruction as being for good intentions to establish order with regard to access by members of the media and civic organizations since «visits to penal institutions and SIZO require additional measures to safeguard security which distracts personnel from fulfilling their direct duties»,

Donetsk Memorial then turned to the management of the Department again, this time with an open letter in which it stressed that the behaviour of the Department ran counter to European standards in the penitentiary sphere. The organization also turned with a request to check the legality of the Department's actions to the Prosecutor General's Office which concluded that the instructions were unlawful and instructed the State Department for the Execution of Sentences to remove the identified violations of the law. The unlawful instruction was cancelled on 10 September 2007.

Yet even after it had been cancelled, some territorial bodies insisted on following it. For example, the management of the Volyn Regional Division of the Department and the administrations of some of the region's penal institutions, including the Kovel Educational Colony, issued instructions which restricted visiting hours to the weekends for supervisory commissions, these being structures which are entitled to carry out public control over the institutions.

In response to complaints, the First Deputy to the Head of the Department said that he saw no infringements in the behaviour of the management of the Volyn Regional Division of the Department.

The management of the Department in its turn constantly asserts that the system is open for the public and that all civic organizations that wish to can get into the penal institutions. To prove

[32] The Thing in itself http://www.khpg.org.ua/en/index.php?id=1204070508.
[33] http://human-rights.unian.net/ukr/detail/187277

this at the beginning of 2008 it published statistical information about visits to the institutions by journalists, foreign nationals and civic organizations.

«During the last three years cooperation with civic organizations has been rapidly increasing. For example, in 2005 various civic organizations visited institutions of the penal service 6,168 times; in 2006 – 8,227 times; and in 2007 – 9,467 times (that is, on average each institution was visited 52 times a year.

Increasing media attention to the work of the bodies and institutions of the penal service can also be observed. During the last three years the number of visits by representatives of the media to penal institutions and SIZO has risen by almost 27 percent (from 889 in 2005 to 1126 in 2007).

Interest from international organizations is also increasing in cooperation with institutions of the penal service. Merely in the last three years Department institutions have been visited 845 times by representatives of other countries, including 145 times in 2005, 233 in 2006 and 467 last year.[34]

The role which the Department sets for the public demonstrates the issue of subordination of the system to the Ministry of Justice. Despite the fact that this step was a requirement in joining the Council of Europe, the Department initiated signatures in 2007 from civic organizations to defend the Department against such possible subordination. The Department itself prepared an appeal to the then Prime Minister V. Yanukovych (January 2007) and sent it around to civic organizations for signatures. As a result various organizations signed one and the same text which is saturated with special terms and facts that all the signing organizations would hardly have known.

The numerous suggestions sent to the Head of the Department from civic organizations often receive no response at all. There has been no response to virtually any open letter.

A number of suggestions from Donetsk Memorial made after the check of the Department within the makeup of the Cabinet of Ministers inter-departmental commission have also elicited no response. Among the suggestions were: holding a roundtable with the participation of the heads of the subdivisions of the Department and human rights groups to discuss ways and procedure for interaction; changes in the approach of the management to public initiatives to carry out studies into various aspects of the work of the institutions; introducing an algorithm jointly worked out by Department specialists and representatives of leading human rights organizations on swift response to reports of human rights violations in the penal institutions; involving the broader public, including specialists from the Ukrainian Penitentiary Society and other leading scholars in preparing and discussing a Concept Strategy for the development of the penal service; a balanced approach from the Department to resolving issues on observance of human rights and international standards in this sphere, issues of penal regime and security and others.

The management of the Department often ignores seminars and other events run by civic organizations. During a project aimed at improving penal legislation, Donetsk Memorial and the Chernihiv Women's Human Rights Centre invited the management on a number of occasions to take part in conferences they were running. The Department avoided any active part in these measures.

Over the last three years the Department has not once invited the Ukrainian Penitentiary Society to any of its events to which it invited other civic organizations and members of the public. The Society is made up of leading specialists in penitentiary matters and its management includes more candidates (PhD) and doctors of sciences than in the management of the Department.

Certain possibilities for the development of cooperation between penal institutions and civic organizations were created after the issuing in 2004 of a Cabinet of Ministers Resolution which envisaged the creation of Public Councils attached to the divisions of the Department. These councils were created however they have either remained on paper or are involved largely with carrying out cultural measures in the institutions which is not in line with the basic aim for creating such structures.

The real role of the Public Council attached to the Department is demonstrated by the position of its head I.V. Shtanko, a former head of the Department and now retired. From July 2007 to January 2008 Donetsk Memorial approached the head of the Council five times with strong requests to hold meetings of the Council and consider issues involving cooperation between human rights organizations and penal institutions in connection with exceptional incidents – cases where spet-

[34] «Are there not too few checks?» // Article on the website of the State Department for the Execution of Sentences» http://www.kvs.gov.ua/punish/control/uk/publish/article?art_id=59842&cat_id=45347.

snaz units were deployed and prisoners beaten, deaths in the Lukyanivsk SIZO in Kyiv and hunger strikes. Shtanko did not respond to any of these appeals. Worried letters with calls to hold meetings of the Public Council as soon as possible were also sent twice to some of its members who are heads of civic organizations. There was also no response from them.

The Public Council did not meet from August 2007 for seven months. It met finally only in March 2008 however pressing issues of cooperation with human rights organizations were not included on the agenda. Effectively all the main problems with cooperation between civic organizations and penal institutions on human rights issues have not been afforded any attention by the Public Council.

As the logical summary for the numerous human rights violations, the heads of the Department received the anti-award «Thistle of the Year». This is awarded by the Ukrainian Helsinki Human Rights Union's to public officials or public bodies for the most flagrant and dangerous human rights abuses during that year. The Head of the Department was one of the recipients of the anti-award for the second year running in the category «for absolute failure to act in cases of human rights abuse». Human rights defenders believe that it is he who bears full responsibility for all the unlawful actions and omissions of his subordinates guilty of violating prisoners' rights. Another laureate of the anti-award was Mykola Iltyai, First Deputy to the Head of the Department «for brutal violence against prisoners»..

The «Thistle of the Year» awards were the assessment of human rights defenders and civic society of the real achievements of the management of the Department in the area of human rights.[35]

9. CONCLUSIONS

Of fifteen suggestions made in the Report *Human Rights in Ukraine 2007* not one was carried out. There were no improvements at all in 2007.

We must yet again state that Ukraine's commitment given on joining the Council of Europe in 1995 to transfer the system of the execution of judgements to the Ministry of Justice has yet to be honoured. The management of the Department remains stubbornly against such subordination, and is resorting to an imitation of public support for its autonomous status.. At the same time, during the ten years of its existence the Department has taken no measures to prepare for such subordination at all. There are no plans for preparing these measures and no stages for such preparation.

There has been no demilitarization of the Department. Even quite the contrary: from 1999 to 2008 the number of employees of the Department with military rank rose by 24 %, while the number of civilian members of staff decreased by 47 %.

The trend towards a decrease in the number of prisoners in penal institutions is continuing with this in general having a positive effect on the conditions.

In 2007 the Department continued and even extended its practice of adopting departmental documents which violate the rights of remand and convicted prisoners. Norm-creation heavily favours issues of safety and security at the expense of human rights. The public and leading scholars are not involved in drawing up documents pertaining to human rights.

The human rights situation in penal institutions is somewhat deteriorating as regards the treatment by staff of prisoners. Just as a year ago, respect for human rights and dignity has yet to become the dominant factor of penal policy, while the existing treatment of prisoners is based on strict demands of obedience imposed by the penal administration. This is compounded by the lack of an effective mechanism for lodging complaints.

Protest actions by prisoners have become more frequent, yet there has been no open analysis of the reasons for this development. The results of investigations into incidents which have occurred have not been made released and the public are sometimes given incorrect information about what really happened, with cases of beatings and ill-treatment of prisoners being denied. Punitive measures are used against prisoners who complain or take protest action.

[35] See for example: «Human rights violators get their just thistles http://www.khpg.org.ua/en/index.php?id=1197536935&w=thistle:

The human rights situation is exacerbated by ill-considered staffing policy by the Department management. People are taken on, often at managerial level, who do not have the necessary experience in this area. Unfortunate staffing decisions are combined with a lack of social protection of personnel.

There is no effective and public reaction from the management to cases of corruption among penal staff and the management of the Department.

Access to information within the system is far too restricted. Public officials continue to not provide answers to formal requests for information. No measures are taken against employees who contravene information legislation.

Cooperation with the public, in the first instance, with nongovernmental organizations, is confined to material assistance for the system and isolated services of a legal and consultative nature for prisoners. . The Department management continues to avoid cooperating with organizations which have their own views on facts and events and who express criticism of the management.

There is no public control over observance of the rights of convicted and remand prisoners, nor over the work of penal institutions.. The public councils attached to divisions of the Department are either not functioning or are exclusively concerned with running cultural events. The Public Council attached to the Department only meets twice a year and does not consider urgent human rights issues. Its head does not react to appeals from civic organizations, and the Council effectively simulates consultation with the public.

10. RECOMMENDATIONS

1. Complete the process of transferring the Department to the Ministry of Justice as called for in PACE Resolution № 1466 (2005)

2. Stop adopting normative legal acts and other departmental documents whose provisions violate human rights. In drawing them up, introduce compulsory consultation with the public as demanded by the «Procedure for holding consultations with the public on the formation and implementation of government policy», passed by Cabinet of Ministers Resolution No. 1378 from 15 October 2004.

3. Increase attention to issues relating to the observance of human rights, respect for the human dignity both of people imprisoned, and personnel of the penal institutions, and not just confine oneself to declarations on this subject. Establish human rights observance as one of the highest priorities in the Department's norm creation.

4. Carry out without delay a comprehensive analysis of normative legal documents and other normative acts of the Department to determine whether they comply with international standards, involving independent specialists, including from the Penitentiary Association of Ukraine, in this work.

5. Involve a wide range of specialists in discussion of a Strategy for reforming the penal system, and definitely introduce independent expert conclusion on the Strategy, and public debate.

6. Change approaches in staffing policy, paying considerably more attention to a careful choice of managerial staff within the bodies of the Department, and reduce to a minimum the appointment to managerial positions of people who do not have experience of the system and have not undergone the relevant checking procedure to see whether they are professionally suitable.

7. Immediately and significantly review the objectives and level principles for the activities of special units within the system and preclude their use in carrying our searches and other activities within the institutions.

8. 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.

9. 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 and set down an exhaustive list of actions which will incur disciplinary penalties.

10. 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.

11. Put an end to the practice of procrastinating or dragging out consideration of initiatives from the public and carry out independent studies and monitoring. Introduce monitoring of prisoners' conditions on a wide scale, and prepare annual reports on the state of affairs in the system by nongovernmental organizations, including with public funding, as well as the preparation of alternative reports, reports on problems or on areas of activity of the institutions; use measures to react against managers who stall or obstruct such initiatives.

12. Consider the possibility of making it compulsory to become familiar with, and where possible, discuss in the Department's bodies and institutions the results of independent studies and monitoring, annual Reports prepared and carried out by civic organizations and other independent bodies, and the use where necessary of measures of response. Regularly inform about the actions and measures of the Department aimed at implementing the results of the studies and their recommendations.

13. Qualitatively increase information to society about the situation and problems of the system via regularly carrying out a wide range of measures such as press conferences, roundtables, as well as simplifying the procedure for providing access of members of the public and journalists to penal institutions.

14. Significantly improve the practice of providing information in response to information requests from individuals and organizations. Prevent the issuing of untruthful reports by the representatives of the system, use effective means of response to infringements of legislation on information by public officials and employees of penal institutions. Create a press service for the Department in each region.

15. Promote renewal of the work of the Public Council attached to the Department, activate public councils attached to territorial divisions of the Department, and where necessary make changes to the makeup of these councils, support amendments to the Regulations on Supervisory Commissions.

16. Promote the creation of mechanisms of public control over the work of penal institutions.

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