

HUMAN RIGHTS IN UKRAINE – 2004

HUMAN RIGHTS ORGANIZATIONS’ REPORT

UKRAINIAN HELSINKI HUMAN RIGHTS UNION

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In preparing the cover, the work of Mikoly Vorobiova «The road» was used

Designer

Boris Zakharov

Editors

Yevgeniy Zakharov, Irina Rapp, Volodymyr Yavorskiy

Translator

Halya Coynash

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In this book, the reader will find the first report on the human rights situation in Ukraine in 2004 prepared by various human rights organizations and experts in the field about the observation of human rights and fundamental freedoms. The compilation of such a report is a traditional way of informing the public, both at home and abroad, about violations of human rights and fundamental freedoms with the aim of eliminating such violations and improving the overall situation. These reports provide a tool for public control over the authorities, and they should, above all, determine the priorities and objectives of the work both of human rights organizations and of such State authorities.

The book examines situation with human rights and fundamental freedoms as of the end of 2004. 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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Halya Coynash
Serhiy Fedorynchuk
Dmytro Groisman
Hanna Hristova
Mykola Kozyrev
Olena Kochemirovska
Maryana Kulya
Oleg Myroshnychenko
Vadym Pyvovarov
Vitaly Razik
Roman Romanov
Natalya Romanova
Oleksandra Rudneva
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Oleksiy Tarasov
Ivan Tkach
Stanyslav Topolnitskiy
Volodymyr Urivay
Oleksandr Vinnikov
Mykola Vorobyov
Marya Yasenovska

PREFACE¹

In order to carry out comprehensive research into the human rights situation in a country, as a rule, human rights organizations use a form of annual report about the observation of human rights and fundamental freedoms. The compilation of such a report is a traditional way of informing the public, both at home and abroad, about violations of human rights and fundamental freedoms with the aim of eliminating such violations and improving the overall situation.

These reports provide a tool for public control over the authorities, and they should, above all, determine the priorities and objectives of the work both of human rights organizations and of such State authorities.

In Ukraine, regrettably, such annual reports, which, on behalf of civic society, could systematically and professionally describe the human rights situation, were never produced before, and this absence of professional reporting was detrimental to the human rights movement. The only previous examples one could mention were two annual reports, as well as two special reports, prepared by the Human Rights Ombudsperson (the Verkhovna Rada's Representative on Human Rights).

A number of special reports are also produced, which address how either one crucial right or a group of interconnected rights have been observed in the last year or over a longer period. These reports may, for example, be in the form of commentaries to periodic governmental reports on the implementation of provisions stipulated in the UN Conventions on human rights, which are sent once every 2, 4, or 5 years to the UN Convention Committees, or analytical reports on adjusting the legislation and case-law concerning some civil or political right, a relevant article of the International Covenant on Civil and Political Rights and the case-law of the European Court of Human Rights, or a relevant article of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

In this book, the reader will find the first report on the human rights situation in Ukraine in 2004 prepared by the following human rights organizations: the Ukrainian Helsinki Human Rights Union (hereafter – UHHRU), the Kharkiv, Vinnytsa, and Sevastopol Human Rights Protection Groups (hereafter KHRG, VHRG and SHRG, respectively), the Chernihiv Civic Committee for Human Rights (hereafter – CPCH), the Ukrainian Association «Green World», the Kharkiv Organization «Zhinocha Gromada» (Women's Society), the Kharkiv Centre for Women's Studies, Kharkiv and Dnipropetrovsk Regional Unions of Soldiers' Mothers, and other human rights organizations. We considered different approaches before preparing this report.

There are various types of annual report. «Russia's White Book», for example, is compiled as a commentary to each article of the Universal Declaration of Human Rights, with a review of the situation with regard to each of these rights within the Russian Federation. The All-Ukrainian Committee for the Protection of Children has compiled a report on violations of children's rights as commentary to the official report by the State on its compliance with the UN Convention on the Rights of the Child. The Kharkiv Human Rights Protection Group has prepared reports on torture and cruel treatment in Ukraine as commentary to

¹ Notes on the translation

We have attempted to standardize all spelling, but since there is no universally accepted system of transliteration, we cannot guarantee total consistency. One issue connected with this is worth mentioning. Ukrainian usually has 'h' where Russian uses 'g'. This can create some confusion. In general, we have used the Ukrainian 'h' unless the relevant word is much better known with 'g'. No offence to any person's linguistic self-identification was intended!

Given the number of names which may seem unfamiliar, we have tried to limit the use of Ukrainian terms where an English term seemed broadly similar. This particularly applies to the word 'region' which is used for 'oblast'.

As far as footnotes are concerned, we have provided the Ukrainian original first in footnotes, if it seemed unlikely that the source could otherwise be traced. Laws, etc. can be traced back, even where there is no translation available, from the English, as can some articles, etc in the press.

Websites which are well-known or very easily found, such as the ECHR website for case law of the European Court of Human Rights (www.echr.coe.int/Hudoc.htm) are not given, only the details needed to trace the particular case.

It is never easy to foresee what could create difficulties, and we would be grateful for any comments and suggestions!

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the Third and Fourth Periodical Reports by the State on its adherence to the provisions in the UN Convention against Torture. The Helsinki committees of different countries prepare their annual reports as comments on periodic reports regarding the implementation of the UN international covenants on human, political, social, economic, and cultural rights.

Annual reports on the observation of human rights in the Russian Federation during 1993 and 1994, which were prepared under the supervision of the renowned Russian human rights activist and the first Russian Human Rights Ombudsperson, Sergei Kovalyov, were a compilation of different sections, each of which covered the situation with regard to the observation of a specific category of rights (for example, socio-economic rights), or the rights of various social groups (military personnel, prisoners), or violations of human rights during certain events (violations of human rights during the events in Moscow in October 1993, violations of human rights during the military conflict in Chechnya). In 1998, 1999, and 2000, the Russian human rights community prepared reports on the situation regarding human rights during those years in the Russian Federation as a whole, as well as within its individual regions, with the latter covering all 89 administrative units of the Russian Federation. The Russian experience in preparing such reports is very important for Ukraine and should be closely studied. The structure of these reports (sections «Respect for the security of person», «Respect for civil liberties», «Respect for political rights», «The right to environmental security», «The situation regarding specific particularly vulnerable groups and violations of their rights», «Respect for socio-economic rights») is, to a great extent, borrowed from the annual reports of the US State Department.

The US approach towards preparing annual reports is of great interest for Ukrainian human rights organizations. The Bureau of Democracy, Human Rights, and Labor of the US State Department prepares and publishes an extensive compilation of human rights reports in a two-volume edition, which contains reports on the human rights practice of virtually every country in the world. These reports are prepared by the US Embassies in the respective countries and are structured uniformly, as follows:

Summary;

Section 1. «Respect for the Integrity of the Person», including sub-sections entitled «Arbitrary or Unlawful Deprivation of Life», «Disappearances», «Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment», «Arbitrary Arrest or Detention», «Denial of Fair Public Trial», «Arbitrary Interference with Privacy, Family, Home, or Correspondence»;

Section 2. «Respect for Civil Liberties» which covers freedom of speech and the press, freedom of peaceful assembly and association, freedom of religion, and freedom of movement within the country, foreign travel, emigration, and repatriation;

Section 3. «Respect for Political Rights: The Right of Citizens to change their government»;

Section 4. «Government Attitude Regarding International and Nongovernmental Investigation of Alleged Violations of Human Rights»;

Section 5. «Discrimination on the basis of race, gender, religion, disability, language or social status», which considers the situation with regard to observance of the rights of women, children, the Disabled, religious and ethnic minorities;

Section 6. «Workers' Rights» (the right to trade unions, the right to organize and bargain collectively, prohibition of forced labor, child labor and the minimum age for employment, acceptable conditions of work).

What is noticeable here is a clear hierarchy of human rights and freedoms, which starts with the protection of individual human rights from the arbitrariness of the state, before moving on to civil and political liberties, protection against discrimination, and concluding with just a short list of worker rights. The American tradition of human rights is free from paternalism, according to which the state is obliged to provide a person with a «good life» (even though the level of social assistance to those who really deserve it is fairly high!); here, the individual' freedom and opportunity to freely manage his or her personal affairs are considered to be of the greatest value. This is why the Americans find it difficult to understand our problems in respect of the rights to work, housing, and a sufficient standard of living.

In our opinion, the following structure for an annual report most adequately reflects the Ukrainian reality:

1. Introduction (a general assessment of the situation regarding human rights in Ukraine during 2004, as compared with 1991-2002, and the Soviet period).

2. The observation of fundamental rights and freedoms (the right to life, protection from torture and cruel treatment, freedom and security of person, fair trial, right to privacy, freedom of thought, conscience,

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and religion, freedom of expression, freedom of peaceful assembly and association, the right to marriage and creation of family, right to protection from discrimination, right to free elections, right to apply to state and local authorities, right to property, right to education, freedom of movement, and freedom of creative work).

3. The observance of social, economic and cultural rights (sub-sections in accordance with Article 42 to 49 of the Constitution of Ukraine).

4. Human rights in «closed» communities (military personnel, prisoners, psychiatric patients).

5. Collective rights (the rights of the child, the rights of women, the rights of ethnic and linguistic minorities, the rights of some social minorities: disabled persons, pensioners, families with many children, refugees, and stateless persons, drug addicts, HIV-positive patients, and the rights of sexual minorities.)

6. The observance of environmental rights.

7. Conclusions and Recommendations.

The report is based on material produced by human rights organizations and information from the media, as well as material presented by the authorities. International standards in each area of human rights, as well as compliance with Ukrainian legislation and the latter's adherence to international standards served throughout as our criteria.

The course of the recent election campaign, and the mass scale and number of human rights violations that it involved, required that we adequately respond. We could not, as a result of the demands placed on our resources by the election, fulfill all of our plans for a comprehensive human rights report but were able to prepare the present document. It has, understandably, a number of shortcomings, and we would be grateful for any comments, additions, and proposals which could help us to improve future issues of the report.

I would like to thank all my colleagues, who participated in this work, as well as the Democracy Fund of the Embassy of the USA, and the International Renaissance Foundation, whose assistance made this work possible.

Yevhen Zakharov,

Co-Chairperson of the Kharkiv Human Rights Protection Group, Chairperson of the Board of the Ukrainian Helsinki Human Rights Union, member of the Board of the International Society «Memorial»

INTRODUCTION²

HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN UKRAINE (1989 – 2004)

Ukrainian human rights organizations have for the first time been able to present a report on the situation with regard to human rights in Ukraine in 2004. Since this is the first annual report, we feel it to be appropriate to take a retrospective look at the situation with regard to human rights in general during the period 1989 – 2004.

Before 'perestroika', nobody except dissidents spoke seriously about human rights in the USSR. Although the USSR was a party to the UN pacts of 1996 and other international treaties in the field of human rights, and had signed the Helsinki Accords in 1975, it demonstrated no intention of fulfilling its obligations.

Soviet lawyers even at the beginning of the 90s were still referring to human rights as «a bourgeois invention», and up to the middle of the 80s, nobody had any idea about the Universal Declaration of Human Rights, not to mention other documents, even though these were confiscated when dissidents were subjected to searches as anti-Soviet documents, which, in essence they were, of course. Human rights activists, the vast majority of whom had a purely intuitive concept of human rights at that time, and who seldom used the appropriate terminology, were severely punished for publicly expressing their views. Yet it was they who provided the moral and intellectual support of the intelligentsia. In Ukraine large numbers of human rights activists were most often involved in the national democratic movement. Here repression was particularly fierce, especially towards those who defended their national rights.

At the same time, by the middle of the 80s, it was quite clear to anybody who spent any time thinking about the situation in the country that changes were needed. The Chernobyl disaster speeded up this process throughout society. The situation began to change radically during the spring of 1987 when a huge number of prisoners of conscience were released. People stopped being imprisoned for their views, in fact, quite the contrary: their views began to be listened to, and their ideas, for which they had previously been persecuted, now began to be implemented. Books which had previously been labelled 'anti-Soviet', and which people had been imprisoned for distributing or even for holding, were now published. It became possible to create open associations which were truly free from state control. We saw the appearance of the first cultural, ecological, socio-political, and with time, purely political civic organisations. 'Samisdat' was replaced by an independent press. Public actions, organised 'from below' began to be held – gatherings, political rallies, demonstrations and pickets. The civic democratic movement which began in 1987 in Kiev and Lviv, by the end of 1989 had spread to almost every city in Ukraine. Its rapid growth was encouraged by the elections to the Supreme Soviet of the USSR in 1989 and to the Supreme Soviet (Rada) of Ukraine and to Local Soviets in 1990, where representatives of the civic movement were elected in cities, and in Western Ukraine, also in rural areas. It should be mentioned that the main aims of the movement were at that time to defend national rights and to gain freedom from rigid state control of different spheres of civic life, most importantly from control of means of mass communication, literature, art and religious life.

The civic movement in Ukraine of 1987 – 1991 developed, in general, in a way typical for the post-totalitarian area, although with a slight time lag: in the middle of 1991, it was at approximately the same stage as the Baltic States had been at by the middle of 1989. It was, moreover, extremely uneven and heterogeneous. In western regions it was more of a mass movement and was overtly nationalist and democratic in its orientation. As one moved further east and south, the number of supporters of nationalist ideas became fewer and fewer. In the east, the civic movement defended general democratic values, was limited to large cities and was much weaker. Here, right up to the end of 1989, the display of a national flag could lead to a

² Prepared by Yevhen Zakharov, Co-Chairperson of the Kharkiv Human Rights Group and Head of the Ukrainian Helsinki Human Rights Union.

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person being punished for an administrative offence, and even imprisoned for several days. All political parties which appeared around the beginning of the 1990s were nationalist-democratic, were headed by former political prisoners, and had programs which expounded non-violent methods of opposition and observance of human rights. On the whole, the democratic movement at that time defended human rights spontaneously and unconsciously in that it favoured a move towards greater freedom for Ukrainian society.

The August coup and subsequent collapse of the Soviet Union led to a fundamental change in this situation. Ukraine became an independent state for all that Ukrainian society was not yet ready for this. The gaining of independence immediately highlighted the differences in approaches to resolving main issues, differences in the general world views of civic activists who had previously been united in a common aim – the democratisation of public life, and in having a common enemy – the communist regime. Internal conflicts split the previously united movement, disagreements and the increasing worsening of the socio-economic situation led to a thinning of their ranks and a loss of public support. Although the ideological barriers had come down, and the communist elite had temporarily become subdued, with a large part of them supporting independence, the democratic movement was not able to overcome these problems. The degree to which society was not prepared for change, the general disorientation, ‘chaos in the minds’ of a critical mass of the population were factors contributing to the lack of political and economic reforms and impossibility of making a rapid start towards democratic transformations in a now independent country. The sphere of freedom did not widen in those years, and in many ways, actually became narrower.

The main reason for this was the weakness of Ukraine’s democracy. Communism in Ukraine had not been defeated. Ukrainian society, ravaged by the mass political repressions of the 30s – 80s, was split into ‘easterners’ and ‘westerners’, and psychologically not ready for independence, and incapable of effecting a change in the political elite. Ukraine did not go through the process of de-communisation that Poland, the Czech Republic, Hungary and other post-totalitarian countries experienced: it began with the prohibition of the communist party, and ended there. The Soviet administrative and directive system, with all its inherent contradictions, was however retained. The former political elite virtually entirely stayed in control at all levels of power. This can partially be explained by the general conservatism of Ukrainian society. It is no accident that an ex-leader of the ideology department of the Central Committee of the Communist Party of Ukraine, Leonid Kravchuk, became the first elected president of Ukraine, despite the fact that he had stated publicly that he knew nothing about the artificially induced famine of 1933³. More than 60% of Ukrainian voters preferred him to the former political prisoner, Vyacheslav Chornovil. The relaxed, familiar Kravchuk seemed closer.

Human rights in those years were seldom mentioned, with literally only a few in this huge country concerned about them. The vast majority of Ukrainian human rights activists had already entered politics during the second half of the 1980s and were now involved in the building of the State. In the autumn of 1991, it suddenly became clear that there were no human rights organisations in the country, that is, no civic groups, whose aim was not to obtain and use power, but rather to monitor activities, collect, collate and disseminate information about the situation as regards human rights, to help citizens in various ways to defend themselves from organised force, imposed by the State, providing advice, legal, material, moral assistance, etc, and analysis of the activities of various branches of State power, to organize monitoring of these branches and to counter systematic violations of human rights. Such structures needed to be created from scratch, and this process began. In spite of the enormous efforts made and isolated successes (the active and fruitful participation in the constitutional process, drawing public attention to the huge number of executions, protecting people from criminal persecution and, in some cases, flagrant violations of human rights, the translation into Ukrainian and dissemination of the fundamental body of international documents relating to human rights, innovative ways of teaching human rights in schools by dedicated teachers, and so forth), they could not have a vital influence on events.

Having waited a little and looked around, the Ukrainian nomenclature (the political elite) understood that nobody was seriously threatening to usurp their position and began to organise the state to suit their aims and interests, principally that of increasing their personal wealth. The fact that in the process whole areas of the economy were devastated concerned virtually no one. Meeting with practically no opposition from society, the nomenclature, which was closely linked to business and state bodies, became more and

³ This famine was entirely man-made, with crops being forcibly removed under Stalin’s policy aimed at crushing opposition to collectivization. Estimates of the number who died of starvation range from 5 to 7 million, or higher. The very fact that the famine had taken place was officially denied throughout the Soviet era. (*translator’s note*)

more powerful, providing stark confirmation of the old rule: the state can do anything with people if the people let them do it. A young, initially quite passive, State began to gradually stagnate into a form that was increasingly unacceptable for the general population: it became more and more concerned with serving those in power while increasingly indifferent to the fate of all others and aggressive to anybody who expressed dissatisfaction with the system of relations which was developing.

With the election of Leonard Kuchma President of Ukraine, the process of personal aggrandizement of the nomenclature, the creation of financial-oligarch clans and increasing poverty of wide layers of the population gained momentum and became more vicious. The hopes of many that a strong President-technocrat, as Kuchma «the bulldog» seemed to be, would carry out reform proved to be suicidal illusions. Faith in strong executive (presidential) power has never proved justified, government structures are slow to reform and cannot keep up with the fast development of events. Paternalism was supplemented by an information crisis, the direct dictatorship of executive structures over society, financial and economic extortion by a bureaucracy which had not internally changed to become accountable to citizens. In the economic sphere, our country, unfortunately, had become bankrupt, and culturally it seemed provincial. The interests of the bureaucratic apparatus in a whole range of political situations proved too strong, and social activity was, accordingly, undermined.

According to Article 3 of the Constitution of Ukraine «human rights and freedoms and their guarantees determine the essence and orientation of the activity of the State». Yet the Ukrainian state appeared to be incapable of fulfilling this duty, particularly given it was itself the perpetrator of human rights violations, and since public control over the actions of the State powers in many areas was non-existent or weak, these violations became more and more widespread and substantial. Some interrelated trends which are highly dangerous as far as human rights are concerned gradually strengthened:

1. The administrative arm of the State strengthened together with the will to strictly regulate life in any sphere (particularly economic), which significantly restricted individual liberty. People remained, as before, defenceless and dependent on the State machine, while those who, by engaging in business, sought to become economically independent found themselves in the clutches of fiscal authorities, whose administrative procedures and methods of punishment became more and more sophisticated. The consequences of this for the expansion of business were fatal. It is not appropriate to talk of freedom of enterprise in this situation. In the country, the tax system seemed designed to render legal business impossible, and everybody was forced to break the law, and was therefore vulnerable. However the bodies which could impose punishment, worked selectively: they repressed those who supported the opposition financial, or who tried to be independent (Boris Feldman, the head of «Slovyanski» bank is just one example) and who broke the unwritten rules of behaviour in the system of inter-clan relations which had developed. With the intensification of the political conflict between those in power and the opposition, the policy of the tax authorities became accordingly more repressive, the latter effectively turning into a controlling body, and to a certain extent beginning to fulfil the same role in Ukraine that the KGB had had in the former USSR. Those in power did everything to make sure that only business which was closely linked with them could succeed.

2. Poverty and social inequality rose. According to official statistics, at the end of 1999 (this was the harshest year for Ukrainians) at least 30% of the population had an income below the poverty line (that is, the low income point, below which social security assistance is paid – 73.7 UH⁴, while the average salary was 155.5 UH a month, and the subsistence minimum was 220 UH) The divide between the income of this part of the population and that of the 5% of the wealthiest people grew wider and wider, and was already five or six times greater than the corresponding divide in countries of Western Europe and USA. The social and economic rights declared in international pacts and guaranteed by our Constitution (their inclusion in the Constitution was a long despised Soviet trick!) – the right to an adequate standard of living, to social security, to employment, to healthcare, etc – seemed a total mockery. Violation of these rights was most significant. The State had never actually defined «an adequate level of nourishment, clothing and housing», and could therefore with impunity fail to fulfil the obligations that it had taken upon itself with relation to the elderly, the disabled and families with many children. Widespread delays of many months in paying salaries and pensions from the state budget, pitiful assistance to families with many children, the allocation to those with oncological diseases of 3.7 UH a year (!) for medication, the closure of entire units

⁴ UH used throughout the report for the Ukrainian hryvnia (the basic unit of currency). There are 100 kopecks to one hryvnia. (*translator's note*)

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in psychiatric hospitals, stopping the issue of medicine to chronic psychiatric patients (this list could go on and on) – all these typical features of the government under Evhen Marchuk, Pavel Lazarenko and Valery Pustovoitenko were seen in the popular perception as a violation of the right to life, which is understood in our country in a different way than in western countries, where the issue is one of deprivation of life in the implementation of a sentence of court. As a result of a demographic crisis, caused in the first instance by social and economic factors, the population of the country is decreasing by approximately 400 thousand a year. The government under Yushchenko as Prime Minister succeeded for a short time in countering these trends. Having changed the conditions of work on the energy market, and forbidden barter, the government achieved such a successful increase in State revenue that in the year 2000 State revenue exceeded expenditure. As though with the waving of a magic wand, the budget debt from salaries and pensions began to disappear, pensions were increased, foreign debt decreased and its economic growth rate made the country one of the most dynamic in Eastern Europe. The income level of Ukrainians began, albeit very slowly, to rise. The poverty level for the first half of 2000 was set at 90.7 UH (per month), for the second half – 118.3 UH and for 2001 – 153 UH. After the dismissal of Yushchenko's government, this positive trend continued, but at a significantly slower pace. According to statistics from the Ministry of Employment and Social Policy, at the beginning of 2002 at least 25% of the population had income below the poverty line, with the income of half of these people no higher than 120 UH per month. Due to a sharp fall in State revenue, there were again delays in paying salaries in the State sector, while the much trumpeted pension reform proved to be aimed exclusively at former State officials and had practically no effect on lightening the burden of poverty of those with little. Yet, nonetheless, the income level of those who were active and wanted to work, albeit slowly, did rise. A large role in this was played by the 7 million Ukrainians, forced to work abroad. An increase in number of births led to a slowing down in the demographic decline. However the rise in prices to a large extent negated the growth in income, and a large part of the population (by our calculations, approximately 22–25%), still have an income on the poverty line or below.

3. Political conflict gradually turned into a situation where opponents were stifled using any means, in particular, with the help of State bodies, including law enforcement agencies. This was demonstrated clearly in the election campaigns of 1998, 1999, 2002, 2004 and the referendum of 16 April 2000. Infringements of political and civil rights during the elections and referendum were the most serious of all the years of independence. Voters were flagrantly and persistently pressurised to make 'the correct choice', and there was practically no chance for any opposition candidate to have contact with the electorate through electronic means of mass media. No means were barred when it came to applying administrative pressure to ensure the desired result, and State executive bodies turned both the elections and the referendum into a show which elicited no other feelings, than humiliation, shame and outrage.

Following victory in the 1999 elections, the President's team went on the offensive, in order to crush dissent once and for all, ignoring in this all principles and norms of the law. First of all, a coup was effectively organised in parliament. The actions and decisions of a 'parliamentary majority' which met away from parliament in another building all together were declared legitimate without any grounds whatsoever. By voting again for the key leadership positions in parliament and on parliamentary committees, and taking a number of other decisions in the absence of the minority, the majority fundamentally violated universally recognised international standards of parliamentary democracy. The next step, which was aimed at effectively subordinating parliament to the President, was the Referendum of 16 April 2000 on introducing amendments to the Constitution, supposedly at public request, but in fact, following a presidential initiative. The referendum was a flagrant violation of the Constitution, both with regard to the introduction of addenda to it, and procedural guarantees for expressions of the will of the people, and, most importantly, in relation to Article 3 which proclaims the dignity of a human being to be the highest social value. Coercion of voters and intimidation were of a total and thoroughly idiotic nature: from doctors collecting signatures in support of the referendum from their patients, to teachers taking school bags away from their students so that their parents would come to school to collect their children's bags, and would also vote. Students and their lecturers were ordered by the administration of their institutes to bring documents confirming their participation in this festival of democracy. Nonetheless, the referendum was a flop, with both the opposition and society as a whole finding enough strength to counter this national farce. However society in general was still weak, and those in power strong, and determined, as before, to keep total control. This was clearly seen in the parliamentary elections of 2002. Having mobilised all resources and yet been abjectly defeated, the party in power succeeded through intimidation, blackmail, and bribes to form

the biggest faction in parliament, thus stealing victory from the bloc «Nasha Ukraina» [«Our Ukraine»]. In order to retain power-giving authority, other drafts for reforms to the Constitution were pushed, the implementation of which was also of an imposed nature. The opposition succeeded in defeating these attempts to crush constitutional rule, however the issue regarding amendments to the Constitution to suit those in power remained open.

The case of Gongadze and Major Melnichenko's tapes⁵, as well as the activity of the Committee «Ukraine without Kuchma» speeded up the process of confrontation of those in power and the people, and its formalisation in the political field at an institutional level. After the dismissal of Yushchenko's government, it became clear that a political opposition had appeared with all chances of changing the course of events in the country. The political confrontation of those in power and the opposition became more and more ferocious and turned into open conflict during the election campaign of 2004.

4. Criminal and legal policy became increasingly brutal. Torture and inhumane treatment during initial questioning and pre-trial investigation became an everyday occurrence, most often remaining unpunished or, worse, being seen as normal. This leads to the spread of arbitrary rule and a sense of impunity in the law enforcement bodies on the one hand, and an increased feeling in all others of being defenceless, on the other. The level of trust in the police dropped during these years by 5 – 12% (depending on the region). Our country was a record holder for the number of prisoners per head of population and for the number of death sentences passed in that period. The number of people convicted of crimes rose from 108,500 (35% of whom were sentenced to deprivation of liberty) in 1991 to 222,200 (37% being sentenced to deprivation of liberty) in 1999. The problem of overcrowding in pre-trial detention centres (PTDC) became more and more serious. At the beginning of 1994 38,9 thousand detainees were being held in PTDC, with official space for 11,300 people, while by the end of the year 2000 this figure stood at 46,2 thousand, although the number of official places had risen to accommodate only 1800 more detainees. Despite recommendations from international organizations to shorten the length of time spent in custody during preliminary investigation, this remained unchanged, with the maximum detention period standing at 18 months. Nor was there any success in introducing limitations on the total time limits for detention during investigation, time for familiarizing oneself with the case and court procedure. Despite the fact that judges sent approximately each tenth criminal case away for additional investigation, it was not uncommon for people accused to spend years in pre-trial detention centres, although innocent, simply because there had been no verdict in their case, and a judge would not dare to either acquit them or change the preventive measure imposed. Incidentally, the number of acquittals during all those years did not exceed 0.35%. The conditions in pre-trial detention centres were in themselves harsh and inhumane. The acute worsening of the economic situation was reflected also in the financing of PTDC and penal institutions – expenditure on food during those years fell to 8–12 kopecks a day for each prisoner between 1998 – 1999, and on medical care – to 4 – 7 kopecks. Such pitiful financing can explain the high percentage of illness and high mortality rate in places of deprivation of liberty. In 1999, 3081 prisoners died, which almost equalled the mortality rate in the country as a whole (14 deaths in each thousand of population) and this is despite the fact that the vast majority of prisoners are young and able-bodied (almost half are under the age of 30).

The introduction of a new Criminal Code, and court control over arrests, did not ease the problems of the penal system as had been expected. The repressive nature of criminal and legal policy remains at present intact. The number of those convicted of a crime and deprived of liberty is decreasing only very slowly. The number of people suspected of a crime, where the court imposes custodial detention as preventive measure has not fallen, and thus the conditions of detention in pre-trial detention centres remain harsh. The general number of prisoners remains on the level of 190 – 200 thousand. As a result of increased funding of the penal system, there has been a fall in the mortality rate, however it remains relatively high. The problem of tuberculosis in prisons is not being adequately addressed.

The reform of the judicial system has stalled. It should be noted that people are now seeking redress from the courts much more often. In 10 years the number of civilian suits has increased more than 2.5 times, while the number of complaints about unwarranted actions (or inaction) of state executive bodies and state officials are 50 times higher. The courts are now more obviously seeking to be independent. A number of decisions were taken in cases which gained publicity, which went directly against the wishes of executive bodies, leading to an outburst of irritation from the high-ranking state officials in the country.

⁵ Major Melnichenko made public a cassette recording which clearly implicated President Kuchma in the disappearance (and murder) of the journalist Georgiy Gongadze. (*translator's note*)

INTRODUCTION

The former Head of the Supreme Court, Vitaly Boiko, as well as his deputies and judges of the Supreme Court spoke frequently of courts being dependent on the executive and of cases of interference in their activity. Judges' salaries also leave a great deal to be desired.

There have been some changes for the better as regards prevention of torture. In December 2000, the death penalty was declared by the Constitutional Court to be in breach of the Constitution, and was replaced by life imprisonment. Torture is defined as a separate crime in the new Criminal Code of Ukraine. Prison institutions have become more open. Thanks to the principled stands of the Ministry of Defence and the Chief Military Prosecutor, and greater cooperation with human rights organizations, there have been less serious cases involving «dedovschina» (mistreatment and bullying of conscripts by those with higher rank) in the army. Through the efforts of human rights organizations the problem of torture and inhumane treatment has begun to receive much more attention in the mass media. Law enforcement agencies of the Ministry of Internal Affairs have become more open.

5. Freedom of speech was increasingly restricted. Control over the mass media, especially forms of electronic media, became more and more blatant and strict. Independent information and analytical programs virtually disappeared. The ability of journalists to freely express an opinion was directly dependent on the political views, interests and possibilities of the owner of the channel, and of the financial-political group which backed it. In each form of the media there were (and are) permitted subjects for criticism and areas not to be touched. Since all financial-political groups were dependent on the President, the latter had to be held immune from criticism. This unwritten rule was broken during periods of heightened political conflict between the President and parliament, between the President and the opposition (publications controlled by Pavel Lazarenko, Yevhen Marchuk, Oleksandr Moroz) during parliamentary and presidential elections. However it became very difficult to express an overtly opposing viewpoint; the State executive bodies gradually developed a huge arsenal of means for forcing those in opposition to be silent. With time this became richer and more varied: the closure of media outlets (using an administrative order in the case of the newspaper «Pravda Ukrainy», removal of license, reallocation of radio frequencies); making rules for registration more complication, endless checks from various monitoring bodies – the Control & Audit Department (whose checks were, in general, unlawful in relation to non-governmental organizations), from the tax authorities, fire services, etc (moreover the objects of such checks were not only the mass media, but also those business structures which provided them with funding), freezing accounts in banks, printing companies refusing to print issues and even withdrawing printed issues, refusal to allow publications centralized distribution, intimidation and even beatings of journalists. After the parliamentary elections of 1998, the Security Service began to be used against opposition publications.

One powerful and widespread instrument of pressure was the use of defamation suits brought by state officials in defence of their honour and dignity with absurdly large amounts of compensation for moral damages being demanded. Unfortunately, the courts satisfied these claims more and more often, which sometimes led to a newspaper going bankrupt. Thus the newspaper «Vseykrainskie vedomosti» ceased issue after satisfaction of an absurd suit to defend honour and dignity with a massive 3.5 million UH awarded as compensation for moral damages. As well as civil suits in defence of honour and dignity, criminal prosecution for slander or libel was also applied as a way of silencing critics. According to statistics of the Ministry of Justice, from 1998 to 2000, and in the first 6 months of 2001, 372 people were convicted of slander, 8 of whom received a prison sentence.

From 2000 to 2001 the scope for freedom of speech and the press broadened somewhat. The opening in the year 2000 of a substantial (for Ukraine) number of new web-sites, such as korrespondent.net, FORUM, «Ukrainskaya pravda» and others to a large extent gave new life to Ukraine's information expanse. Internet publications attracted a large number of experienced journalists away from the printed forms of mass media. A lot of the methods of control developed by those in power did not work here. Moreover, journalists immediately used the cassette scandal, broadened the range of topics considered and made their coverage much more biting. However, it would not, in our view, be possible to speak of a significant expansion in freedom of speech. There remains, as previously, virtually no independent journalism in the country, with journalists still forced in the same way to remain within the boundaries imposed by the owners of that particular form of the mass media. Among successes (achieved largely thanks to the efforts of human rights organizations), it is worth mentioning the removal of slander and insult from the new Criminal Code, and the passing by the Plenary of the Supreme Court of Ukraine on 25 May 2001 of a progressive resolution «On court practice in cases involving compensation for moral (not material) damages», in which

the Supreme Court strongly recommends that the courts apply the European Convention for the protection of human rights and fundamental freedoms. Between 2000 and 2004 there were a large number of precedents of Article 10 of the Convention being applied by courts in law suits against the mass media, where a rejection of the case was argued from the position of the European Court of Human Rights. On the whole, one can state that suits against journalists to defend honour and dignity are now much more often decided in favour of the latter, as long as the journalist acted conscientiously. Thus, for example, all known suits brought against journalists to defend honour and dignity by generals of the Ministry of Internal Affairs have been rejected.

In the middle of 2002 a new attack on freedom of the mass media, in particular, electronic forms, began, where the use of 'temnyki'⁶ made all news programs similar and uninteresting. The printed mass media also became less interesting. The desire of those in power to also bring the Internet under their control is obvious however the Ukrainian Internet community has thus far thwarted such plans.

6. The practice of classifying as secret and limiting access to official information has become wider, with the justification given that this is defending the information security of the state (with this concept not being defined by any law). Progressive laws, regulating access to information, have been effectively nullified by subordinate legislative acts and unlawful practice epitomized by the widespread use of illegal stamps restricting access to information. In particular, there are stamps with «Not to be published» (used by the President), «For official use only» («OU») and «Not to be printed» (used by the Cabinet of Ministers and other departments). From our observations, the number of documents with these stamps rose sharply during the period of election campaigns and the referendum. The number of documents with the stamp «Not to be printed» reached 10% of the general number of documents. It is hard not to notice that that it is the very President of Ukraine who classifies a much larger number of documents than the Cabinet of Ministers or any other department. These stamps of secrecy are not defined by any law, and the regulations for working with documents which have this stamp are either not defined by any legislative norm whatsoever, or, as in the case with «OU», effectively block access to documents with that stamp.

The range of information which can be classified a state secret has also broadened significantly. A «Code of types of information which constitute a State secret» was first made public (in 1995), but then classified as secret. All of the above are flagrant violations of Ukrainian, as well as international, legislation. As for open information, departments are extremely reluctant to make this available. The response to formal requests for information is frequently a formulaic letter giving no answer, or there is often no response whatsoever. From 2000 to 2004 the situation with access to information about the activity of State executive bodies became a little better. In 2000 all bodies of executive power opened their own web-sites, and access also appeared to drafts of laws. Following persistent demands from human rights organisations, the Security Service of Ukraine in March 2001 declassified the «Code of types of information which constitute a State secret». On the whole, access to information held by state bodies remains a serious problem. The amendments of 11 May 2004 to laws on information and on printed forms of the mass media significantly narrowed the scope of the rights to information and freedom of the mass media: one is now only allowed to work with information which is open under the rules of access. What is more, administrative liability is now foreseen if a journalist makes information for official use only public. What exactly information classified with the stamp «OU» is still not known. This effectively means the introduction of censorship.

7. The abolition of registration led to a new task of creating a register of individuals. The main decisions of the State, passed in this field, have, unfortunately as their aim the creation of an effective mechanism for spying on the private lives of Ukrainians. Long discussion as to which state body should be responsible for this register – the Ministry of Internal Affairs (MIA) or the Ministry of Justice, or a separately created special body, and what the register should be and how to ensure protection of the personal data, ended unexpectedly on 30 April 2004 with a Decree of the President. The Decree states that the MIA shall be responsible for the register which will be on the basis of the Single state automated passport system, which began in 1996, and the process of bringing the Single register of individuals into force should be accelerated. There was no adequate response from the opposition to this Decree which effectively violates the Constitution and discards a number of existing draft laws. This solution to the problem of registration of individuals means in effect the use of a single multi-purpose individual identification number, which will make it possible to unite all data bases where information about the individual is contained. One can expect heightened conflict in this area connected with the mass refusal of Orthodox Christians to accept such an identification number. In general, if these plans are successful, they will mean that Ukraine becomes a police state.

⁶ These were directives from the State authorities instructing journalists what to cover and how, and which themes to avoid. (*translator's note*)

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It should be mentioned that some of the human rights violations listed above are incompatible with the level of freedom characteristic of a post-totalitarian society, and have therefore been the subject of particular attention from human rights organizations. The point is that many human rights violations are characteristic for countries during the transitional stage from totalitarianism to democracy, although they appear to differing degrees: police brutality, lack of openness of those in power, infringements of electoral rights, manipulation of public consciousness through the mass media, poverty of the elderly, etc. There are, however, non-typical violations, and these are serious and dangerous, in that they reflect the assault of those in power on the freedom of the people and threaten to restore totalitarianism. Such violations include political repression; combined with violence and / or being accused of various crimes; disappearances; the use of law enforcement bodies, in particular, the police or security services for political purposes; the imprisonment of journalists for carrying out their professional duties; poverty of people who are not unemployed; violations of minority rights, also with violence, etc. Unfortunately, only the last violation listed was not observed during the period under review in Ukraine (aside from a few cases involving violence towards the Roma). As far as the rights of minorities are concerned, the situation on the whole has been relatively favourable, as also with some other rights and freedoms – freedom of thought, conscience and religion, freedom of association, freedom of movement, the right to respect for family life, to equality of men and women. Furthermore, one can, perhaps, state that the rights of minorities are better observed here than in other post-totalitarian countries.

It is impossible not to notice that a policy of double standards continued to exist in the attitude to human rights. Yet, nonetheless the presence of international obligations in the field of human rights has stimulated changes in legislation and created a space for mutual cooperation between human rights organizations and the State. The participation of the latter in commenting on periodic reports about observance of UN Conventions (Ukraine is a signatory to 16 of the 25 conventions of the UN on human rights) has had a significant effect on drawing public attention to the issues being considered there. Since November 1995, Ukraine has been a member of the Council of Europe, and has since become a party to a number of European conventions on human rights. Ukrainians now have the right to make appeals to the European Court of Human Rights in cases of violations of their civil and political rights, and have begun to use these new opportunities. The number of appeals to the European Court has steadily increased, as has the qualities of the appeals put forward, the result of which have been 78 decisions declared admissible, with 23 judgments on claims brought by individuals against Ukraine (as of 1 August 2004). This could significantly influence the process of changes to the legal system.

In our country the Ukrainian Constitution is considered to be one of the best in Europe. In our view, it is difficult to agree with this point of view. Ukraine is not yet ready for organic constitutionalism, and the second section of the constitution, devoted to rights and freedoms shows this clearly. Yes, the formulations of rights and freedoms are taken almost verbatim from the UN Conventions on human rights of 1966 and the European Convention on human rights and fundamental freedoms. However, in our opinion, the inclusion into the Constitution of social and economic rights, as well as other empty social guarantees, was a mistake of the authors of the Constitution. These rights cannot be fulfilled by the State and cannot be norms with legal force. Another fault is that the Constitution also contains a large number of limitations to civil and political rights. The years which have followed since it was passed have clearly shown that such limitations, as «the morals of the population», «defence of reputation», «in the interests of public order» are determined not by law, but by those actually in power. This is the typical presumption of a paternalistic state: state officials understand better than citizens what is moral, and what immoral, what is for the good of society and what is not. General and special limitations introduced as supplements to the proclaimed law can render meaningless virtually all these rights and freedoms. Therefore the legal force of these constitutional norms is highly dubious. Moreover, the Constitution does not allow for appeals to the Constitutional Court of normal courts, not to mention appeals from individual citizens. Citizens may appeal to the Constitutional Court only with requests concerning the interpretation of constitutional norms, and only in cases where there are discrepancies between the application of these norms by different administrative bodies. Of the thousands of appeals from individual citizens regarding the interpretation of constitutional norms, the Constitutional Court has only considered a few. In other words, the constitutional system for defending human rights has not, in effect, worked, and the Constitutional Court has merely been an arbiter between different branches of state power. It is true that at first it seemed a much better arbiter than could have been expected, since it tried to be independent, despite pressure from the executive, however later its decisions were more disappointing.

HUMAN RIGHTS IN UKRAINE – 2004. HUMAN RIGHTS ORGANIZATIONS' REPORT

In 2004 all of the above mentioned trends as far as human rights violations were concerned became even more pronounced, and became fully evident during the election campaign. This took place as a confrontation between the forces in power and the people, who found the strength and courage to stand up to those in power. Factors contributing to this victory were the appearance on the active public area of two generations who had not been crushed, crippled by an inferiority complex, and who had a modern world view, the growth of small and middle-scale business, the openness of the country, the numerous visits abroad of Ukrainian citizens, a developing public consciousness and readiness for changes, the growing strength of a civil society and, in particular, of the defence of rights. The youth movements of 2004 were unconsciously (and for a certain number – consciously) human rights activists. They were, if one could put it that way, human rights activists on the offensive, as can be seen even at a semantic level in their banner: «You can't stop freedom!» As Vaclav Havel said, the presidential elections in Ukraine were the funeral toll for the remnants of Ukrainian post-communism. A bell which rang on the capital's Independence Square – as though by itself. And once again the old truth was confirmed: a political regime, which violates human rights more and more flagrantly, sooner or later is doomed.

I. HUMAN RIGHTS IN THE CONSTITUTION OF UKRAINE⁷

1. GENERAL ASSESSMENT OF THE CONSTITUTIONAL AFFIRMATIONS OF RIGHTS AND FREEDOMS

The Constitution of Ukraine of 1996 effectively consolidated the system of State relations that existed at that moment – a semi-Presidential unitary republic with a parliament lacking any real powers, a relatively weak judicial system and also a government⁸ without any significant political functions and therefore constantly dependent on direct presidential support. In general, the lack of accountability of the state to society in the new Constitution remained almost on the level of Soviet times.

The main, while at the same time, «shadow» power in the State was wielded by the Presidential Administration – accountable to no one, managing everything, an effectively uncontrollable power structure. The government was to fulfil not only the President's directives, but also those of the head of the Administration, while bearing full responsibility for the state of affairs in the country. At the same time the Prime Minister's role was often that of a naughty boy who deserved a beating. It is hardly surprising that the holders of this post changed virtually every year.

All this, to a certain extent, doomed the role of the Constitution to be a force not of dynamism, but of stagnation in the Ukrainian socio-economic and political transformations. The Constitution, moreover, was a rather eclectic legal text with norms passed as a compromise which different political players – from the communists to the «Greens» – interpreted in their own ways. However, the contradictions imbedded in the Constitution fairly soon became apparent and not only at the level of party disputes and differences in interpretation. Shortly after its adoption, discussion began within society about the need for amendments and supplementary articles to the constitutional text.

The Constitution of 1996 was, in general, an adequate reflection of paternalistic State aspirations and traditions typical of a post-totalitarian country. The State was proclaimed the national good, held the monopoly over all levers of influence in politics, economy, culture, education and health protection. At the same time, it remained the most powerful player on the market, the main cultural arbiter in the realm of ideas, the guarantor of welfare, employment, pensions and the physical health of citizens.

It is no wonder that liberty as a category, but not an instrumental concept («liberty» as distinct from «freedom») not only failed to become the main priority of the Constitution, but was not even mentioned in the list of its highest values and priorities. Political, civil and individual rights were also significantly limited. For instance, Article 34 of the Constitution contained thirteen direct restrictions on freedom of speech. A further two limitations on freedom of expression (in a state of emergency or military emergency) were allowed for in separate articles of the Fundamental Law.

The second chapter of the Constitution of Ukraine, numbering almost a third of the total number of constitutional norms, contained a great deal taken directly from two well-known international pacts of the UNO on human rights of 1966, yet, at the same time, from a strictly legal point of view, did not distinguish between norms of the International Convention on civil and political rights which a state must observe under any conditions and provisions of the International pact about social, economic and cultural rights, the possibility of fulfilling which is linked to the actual economic state of any given country. The point is that socio-economic rights are usually only considered to be norms of direct action if they receive official commentary defining the specific parameters of judicial safeguarding of the so-called «positive» rights and freedoms, that is, those over which the State has an active position.

⁷ Prepared by the Head of the Ukrainian Helsinki Human Rights Union and Co-Chairperson of the Kharkiv Human Rights Group Yevhen Zakharov and legal expert of the Kharkiv human rights group, Vsevolod Rechyt'sky.

⁸ The government is the Cabinet of Ministers, with the Prime Minister being appointed by the President, although the choice must be supported by half or more of the members of the Verkhovna Rada (Parliament) (*translator's note*)

Thus, directly copying western models in this case had a purely ideological, to a great extent, even demagogical result. For instance, the following rights included in the Constitution remain openly problematic in Ukraine: «the right to a home» (Article 47), «the right to a sufficient standard of living for oneself and one's family, including sufficient nourishment, garments, dwelling» (Article 48), «the right to health-care, medical care and medical insurance» (Article 49), «the right to an environment safe for life and health and the right to compensation for damage caused by violation of this right» (Article 50). These and other positive rights in present Ukrainian conditions have become pure fiction for a large number of Ukrainian citizens.

In this context one should also mention the right of every worker «to rest» (Article 45), as well as the altruistic promises of the state to promote «the development of medical institutions», to provide for «the development of physical culture and sport» (Article 49) and others. Hence, although in Article 55 of the Ukrainian Constitution it is stated that all «rights and freedoms of a person and citizen are protected by court», in reality most social, economic and cultural rights in the version they are affirmed in the still current Constitution cannot be protected in court.

This in turn leads not only to scepticism of ordinary citizens not only with regard to the possibility of defending their rights at a judicial level, but to a profound distrust in society of the promises in general made by the leaders of the Ukrainian State. Since the Constitution does not allow for any possibility of appeal to the Constitutional Court from ordinary subjects of the law (citizens, public human rights organizations, courts of general jurisdiction, except for the Supreme Court) many of the rights and freedoms proclaimed in the Constitution in 1996 have remained purely theoretical.

The issue of the constitutional right to private property and business activity (Articles 41 and 42) also remains important as of 2004. According to Article 92 of the Constitution, the legal regulations for property are defined «exclusively by law». This means that one can alter the parameters of such regulations relating to property only by introducing amendments to current (standard) legislation. In our opinion, the foundations (principles) governing the legal regulations for property in Ukraine should have been more specifically defined directly in the constitutional text. Since property in the socio-economic sense is inseparable from the civil status of a person, legal protection of property, in our opinion, must be secured by legal guarantees of the highest order.

However, the situation in Ukraine is such that any composition of the Ukrainian parliament and government (this being confirmed even by the results of the Orange Revolution) can alter de facto the legal regulations for property. On the other hand, it remains somewhat incomprehensible why, for instance, guarantees of business, competition and other antimonopoly measures are determined in Ukraine exclusively by law. That is, it is not clear why the government cannot, under the Constitution, approve and introduce its own, supplementary guarantees of economic freedom.

The Constitution of Ukraine of 1996 recognizes that «compulsory withdrawal of private property can be applied ... where justified by public need». We must acknowledge that this rule was not only applied under Presidents L. Kravchuk and L. Kuchma, but has continued to be applied by high-ranking state officials of the country since the victory of the Orange Revolution. Nor does one specially need to prove that systematic re-privatization, even as a «just» outcome of the Orange revolution of 2004 could destroy the right to private property no less than Bolshevik nationalization.

According to the Constitution of 1996 the right to private property can be cancelled by the State in a state of emergency or in war. Unfortunately, even in 2004, recognition (or lack of recognition) of the regulations for private property regarding many economic objects still remained an, albeit questionable, but nonetheless current prerogative of the state.

Since withdrawal of private property «justified by public need» is directly allowed for in the Fundamental Law, the norm concerning «the further full reimbursement of its value» (Article 41) does not significantly alter the situation. In a practical sense the given norm means that in the case of need, the State does not need to enter the property market as an ordinary participant. At the same time it proves that the Ukrainian post-totalitarian state continues to place its interests higher than the interests of the individual or of civic society.

Thus, the State's commitment to ensure 'the social orientation of the economy' (Article 13) and also the whole context of Article 41 of the Constitution of Ukraine reflect the traditional supercilious mentality typical of a post-Soviet state not only in relation to individual owners of private property, but towards market and economic freedom generally. Evidence of this can also be found in Article 74 of the Constitution prohibiting the holding of nationwide referendums on questions of taxes or the budget.

Yet another example of constitutional support for State monopoly and a political course which protects the State from the direct influence of civic structures is demonstrated by Article 44, which defines the human right to strike action as being exclusively «to secure economic and social interests». The observance of this right can additionally be restricted in law, according to the Constitution, taking into consideration «the necessity to ensure national security, health protection, and rights and freedoms of other persons».

Generally, the legal regulations on strikes in Ukraine mean that strikes with political demands according to the Constitution of 1996 are banned. Yet even in 2004, a huge number of industrial objects in Ukraine remain the property of the State. This in turn automatically suggests that strikes for political reasons and motives in contemporary Ukraine are inevitable. What else, after all, can State teachers, doctors, scientists do when, 14 years after independence, the State pays them a pittance, and then, not always in full?

Considering the demands of the time, we consider that the Constitution of Ukraine contains an unacceptable number of indirect restrictions on civil, political and personal rights and freedoms. For example, one can say that such constitutional cautions as «the interests of national security», «territorial integrity», «public order», «health protection of the population», «protection of the reputation or rights of other people» in many cases do not promote the fast economic development of the country.

On the whole, the general constitutional restrictions (their list is given in Article 64), and also separate special restrictions given in addition to each specific proclaimed right or freedom (Articles 29–39 of the Constitution) can, in our view, be used by the State in order to considerably hamper Ukrainian progress. In the given context, even the requirement of Article 8 of the Fundamental Law concerning the direct legal force of all norms proclaimed in the Constitution (including rights and freedoms) cannot rectify the situation.

Since all the norms allowed for in the Constitution of Ukraine of 1996 which place restrictions on human rights and freedoms do not contain the general criterion of being «necessary in a democratic society» (the requirement of the European Convention on Human Rights and Fundamental Freedoms of 1950), the degree of state interference in the fulfilment of human rights and fundamental freedoms cannot be measured against the standards of the European Court of Human Rights.

One should also note that the European Convention of 1950 deals with «human rights and *fundamental freedoms*», whereas the Constitution of Ukraine of 1996 – only with «human rights and freedoms». This means that in Ukraine today, as before, a legal entity (newspaper, other mass media) cannot make an appeal to a court in defence of its constitutional rights and freedoms which have been violated by the State.

In general, the approach of the Ukrainian Fundamental Law to the protection of the rights and freedoms proclaimed by it is too maximalist and at the same time puritanical. On the one hand, «The human being, his or her life and health, honour and dignity, inviolability and security are recognised in Ukraine as the highest social value». (Article 3), on the other hand – «No ideology shall be recognised by the State as mandatory». (Article 15).

On the one hand «Everyone is obliged to strictly abide by the Constitution of Ukraine and the laws of Ukraine, and not to encroach upon the rights and freedoms, honour and dignity of other persons». (Article 68) and «Any violence against a child, or his or her exploitation, shall be prosecuted by law». (Article 52), on the other hand – «to ensure its informational security a matter of concern for all the Ukrainian people». (Article 17).

Certainly, the canons of the law demand that we consider the interests of other people and do not transform the exercising of one person's rights into aggression directed at other subjects of law. In real life, however, and therefore in judicial practice, there is always a conflict of interests, and, accordingly, of different rights and freedoms.

In particular, as Montaigne once wrote, an unfavourable situation for one subject of law can bring certain benefit to another. It is difficult not to agree with G. Spenser's statement that a perfect law would take into account not only human reason, but also human instincts, and would not therefore make unrealistically high demands as to individual human virtues. There can be no doubt that any natural constitution must reckon with the logical and rational features of human behaviour, but human nature also presupposes a considerable emotional and pragmatic aspect. That is, a natural constitutional law should not have parameters in excess of the average emotional matrix of homo sapiens.

It is also generally accepted that social interests cannot be forecast at once for many human generations. As Beccaria wrote, the only stable feature of any society is its dynamism, which presupposes an evolving concept of justice. On the background of the legal axioms mentioned the Ukrainian Constitution looks like a document based on reason, which has not been able to free itself from the spell of certain well-

known Marxist paradigms. One example of this is the concept of public society as a pyramid of purely rational activities.

This understanding is reflected in the literalism of the constitutional requirement of punishment for «any violence against a child» (Article 52); in the idealism of «equal rights and obligations» of spouses in family relations (Article 51); in the maximalism in expectations as to «equal opportunities in the choice of profession and of types of labour activity» (Article 43), etc.

A Ukrainian publicist once called the Draft of the Ukrainian Constitution in the version of 26 October, 1993 «an instruction manual for Ukrainian people». Unfortunately, we are forced to acknowledge that this ironic characteristic has lost none of its sharp flavour.

2. THE CONSTITUTIONAL REFORM OF 2004 AND HUMAN RIGHTS

Constitutional reform as of December 31, 2004 was represented by the law № 2222-IV ‘On amendments to the Constitution of Ukraine» dated December 8, 2004. That law was based on Draft Law № 4180 on amendments to the Constitution of Ukraine in the final version of the Temporary Special Commission of the Verkhovna Rada of Ukraine on processing draft laws of Ukraine on amendments to the Constitution of Ukraine dated June 21, 2004.

The bill passed through the required procedure for consideration in the Constitutional Court of Ukraine and received the permission of the Court to put it to the vote in the Verkhovna Rada of Ukraine. Draft № 4180 was significantly different from Draft № 4105 which had already been put to the vote in the Verkhovna Rada of Ukraine but had not received the required (300) majority of votes to be passed. Thus, the final version of Draft № 4180 differed substantially from the draft with the same number which had been the object of consideration of the Venetian Commission in December 2003.

Law № 2222-IV is radically different from the previous versions (Draft № 4105, the first version of Draft № 4180) simply in the fact that the election of President is allowed for in nationwide elections. At the same time, Law № 2222-IV is a significantly less radical law in making amendments to the Ukrainian Constitution than its predecessors. Even in its updated version, it does not, in our view, encourage positive changes in the political system of Ukraine.

Like its unsuccessful predecessors, Law № 2222-IV allows for the election of State Deputies (members of parliament) on a purely proportional basis. In this respect it – now on the highest constitutional level – confirms the procedure of elections which had previously been allowed for by current legislation. In our opinion, the election of deputies to the Ukrainian parliament solely on the basis of proportional representation is not a sufficiently considered way of improving Ukrainian electoral legislation.

As a result of political compromise, a proportional system of elections to the Ukrainian parliament is already in existence at the level of constitutional and ordinary laws. However it would be more expedient before introducing such amendments to test the new system of elections to the Verkhovna Rada first in practice, and after that, depending on the results of the test, decide whether to formally install it at a constitutional level. The new system for elections has thus far not made a positive impression in practice. In a constitutional sense it does not seem optimal, while in the political it suggests both a lack of balance and unwarranted haste.

Whether Ukrainian society has gained anything from the introduction of a proportional system is impossible as yet to judge. Although the final version of the Ukrainian constitutional reform is the most moderate of those thus far offered, its effect will not be seen in the near future. In general, the new constitutional scheme is relatively simple. Henceforth, the President will be in charge of the foreign policy of the country, defence, internal security, and also of the heads of local state administrations. All other matters of internal political government will be decided by the Cabinet of Ministers and the Council for National Security and Defence. There is a clear weakening in the executive government vertical, which would in fact seem to be what the reformers were aiming to achieve.

A fundamental flaw in the constitutional reform is, in our opinion, the placing of some ministers of the Cabinet of Ministers of Ukraine (in the sense of their appointment and actual subordination) under the President of Ukraine, and the rest – under the Verkhovna Rada and Prime Minister of Ukraine. As we already mentioned, this new system of appointments and subordination will result in a situation where the foreign and domestic policy of Ukraine are in completely separate hands.

Since the post of President of Ukraine according to these reforms remains not only representative, but genuinely influential regarding some executive functions (foreign policy, internal security and defence), in

practice this could lead to the deformation of the executive vertical, with clearly non-constructive competition between the President, Prime Minister and Secretary of the Council of National Security and Defence of Ukraine (CNSD) within the framework of this overall branch of state executive power.

If one considers that there is already competition between the roles of speaker and that of the President in Ukraine, the logic behind this constitutional reform seems even less comprehensible. In simplest terms, competition between high-ranking posts which belong to different branches of the government is constitutionally justified. However, it is difficult to see cogent reason for having competition between high-ranking state figures within one (executive) branch of the government.

We suspect that the authors of the constitutional reform were looking for a strategic compromise, but the way out they found has turned out to be a compromise of short-term tactics. As a result, a legal system, already criticized by the Venetian commission is again raised to the constitutional level. We are convinced that such a solution and version of political reforms would make Ukraine less a parliamentary republic, than an unwieldy legal conglomerate, inconsistent in the constitutional sense with new European political formations.

The fact that, according to the reform, the President of Ukraine can dissolve parliament in three cases (each of which can be the result of a broad range of reasons) is not consistent with the professed goal of transforming Ukraine from a presidential to a democratic republic.

Today the President is directly involved in forming the Cabinet of Ministers and appointing heads of local state administration (the Ukrainian version of governors). However in practice Ministers and heads of local state administration also depend to a great extent on the Prime Minister. Thus, having appointed some members of the Cabinet of Ministers and heads of local state administration, the President leaves the latter under the supervision of the Chairman of the Cabinet of Ministers. Of course, if Ukrainian governors, rather than being appointed by the President, were elected by their constituents, it could prove sufficient reason for constitutional reform. However there is no talk of electing governors at present. The principle of direct dependence of governors on the President has remained unchanged according to the reforms.

As for the relationship between the President and the Verkhovna Rada (parliament) of Ukraine, the new reforms not only do not change this in favour of the Verkhovna Rada, but in fact lead to an even greater level of dependence of the parliament on the will of the President. The power of the President to dissolve Parliament is, as mentioned, increased threefold. The reforms, therefore, weaken the influence of the President within the executive government branch yet at the same time make his control over the Ukrainian parliament several times greater. It is clear that in this, the reforms turn Ukraine into a relatively inconsistent parliamentary republic.

The judicial system remains virtually untouched by the reforms. The partial reinstatement of the system of general supervision by the prosecutor's offices of observance of human rights and freedoms is, in our opinion, difficult to support. Although, according to specialists, this partial return of the prosecutor's supervision over adherence to human rights and civil liberties is explained not so much by Ukraine's low level of legal development (which is Strasbourg's official position), as by the low level of income of the Ukrainian population. Indeed, the defence of one's rights, freedoms and interests in a court of law remains an expensive and casuistic procedure for many ordinary Ukrainian citizens.

In general, it would be possible to reconcile oneself to the reform if Ukraine's level of civic and political development were significantly higher. However Ukraine is a very young democracy and it is unlikely that the application of parliamentary mechanisms and procedures for solving most of its problems will truly impress its young political system.

Hannah Arendt, in her analysis of the features of any organic revolution, once stated that genuine revolutions always widen the framework of people's representation. That is, the social basis of State management with every new revolution becomes wider, more democratic. The exact opposite of this can be observed as a result of the constitutional reform, since the direct influence of the people on Ukrainian politics is actually decreased. Although citizens of Ukraine will continue to elect Presidents, and the mass media will function, hopefully, without censorship and «temnyki»⁹, this will not significantly influence the political course of the country. It is for this reason that the legal consequences of the constitutional reform may be regarded as legislative devolution.

⁹ «temnyki» – were the 'instructions' given to journalists etc as to 'safe' subjects and how to cover them, and subjects to be avoided entirely. (translator's note)

After all, the President with post-reform powers could be elected in Parliament, and only the subordination of the local state administrations to him still allows us to see his post as a balanced counter to the legislative branch of power in the State. If, in future, the heads of the local state administrations start being elected, the national election of a President will lose any sense.

One should also take into account that after the election of Viktor Yushchenko President, Ukraine has gained the opportunity not only to become a democracy, but also a country, which (like the Baltic states) maintains a positive separation from post-Soviet republics. However it is precisely Russia's presence on the long Ukrainian border that serves as sufficient evidence of the need for Ukrainian presidential republicanism. The key point here is the possibility for a swift presidential reaction to Russian challenges to foreign policy which Ukraine will not lack in the future.

As far as the European and Atlantic political world is concerned, it is not very important whether Ukraine becomes a parliamentarian or a presidential republic. However, the situation is quite opposite from the point of view of Ukraine's political relations with its Eastern neighbours. It is precisely in this context that it is worth paying more attention to the organizational disarray of Ukrainian political forces, to the factional self-centredness of their interests, and to the ever present demagogy found in national parliamentary debates.

The paradox of the constitutional reform is seen in the way that, while continuing to dilute responsibility in a mixed parliamentary environment for strategic decisions in the country, the reforms demonstrate a sharply increased level of political demands with regard to tactical parliamentarian manoeuvres and operations. On the one hand, the Cabinet of Ministers of Ukraine and the Verkhovna Rada of Ukraine will in parallel be responsible for the current home and strategic foreign (principle-defining) policy of Ukraine. On the other hand, in order to carry out this role in a proper fashion, an unprecedented degree of factional discipline will be introduced into parliament.

Thus, if in accordance with Article 81 of the acting Constitution of Ukraine, a decision about pre-term cessation of the authorities of a State Deputy of Ukraine following his or her resignation, or due to withdrawal of citizenship or the person's departure abroad for permanent residence, is taken by the Verkhovna Rada of Ukraine, in accordance with the reform... «if a State Deputy of Ukraine, elected from a political party (electoral bloc of political parties), does not belong to the faction of Deputies of this political party (electoral bloc of political parties) or if the Deputy of Ukraine leaves this faction, his or her authorities shall be cancelled pre-term on the basis of law at the decision of the higher leadership body of the relevant political party (electoral bloc of political parties) from the date of the decision».

Moreover, this new procedure for removing a State Deputy's authorities demonstrates not only the introduction of tough factional discipline into the Verkhovna Rada, but also the diminished importance of the individual in the Ukrainian political process. From the outside, it is reminiscent of the consolidation of political allies around their ideological leaders, familiar in Ukraine from communist days.

The reform also stipulates that a State Deputy's parliamentary mandate is incompatible with other kinds of activity prohibited by the Constitution. In turn, non-compliance with the rules regarding incompatibility shall be grounds for the compulsory removal of a deputy's mandate.

In this way, the constitutional reform is reinstating an imperative (party-corporative) mandate which was already half forgotten in Ukraine. A Deputy is again regarded here as a party pawn, a rank-and-file cardholder for electronic voting. It looks as though the elections to the Verkhovna Rada of Ukraine risk becoming a link in the mechanism for introducing not so much electoral, as party priorities. It is unlikely that the personal psychological qualities of a parliamentarian, his or her individual experience, intellect, and also geographical link with a certain region will be used here. In general, as open preliminary calculations show, the implementation of a purely proportional system of representations runs the risk of creating a situation where 85–90% of Deputies will be citizens of Ukraine's capital Kyiv.

It looks as though the constitutional reform will transform parliament from a place of open public discussion into an arena for battles of factional gladiators. This is to be regretted, since in the context of constitutional changes, one cannot so far speak of the renewal of the stimuli of political action which Vaclav Havel believes to be: moral instinct, sense of taste, ancient political wisdom, and analytic delicacy of feelings. On the contrary, one can observe that as far as the renewal of the status of State Deputies is concerned, the constitutional reform has applied philosophical reduction, legal-logic simplification, and the denigration of constitutional material to the requirements of crude legislative tactics.

Besides, combining voting for the constitutional reform with amendments to current electoral legislation was also ethically questionable. When the faction «Our Ukraine» (leader Viktor Yushchenko) demanded the resignation of the government and the Central Election Commission, and also the immediate amendment to the

Law on Presidential elections, this was not a question of gaining political benefits for the opposition, but about the intrinsic right of the Ukrainian people to vote for the fulfilment of their sovereign will. This will was not *subordinate to, but above* the participants in the Ukrainian negotiation process.

Since the political right to elect and to be elected precedes all bodies of power, their branches and subdivisions – from Parliament and President to Cabinet of Ministers and Central Electoral Commission included, the electoral rights of Ukrainian citizens, their scope and procedure for being implemented must not be the object of profit-seeking agreements.

This meant the impossibility in principle of improving the Ukrainian electoral legislation under the guarantees of a parliamentary vote for constitutional reform, or for any other vote at all. The will of the people in a material and procedural sense is sovereign, and cannot therefore be subject to the whims of the participants in any negotiation process. It is a priori higher, inherently *superior* to any leaders and political elite of the country as a whole.

That is why the decision whether the second round of presidential elections should be fair and transparent could not and should not depend on deals reached from above, but which remained in essence private. The values directly involved were incomparably higher than interests of any parliamentarian factions or presidential contenders. Moreover, the issue of constitutional reform is generally too important to be «pushed through» under the pressure of a short-term crisis. The Constitution is the ultimate regulator of domestic and foreign political life of Ukraine, and in no way should it be a hostage to political manoeuvring.

In one way or another, Ukraine's domestic policy has become for the future a prerogative of the parliament – a political institution the course of which in the conditions of Ukraine can be outwardly corrected. As is well-known, direct democracy is important because it is physically impossible to corrupt all the people. This well known statement of Thomas Jefferson has repeatedly been confirmed in practice. This is why it remains imperative that the authority and effectiveness of the post of President and also his dependence on the direct will of the Ukrainian people are retained.

In addition, the post of the President is an important counterbalance to possible foreign economic pressure on Ukraine. This argument is strengthened by the fact that Ukraine is at the level of development where its financial-economic strength and public policy are virtually inseparable. Under these conditions, a special role in the political system of Ukraine can be played by a nationally elected leader.

For these reasons, the reduction of the presidential status to representative functions and functions of foreign policy introduced by the reforms is, in our opinion, dangerous even from the point of view of ensuring the interests of state sovereignty. One can predict that corporatism in the political system of Ukraine after implementation of the reform will increase, and the influence of financial-economic groups on parliament will become systemic.

One should also stress that the main lobbyists of constitutional reform were political supporters of the former President L. Kuchma, and also representatives of parliamentary factions which during the elections gained no more than 5–6% of votes of the Ukrainian electorate. It does not appear justified, therefore, that the constitutional ideas of Ukrainian political outsiders should have to be implemented by their opponent Viktor Yushchenko.

However, the implementation of constitutional reform with radical transformations of Presidential authorities between the first and the second rounds of the presidential elections even defied common sense. Neither from the point of view of law, nor with a view to efficient politics, could it reasonably happen that the citizens of Ukraine in the first round of the elections voted for a President with one constitutional status and in the second – for a President with a manifestly different status.

Hundreds of thousands of people stood on Independence Square in Kyiv in December's freezing temperatures in order to elect a strong leader. Consciously and subconsciously they counted on the power of his constitutional post. In general, the strength of spirit and mind of the people on the square were significantly higher than the ideological tone of the Ukrainian constitutional reform. Unprecedented in its scale in the modern history of Ukraine, the permanent Orange Demonstration stood up not for a change in formal-legal institutions, but for a change in the actual corrupt live government.

During the days of the Revolution, Ukrainian citizens protested not against imperfect judicial frameworks, but against specific individuals. The passing-bell which rang for half a month on the capital's square was convincing proof that the last remnants of Ukrainian post-communism could be buried. It was there and at that time that Ukrainian citizens freed themselves of their old political fears, and at the same time – their sense of dependence and slavery.

3. RECOMMENDATIONS

In our opinion, Draft № 4180 on amending the Constitution (now the Law of Ukraine «On amending the Constitution of Ukraine» № 2222-IV dated December 8, 2004) requires review by the Constitutional Court as well as a re-vote with a constitutional majority in parliament. After all, the draft was significantly amended after its presentation to the Constitutional Court but before the vote on it in parliament on December 8, 2004. It is highly likely that in the new post-revolutionary situation, it will be rejected by the parliament as not meeting current Ukrainian needs.

On the whole, taking into account the abovementioned specific features of the Ukrainian political situation, we suggest redrafting the Law on amending the Constitution of Ukraine in the direction of fundamentally different issues. We have in mind the following:

1. The Verkhovna Rada (Parliament) must effectively control the activities of the Government, and of the executive branches of power as a whole through permanent and temporary parliamentary committees and commissions. In order to achieve this aim, the supervisory functions of parliament and of the public (individual citizens and non-governmental organizations) must at a judicial level be significantly strengthened.

This can be achieved by passing relevant legislation: on access to information; on the government; on public control over the activities of the state executive; on political opposition. It would be useful in this case to also prepare and pass a special law on impeachment, as well as on parliamentary temporary, investigative and other commissions.

2. Ukrainian procedural legislation on the Constitutional Court must be significantly improved. Up to now the Constitutional Court of Ukraine, as is well-known, has worked as an arbiter or go-between in disputes between the President and the Verkhovna Rada of Ukraine. Furthermore, the Constitutional Court's function of providing constitutional defence of rights and freedoms was never seriously carried out. We therefore believe that in the future the list of possible complaints which can be taken to the Constitutional Court must be broadened.

3. It is also necessary to prepare and pass a separate law on constitutional court procedure, since without detailed regulation of procedural questions at the judicial level, it will remain impossible to consider the Constitutional Court of Ukraine as a court with constitutional jurisdiction in the full understanding of this concept.

4. A strengthening of guarantees of independence of the judiciary and of access to legal justice needs to be allowed for in the Constitution.

5. The constitutional status of the prosecutor should be changed, leaving only the function of representing the state in court: support for State prosecutions in criminal cases and the representation of the State in civil cases should be the function of a Department of the Ministry of Justice.

6. The Constitution should allow for the creation of an Investigative Committee which would absorb the investigative departments of the Ministry of Internal Affairs, Security Service of Ukraine and the Prosecutor.

7. The State committee for television and radio should be disbanded, and its functions according to the Constitution should be carried out by a National Council for television and radio.

II. THE RIGHT TO LIFE¹⁰

The right to life is a fundamental human right and the right which ensures basic democratic values. It is guaranteed by the Universal Declaration of Human Rights (Article 3): «Everyone has the right to life, liberty and security of person». Article 6 of the International Covenant on Civil and Political Rights recognizes the inherent right of every person to life, adding that this right «shall be protected by law» and that «no one shall be arbitrarily deprived of life». The right to life of those under the age of 18 and the obligation of States to guarantee this right are both specifically recognized in Article 6 of the Convention on the Rights of the Child.

These provisions of a universal nature should be interpreted in the context of other treaties, resolutions and declarations, adopted by UN competent bodies as well as those of regional organizations. These include in the first instance The European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter «the European Convention»), Article 2 of which affirms the right to life and to protection by law of this right.

The Constitution of Ukraine also states that «The human being, his or her life and health, honour and dignity, inviolability and security are recognised in Ukraine as the highest social value. (Article 3) and «Every person has the inalienable right to life. No one shall be arbitrarily deprived of life». (Article 27).

Cases from the European Court on Human Rights are of particular interest in the interpretation of the right to life as the Court considers more cases than other authorized international bodies and its interpretations of the European Convention are binding. Interpreting the duties of a State in accordance with Article 2, the Court defines them as negative and positive. Procedural duties which concern a retrospective investigation into any violent deprivation of life also constitute positive duties.

1. NEGATIVE DUTIES

For a long time an interpretation of Article 2 on the right to life was widespread which, in addition to allowing the death penalty,¹¹ defined the circumstances under which the representatives of the State had or did not have the right to legitimate killing. This means, that under certain circumstances, State representatives, for examples, the police, have the right to use force which could cause death when enforcing law and order.

The issue of whether the use of force is reasonable concerns law enforcement actions. The use of excessive force or unjustified use of fire-arms constitutes a flagrant violation of the right to life.

However there can be situations, when use of force can be justified, as it is «absolutely necessary». These situations concern self-defence; defence of others from unlawful violence; a lawful arrest or to prevent the escape of a person lawfully detained; action lawfully taken for the purpose of quelling a riot or insurrection.¹²

In addition to the Convention, other legal sources which should be consulted when considering complaints of excessive use of force and unjustified use of fire-arms are: the UN standards on the main principles of the use of force and fire-arms by law enforcement officials,¹³ the principles of the efficient prevention and investigation of extra-legal, arbitrary and summary executions.¹⁴ The attention of the international

¹⁰ Prepared by Maryana Kulya, a legal expert from the Ukrainian Helsinki Human Rights Union.

¹¹ Article 2 of the European Convention should be read today together with Additional Protocol No. 6 which prohibits the death penalty, and which Ukraine has ratified.

¹² Part 2 of Article 2 of the European Convention.

¹³ UN General Assembly Resolution № 45/121 from 14 December 1990.

¹⁴ UN General Assembly Resolution № 34/169 from 17 December 1979.

society is also focused on the need to train the Police to work in a spirit of respect for human rights, to ensure that they learn about the international standards regarding use of force in law enforcement activities. Thus, it is possible to achieve success (both at a national level and the level of the European Court) in cases seeking compensation for the victims of acts, that were committed by the police if it can be proven that the policemen had not received special training on the use of fire-arms, or where there were deficiencies in the process of planning or control over the operations by law enforcement agencies.¹⁵

Ukrainian legislation which regulates the use of fire-arms is considered on the whole to not be in contravention of international standards.¹⁶ However, official information is not available on incidents of unwarranted use of fire-arms by law enforcement officers or on the conducting of with investigation into these incidents.¹⁷

In autumn 2004 the Litigation Fund for the Victims of Human Rights Violations of the Ukrainian Helsinki Human Rights Union received an application from a resident of Kherson, H. Lovygina. The following events formed the reason for her application.

On 14 January 2000, during a training exercise of the State Automobile Inspection (SAI), H. Lovygina's son – a junior police sergeant, P. Lovygin, who was «acting» the role of a person breaching the law, was killed by officers of the Ministry of Internal Affairs (MIA). After a formal investigation, the person responsible for the death of her son, according to the findings of the investigation through the careless use of firearms, was amnestied and released from the MIA at his own request. The investigation ignored facts that could have proven the infringement of rules as to the running of training exercises within the system of the Ministry of Internal Affairs; carelessness and criminal negligence on the part of those in charge and falsification of the materials of the trainings.

Not being satisfied with the decision of the authorities, the parents of junior sergeant P. Lovygin lodged a claim with the court demanding moral compensation. The Ukrainian courts refused to satisfy the claim. The parents of P. Lovygin have now applied to the European Court on Human Rights.

2. POSITIVE DUTIES

The European Court has also repeatedly emphasized, that Article 2 in certain cases defines also the positive duties of the state authorities to take preventive measures for the protection of person whose life is under threat. The positive duties in this context appear (1) in connection with the lack of any effective result from an investigation by the national law enforcement bodies into the complaints of the claimants or their relatives; (2) during consideration of complaints regarding an inefficient public health service; (3) during consideration of complaints about environmental pollution.

2.1. The lack of any investigation into the circumstances around a case of violent death constitutes a violation of Article 2 of the Convention. The lack of an effective investigation might also constitute a violation of the respective article.

The situation in Ukraine during 2004 as regards consideration by the courts of crimes against human life was as follows:¹⁸

(1) premeditated murder: the number of cases during the given period – 4006; the number of outstanding cases which had not been considered at the beginning of this period – 1307. Proceedings were concluded in 4068 cases during this period;

(2) deliberately causing severe bodily injuries: during the given period proceedings were initiated in 5299 cases, with 1878 cases carried over, still unconsidered, at the beginning of this period. Proceedings were concluded in 5460 cases during this period.

Certainly these dry statistics provide little indication as to whether investigations into crimes against life have been effective. Moreover, it is well-known that the majority of cases in Ukraine are solved on the basis of personal confessions. However, available statistics do not provide us with this classification. The

¹⁵ European Convention on human rights: principal provisions, practice of application, Ukrainian context. Kyiv, VIPOL, 2004, page 25.

¹⁶ Рабинович П., «Право людини на життя (стаття 2 ЄКПЛ)», Європейська конвенція з прав людини: основні положення, практика застосування, український контекст. Київ, «ВШОЛ», 2004, с. 36-37 / P Rabynovych P., «The Right to life», The European Convention on Human Rights: principal provisions, practice of application, Ukrainian context. Kyiv, VIPOL, 2004, pages 36-37.

¹⁷ Formal requests from the UHHRU to the Office of the General Prosecutor and Ministry of Internal Affairs for information received no response.

¹⁸ Report of the State Court Administration of Ukraine to the State Department of Statistics on the consideration by first instance courts of criminal cases for 2004.

methods which the law enforcement bodies apply to achieve their figures for solved crimes are also well-known (graphic evidence of these methods can be found in the chapter here on cases of torture and cruel treatment).

The effectiveness of investigations into prominent cases in Ukraine remains unsatisfactory. It is long-established practice in Ukraine for those in charge of the law enforcement bodies to avoid reporting to parliament, or even informing parliament and society about the course of investigation into such prominent cases. Moreover, law enforcement bodies in general ignore official requests from parliamentary institutions (for example, from the Human Rights Ombudsperson) or from individual State Deputies.¹⁹

Unfortunately, during 2004, the state authorities did not make any progress in high-profile murder enquiries, in particular, with regard to the murders of Gongadze, Aleksandrov, as well as of some prominent businessmen.

The Constitution of Ukraine does not foresee the right of citizens, civic organizations and political parties to control the activities of the law enforcement bodies. Legislation stipulates that citizens have the right to appeal to the law enforcement bodies, their officials and functionaries; civic organizations in turn have the right to the information necessary for the achievement of their aims and tasks. Yet, although the law establishes that these bodies should, within a stipulated period, consider the request and provide an appropriate response, responses to such requests are rare.²⁰

Investigation into the Gongadze case

Before the Presidential elections, pressure was put on the Ukrainian government to find those guilty of one of the most notorious cases of the last years, that of the disappearance of the journalist, Georgiy Gongadze. On 19 June 2004, the British newspaper 'The Independent', on the basis of documents it had received, published an article where they claimed that the investigation was being blocked by high-ranking officials, including «delaying tactics» by the General Prosecutor of Ukraine, as well as a number of other circumstances of the case. Shortly all the material involved in the case, including the protocols of witnesses' interrogations, appeared on the Internet.²¹

In June 2004, the General Prosecutor refuted the allegations made in the article. It was stated at that point that investigators of the General Prosecutor were working with a man who claimed to have killed Gongadze.²²

However, at the end of November 2004, the Deputy General Prosecutor, Mikola Holomsha, was dismissed for demonstrations of political engagement, improper organization of investigations into criminal cases, *including the improper investigation of the criminal case involving the murder of Georgiy Gongadze* which he was directly in charge of²³ At the end of December, after the dismissal of G. Vasilyev from his position as General Prosecutor, and the reappointment of S. Piskun to that post, M. Holomsha again became Deputy General Prosecutor.²⁴

The general chronology of the investigation of the Gongadze case in 2004 was as follows:²⁵

January: General Prosecutor Vasilyev announces that extra tests are to be undertaken in the Gongadze case, including tests on Melnichenko's tapes, by the Kyiv scientific research institute of forensic testing, with the involvement of foreign experts. Representatives of the CoE monitoring committee express disappointment with the state of progress: «It appears that the issue is simply being put aside».

May: Vasilyev announces that in the Gongadze case «Everything has started again from scratch».

July: The Ministry of Internal Affairs begins an internal investigation into the shadowing of Gongadze immediately prior to his disappearance.

¹⁹ Поляков Л., Шангіна Л., «Правоохоронні органи в Україні: контрольована безконтрольність», Дзеркало тижня, 12 червня 2004/ Polyakov, L, Shangina, «L: Law Enforcement bodies in Ukraine: controlled lack of control», Dzerkalo Tyzhnya, 12 June 2004.

²⁰ A number of requests for information on the issues that are considered in this report received no response. An open letter to the Speaker of Parliament concerning unlawful persecutions during the presidential campaign in 2004 was an exception. Speaker V. Lytvyn forwarded the open letter to the Regional offices of the prosecutor; UHHRU subsequently received about ten responses. Unfortunately, the responses should be classified rather as formal replies, than as actually providing the information requested..

²¹ The website address being: <http://delogongadze.org>.

²² The official website of the General Prosecutor of Ukraine on the Internet, News and publications from 21 June 2004: <http://www.gpu.gov.ua/ua/archive.html?id=883>

²³ News and publications from 29 November 2004: <http://www.gpu.gov.ua/ua/archive.html?id=982>

²⁴ News and publications from 29 December 2004 at <http://www.gpu.gov.ua/ua/archive.html?id=1008>

²⁵ «Investigation into the failings of legal and judicial processes in the case of Georgiy Gongadze», Preliminary Report of the Institute for Mass Information on the Internet, <http://www.imi.org.ua>.

September: The television program «Closed zone» offers a new version about the circumstances of Gongadze's murder. The Kyiv Forensic Investigation Institute announces that Melnichenko's tapes are fakes.

October: New detailed research establishes weak points and shortcomings in the Gongadze case: the research is sponsored by the International Federation of Journalists, the National Union of Journalists, the Institution of Mass Information and the Gongadze Foundation.

November: Gennady Vasilyev is removed from his post as General Prosecutor of Ukraine.

December: Svyatoslav Piskun is reinstated as General Prosecutor. He appoints the former investigators to work on the Gongadze case.

2.2. An inefficient health service also constitutes a violation of the State's positive duties. The State should develop rules that oblige public and private hospitals to take appropriate measures to protect the life of patients. Positive duties also demand the introduction of an efficient independent investigation system in order to obtain information and ensure liability of medical staff if they are found guilty of causing a patient's death.

In world practice there are various forms of control over health service efficiency. For example, in the United Kingdom there is a Parliamentary and Health Service Ombudsperson; in Italy a Tribunal on Patients' Rights works with representatives from all over the country; in the USA, in addition to the Commission on Ethics, which includes doctors, lawyers, representatives of insurance companies, patients' rights are also protected by a huge number of NGOs. They became especially active following the publication of research which had been carried out over a four year period through the country. Findings suggested that medical errors may be the reason for the death of 40 thousand patients every year.

In Ukraine, where it can be problematical for a patient to receive his or her own medical records, there are certainly no statistics on medical errors. Nor is any independent medical expertise guaranteed by law, there is no state body for protecting patients' rights nor are there formal health care standards. There are very few civic organizations working in the area of protection of patients' rights. One such organization, the all-Ukrainian Council for the protection of patients' rights and safety, founded in 2002, receives a huge number of applications from citizens and presents cases to the courts concerning violations of patients' rights.

According to the Council's lawyers, usual factors such as a low level of awareness of one's rights and unwillingness to protect these rights are compounded by such problems as:

- (1) flaws in current legislation making it impossible to receive compensation awarded by the court;²⁶
- (2) the lack of a law on patients' rights.

A Draft Law on patients' rights, introduced by State Deputy S. Shevchuk, was submitted to the Verkhovna Rada for consideration at the beginning of 2000²⁷. The Draft Law defines and specifies the rights of patients in the field of health service; it also considers the creation of a system that will allow all to enjoy these rights, and to be protected from any infringements of them, and that will ensure respect for the dignity of a patient, and, where needed, the possibility of legal protection.

In March 2004, the Cabinet of Ministers of Ukraine recommended that the area in the Draft Law concerning personal data protection be further refined.²⁸ However, during the year there was no more progress as far as the given Draft was concerned, and in fact, a Draft resolution for a decree of the Verkhovna Rada of Ukraine rejecting the original Draft Law was tabled by three State Deputies and members of the Committee of the Verkhovna Rada on issues related to health care, motherhood and the child, M.E. Polishchuk, L.S. Grigorovich, and M.V. Loboda.

Data from sociological research on the situation with the rights of patients in Ukraine

- 6 out of 10 patients have experienced violation of their rights in a health service institution;
- 9 out of 10 patients think there is a need to increase measures to ensure the protection of their rights;
- only 7 out of 100 have ever used legislation in order to protect their rights;
- 9 out of 10 patients consider available information on their rights as insufficient;

²⁶ According to information from Lawyers of the All-Ukrainian Council for the protection of patients' health and safety, there have been many such incidents in Ukraine. See also O. Grigorenko «To treat – and cripple with impunity?», *Dzerkalo tyzhnya*, № 5 (480), 7–13 February 2004 poky; T. Parkhomchuk., «The lack of accountability of the State Hippocrates», *Dzerkalo tyzhnya*, № 14 (489), 10–16 April 2004 poky.

²⁷ Draft Law № 2649 «On the rights of patients» from 16 January 2003 poky, available on the server of the Verkhovna Rada of Ukraine: <http://www.rada.gov.ua>.

²⁸ Instruction of the Cabinet of Ministers «On the measures concerning the realization of the priority provisions of the Program on Integration of Ukraine to the EU» from 4 March 2004, № 111-p.

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- every second Ukrainian citizen first learned of the concept of «patients' rights» from the questionnaire used during the sociological survey;
- 7 out of 10 citizens think that attempting to protect their rights by means of law would be a waste of time;
- every second patient has had experience of not being given correct information on the state of his health or the likely health prospects for the future;
- every third patient stated that confidential information as to the state of his/her health had been disclosed;
- every second patient, that no information had been received in advance involving invasive surgery and its likely affect on the organism from medical personnel;
- every second patient did not know about the right of free choice and change of his or her doctor.

Based on material from the information bulletin «Civic rights of patients in Ukraine» of the Doctors' Association of the Mikolayiv region.

The Ukrainian Helsinki Human Rights Union has received a number of complaints on the death of new-born babies, which, according to the mothers, were caused by medical errors. In all these cases, prosecutor's offices have refused to launch a criminal investigation. Those making appeals did not have access to efficient and independent mechanisms for the protection of their rights, in particular, due to the lack of independent medical expertise in the cases involved.

2.3. The positive duties of the State with regard to environmental pollution include providing information as to risks to people's life. Experts consider that even today, notwithstanding the long time that has passed since the Chernobyl disaster, a case over Chernobyl could be taken to the European Court of Human Rights.²⁹ After all, the situation with Chernobyl is an ongoing violation, with people who suffered from it becoming ill and dying up till now.

3. RECOMMENDATIONS

- 1) To introduce changes to legislation on criminal procedure in order to provide more rights to victims, including to the family members of a victim, and to increase their influence on the course of investigations.
- 2) To introduce efficient independent mechanisms to investigate deaths caused by the actions of law enforcement officials and / or medical staff.
- 3) To introduce independent medical expertise.
- 4) To adopt a Law of Ukraine «On the rights of patients» that would provide for legal guarantees of the rights of patients to life; the right to confidentiality and private life and a minimum range of services available as free health care..
- 5) To publish information on investigations into crimes against life on an annual basis.
- 6) To increase the efficiency of State and public control over the activities of law enforcement bodies.

²⁹ Рабинович П., «Право людини на життя (стаття 2 ЄКПЛ)», Європейська конвенція з прав людини: основні положення, практика застосування, український контекст. Київ, «ВІПОЛ», 2004, ст. 35-36Р.:/ Р. Rabinovych: «The right to life», the European Convention on Human Rights: principal provisions, practice of application in a Ukrainian context. Kyiv, VIPOL, 2004, pages 35-36.

III. THE RIGHT TO PROTECTION FROM TORTURE AND CRUEL TREATMENT³⁰

1. THE EXTENT OF THE USE OF TORTURE BY LAW ENFORCEMENT BODIES

1.1. INFORMATION ON CASES INVOLVING TORTURE

It remains as before difficult to assess the real extent of the use of torture in Ukraine. Although the influx of reports about torture and ill-treatment shows no signs of abating, it is practically impossible to obtain official data from prosecutor's offices and offices of the Ministry of Internal Affairs (MIA), on the basis of which any conclusions can be made as to the degree of the use of torture, as well as to their reactions to these reports.

It is also impossible to analyze in detail court practice concerning convictions of persons, responsible for torture, because acts that contain elements of «torture» as defined by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment are not singled out in court statistics.

It is practically impossible to obtain necessary data by making formal requests for information.

The Chief Editor of the bulletin «Prava Ludyny» («Human Rights») requested information from the General Prosecutor of Ukraine and regional prosecutors' offices regarding the following issues:

– the number of law enforcement officers in their region who had been convicted under Articles 365 or 373 of the Criminal Code of Ukraine (Articles 166 and 175 in the Criminal Code of 1960) in 2001, 2002 and the first half of 2003. If such offences had taken place, they were asked to specify in which year and under which Article;

– the number of complaints made concerning unlawful actions by law enforcement officers in their region, against whom disciplinary charges had been brought for unlawful treatment of detainees; the number of complaints made concerning unlawful actions by prison officers in their region, against whom disciplinary charges had been brought for unlawful treatment of prisoners serving a sentence on their territory; those held in pre-trial detention centres in 2001, 2002 and the first half of 2003;

– the number of complaints made regarding unlawful activities of law enforcement officers in their region, as well as of penal institution staff of the State Department on Penal Issues in the region, the number of complaints satisfied and the number of officers against whom disciplinary or criminal charges had been brought, as well as the number of convictions.

In total 19 responses were received, of which only two – from the prosecutor's offices of the Luhansk and Mykolayiv Regions – contained the requested data. All the rest contained refusals for a range of reasons, including the following:

– the information sought was used on an ongoing fashion and was not separately collated;

– the established forms of statistical reporting did not provide for registering the data requested, so the prosecutor's offices did not have such statistics and reports;

– the information requested was for official use only and not available to the public;

– the data requested was confidential, protected by the State, and not available to the public;

– the information requested concerned undercover and investigative operations of prosecutor's offices, offices of the MIA, of the Security Service (SSU), detective inquiry units, and courts, and its disclosure could harm investigative operations and the different stages of criminal investigation.

It is typical that the General Prosecutor's Office sent no reply at all.

³⁰ Prepared by Arkady Buschenko, lawyer and expert on criminal procedure and the European Convention on Human Rights. for the Kharkiv Human Rights Protection Group

The letters with refusals to provide information had references to part 1 of Article 37 of the Law «On information» which prohibits disclosure of «information about undercover and investigative operations of prosecutor's offices, offices of the MIA, SSU, detective inquiry units, and courts, the disclosure of which could harm investigative operations and the different stages of criminal investigation» and to Order No. 89 of 28 December 2002 from the General Prosecutor of Ukraine «List of documents arising from the activity of offices of the Prosecutor which contain confidential information and which are classified as being 'For official use only'»

The Chief Editor of the bulletin «Prava Ludyny» [«Human Rights»] believing that the refusal to give information violates Article 40 of Ukraine's Constitution and sections 28, 29, and 32 of Ukraine's Law «On information», Article 6 of the Law of Ukraine «On Offices of the Prosecutor» has lodged complaints with the respective courts about the inaction of the prosecutor's offices.

It should be noted that on 11 May 2004 amendments to Article 30 of Ukraine's Law «On information» were introduced with provisions that directly prohibit the classifying of information about «natural disasters» or information «on the situation concerning human and civil rights, as well as cases where these are violated, and about unlawful actions by the State, local authorities, bodies of local self-government and their officials» as confidential information which is the property of the State.³¹

It is worthy of note that the General Prosecutor's Office displays the same degree of secrecy in its relations with the Verkhovna Rada's representative on human rights issues (the Human Rights Ombudsperson). According to «Podrobitsy»³², «Human Rights Ombudsperson Nina Karpachova has accused Ukraine's General Prosecutor Gennadiy Vasilyev of concealing cases involving harassment of people held in police custody. Nina Karpachova claims that the General Prosecutor Gennadiy Vasilyev refuses to provide her with information about the number of law enforcement officers disciplined for using violence towards detainees. She stated this on June 16 in Kyiv at an extended meeting of the Parliamentary Committee on Issues involving Human Rights, Minorities, and International Relations. According to Karpachova, in order to obtain information about the number of law enforcement officers disciplined for violence and torture of detainees, she sent requests to regional offices of the prosecutor, but 'the instruction was the same as before: under no circumstances should they give information about these issues to the Human Rights Ombudsperson'. Karpachova added that because she has no full information about this issue, she cannot present data on the situation in Ukraine as a whole. She commented that she knew of some law enforcement officers having had charges brought against them for using unlawful methods to people held in detention only thanks to some regional prosecutors, 'who were fearless and courageous enough to provide such information'».

In response to a similar request to the Ministry of Internal Affairs and its regional departments, the Chief Editor of «Prava Ludyny» received responses providing information from the central apparatus of the Ministry, from 22 regional departments and from the Sevastopol City Department, which suggests greater openness of police offices in comparison with offices of the prosecutor. The largest number of complaints about unlawful actions was recorded by the Luhansk Regional Department – around 1,800 complaints a year, of which 10 to 20% were satisfied; next was the Donetsk Region – around 1,300 complaints a year, of which 34% were satisfied. The maximum ratio of satisfied complaints was 55% – in the Kherson and Sumy Regions. It is worth noting that no police officer has been convicted under Article 373 of the Criminal Code of Ukraine (Article 175 of in the 1960 version), and the number of those convicted for exceeding their authority (Articles 365 or 166 of the 1960 version) is also small. On the whole, the number of complaints, satisfied complaints, and the number of law enforcement officers convicted for unlawful actions have decreased considerably in all regions.

The main source of information about cases of torture or ill-treatment remains reports in the media, as well as information obtained from civic organizations.

Approximately 200 reports of cases where the use of torture is alleged were received through the information network, created under the auspices of the project «Campaign against Torture and Cruel Treatment in Ukraine». Ninety three persons sent complaints to the Kharkiv Human Rights Protection Group, which allege the use of torture and ill treatment on the part of law enforcement officers. From the results of media monitoring, carried out by the Kharkiv Human Rights Protection Group, in 2004 56 cases involving the use of torture were reported. Six of these cases resulted in the death of the victim.

³¹ See more details in the article by Yevhen Zakharov and Iryna Rapp: «Access to information in prosecutor's offices regarding legality of law-enforcement agencies activity // News-letter «Svoboda vyslovluvan i privatnost» [«Freedom of Speech and Privacy»] No. 2, 2004

³² «Podrobitsy» («Details») from 16 June 2004.

The cases described below which allegedly involved torture by law enforcement officers, are receiving legal assistance from the Fund for the Professional Support to Victims of Torture and Inhuman Treatment.

Case of Ivan Nechiporuk (Khmelnitsky)

On 20 May 2004 between 1 and 2pm, Ivan Nechiporuk was detained by police officers and brought to the South-West District Police Station in the city of Khmelnytsky. At about midnight, he was taken to Office No. 4, where police officers suggested that he confess to the murder of I. They proceeded to interrogate him until 4 in the morning, accompanying questions with threats. As to what happened next, here is Ivan Nechiporuk's own story: «They brought a hexagonal crow-bar and a plastic bag; in this bag there was a dynamo with thick stranded cables. They handcuffed me, inserted the crow-bar between my elbows and knees, and suspended me between desks (there are markings left by the crow-bar: the desks were varnished, but some of the varnish was scraped off)... Rybalko [the name of one of the police officers] took the dynamo out of the bag and attached the two cables to my legs. Then he started turning the dynamo, asking, 'Where is the gun? Who fired the shot?' The pain was unbearable; I screamed so much that my lips cracked... Meanwhile Martsinyuk [another police officer] held a pillow over my face to silence me... Rybalko said that next they would attach the cable to 'intimate spots'... There was also Igor, a tall guy with black hair in a crew-cut, he also helped to pin me up and get me down from the crow-bar. Shortly after 7am I scream that I'll sign everything... Closer to 8 a.m. they stopped the 'procedures,' because I told them that I would make a confession».

Case of Yury Golubev (Kyiv)

On the morning of 14 February 2004, Yury Golubev left a friend's place and walked toward his car. As he leaned over the boot of the car, he received a blow to the head and fell to the ground. When he came to, he saw a man in civilian clothes pointing a gun at him, while another man handcuffed him. When he asked them who they were, he received several punches and kicks. It was only when they drove him to the building of the Main Department of the Ministry of Internal Affairs on Volodymyrska Street, that he realized that they were police officers. There they took him into a room where they demanded that he confess to several crimes.

Yuriy relates his story: «*They punched and kicked me on my head, torso, and genitals, so that I almost lost consciousness. I felt dizzy and nauseous. I kept screaming, begging them to stop the beating, but my pleas only made them beat me more viciously. That ordeal lasted for quite some time. Then they asked me to sign some papers... Then they started threatening that if I refused to sign the papers, at very best I would leave that room a cripple, they would beat off all my internal organs, and I would urinate with blood and that I'd never be able to have sex with a woman again, because they would beat off all my organs. Or at worst, they would kill me and take my body to a forest, and bury it in a ditch, so that nobody would ever find me, since the detention was informal and was not recorded anywhere...*»

«*A few more people came into the room, holding a gasmask and bottles, which they began to use. From the gasmask and the smoke from the cigarettes, which they blew into it, I felt giddy, faint. I felt as though I was suffocating, I couldn't breathe. I was faint also because of blows to my head from the bottles, I could hardly understand, what was happening...*»

Case of Yevhen Ismailov (Kyiv)

On 11 September 2004, Yevhen Ismailov was detained by police officers of the Holosiyvskiy District Station of the Main Department of the Ministry of Internal Affairs in Kyiv. He was beaten when detained, and then later in the district police station.

On September 13, he underwent a forensic medical examination, which established numerous bodily injuries. Ismailov submitted a complaint to the prosecutor's office, but on October 7 the latter refused to initiate a criminal investigation. On October 19, the Holosiyvskiy District Court in Kyiv overturned this decision to refuse to begin a criminal investigation. The prosecutor's office has appealed.

Case of Valery Krykun (Kyiv Region)

On 28 March 2004, Valery Krykun was detained and taken from his home by police officers of the Brovary district police station (Kyiv Region). As he stated in his complaint, «On the fourth day [of his de-

tention] police officers took me into a room in a temporary detention centre... The Gestapo sadists in police uniforms punched me in the head and the ears and threatened to leave me to rot there. They demanded that I confess to having taken out 'a contract' on my own father»

On 10 April 2004, Valery Krykun was detained for the second time and taken to the district police station. He relates: «After a while, two heavy-set men in civilian clothes came into the room. Without any explanation... they started calling me names, threatening me, and then began sadistically and brutally torturing me: they kicked me in the face, punched and elbowed me on my back, head, demanding that I sign a confession. They didn't give me a chance to say a word in my defence, and when I tried to say something, they continued their savage torture. When... they saw that I was holding out and refusing to admit to a crime I hadn't committed, they asked their colleagues to bring in police clubs. ... They... continued to enjoy themselves beating me, this time with the clubs, on my back, head, legs, and the lower part of my belly. I fell off the chair, because I couldn't fend off terrible blows from the two clubs, and I couldn't hold on to the chair, because my hands were handcuffed behind my back. As I fell on the floor, I felt an awful pain through my whole body. I had never felt such a terrible pain before. ... I felt giddy, at moments I lost consciousness... It seemed clear that if I refused to sign what they wanted, they'd beat me to death. So, I agreed to write everything [they] told me to... because I understood if I refused to follow their demands... they would beat me to death. Every time I paused for a second and stopped writing, or said something different from what they wanted to hear, they immediately started beating me with their clubs below my belly. ... Then they took me to a temporary detention centre and 'shut me inside' for 3 days».

Case of Serhiy Korvyakov (Kirovohrad Region)

On 9 February 2004, in 11:30am, officers of the criminal investigative operations unit at the Svitlovodsk District Department of Internal Affairs, without any court order, came to Serhiy Korvyakov's apartment and took him into custody on suspicion of using narcotics. During his apprehension, he was severely beaten by those police officers.

According to Korvyakov, in the police station he was subjected to torture with the use of handcuffs, a gasmask, and a rubber club – in order to obtain confessions to any crimes that he might have committed over the last two years. Hearing that the police officers were going to rape him with the use of a rubber club, Korvyakov tried to jump out from a window in the room which was on the third floor of the city police station, but the police officers stopped him.

Due to a deterioration in Korvyakov's state of health by the end of the third day of his detention, the police officers called an ambulance and took him to hospital. He was in hospital from February 12 to February 23.

Case of Kostyantyn Kurazov (Dnipropetrovsk Region)

On 3 September 2004, businessman Kostyantyn Kurazov, a refugee from Chechnya and permanent resident of the city of Kryvy Rig (Dnipropetrovsk Region), was approached by three officers of the Department on Fighting Organized Crime (UBOZ) in Kryvy Rig, who told him that they were detaining him in connection with the terror attack in Beslan (Russian Federation). He was taken to the UBOZ, where for two hours he was beaten by three UBOZ officers, demanding that he confess to being involved in organizing the terrorist attack. Later they chained him with handcuffs to a handrail on the front-steps at the entrance to the police station and held him in this position for almost four hours. He was then placed in a centre for the reception and allocation of vagrants for a term of 30 days, although the police officers were well aware that he had a family and permanent residence.

Case of Denis Kuyan (Kirovohrad Region)

On 24 February 2004, Denis Kuyan was detained by police officers and brought to an inter-district station in the town of Svitlovodsk (Kirovohrad Region). The police officers started to beat him, demanding that he confess to committing the crimes they were accusing him of. At first they beat him with rubber clubs and punched him in the chest, and then, after handcuffing him, they hit him over the head with an armchair. The beating lasted several hours. He was then taken to a pre-trial detention centre in Kirovohrad.

On March 4, as Kuyan's health deteriorated, he was placed in the Svitlovodsk Central District Hospital with the following diagnosis: «erysipelas of the thorax». He went through several operations in the hospital, but his health did not improve and he was continuously kept in an emergency care ward. Kuyan spent a month in all in the hospital and is still being routinely treated.

On March 17, he underwent a forensic medical examination, which established a fracture to his sternum in its middle third and a haemorrhage in the soft tissues of the front surface of his sternum.

Case of Andriy Yatsuta (Kharkiv)

On 24 May 2004, around 8am, Kharkiv resident Andriy Yatsuta was detained by police officers and taken to the Zhovtnevy District Police Station in Kharkiv. In the police station, he was told that he was suspected of involvement in the robbery of Ms. L. According to Yatsuta, in the investigator's office, he was beaten by police officers: they hit him around the area of his liver, sternum, and on his head. They also tortured him with the use of a gasmask, inserting a lit cigarette through a plug made of paper or cloth with a cigarette-wide hole in its flexible hose. They also beat him with a plastic bottle filled with water; they chained him with handcuffs and suspended him onto a steel crow-bar. With his head in the gasmask, Yatsuta lost consciousness several times due to lack of air; they brought him around by using liquid ammonia. During breaks between torture sessions, the police officers demanded that he confess to stealing a mobile phone.

The police officers, seeing that Yatsuta was in a bad state, drove him around the city for two hours, threatening to get him if he told anyone what had happened to him. Around 8:30pm he was driven to his home.

On May 25, Yatsuta went to Hospital No. 4, and on May 27, underwent an examination at the Kharkiv Regional Bureau of Medical Forensic Examinations. Yatsuta attended the outpatients department of Hospital No. 26 from June 3 to June 29.

Case of Oleksy Ignatenko (Kharkiv)

According to Oleksy Ignatenko, on 2 January 2004, he was set upon by strangers, who inflicted blows to various parts of his body. They took away the keys to his apartment and 25 UH [\$5], and then kicked him. Oleksy lost consciousness. When he came to, he found himself, handcuffed, being driven somewhere in a car. The strangers, it turned out, were officers of a police unit fighting drug trafficking. The police officers continuing beating him, demanding that he tell them the address of his apartment. Once they found out the address, the police officers, with him, entered the apartment and searched it without a search warrant.

They then drove Ignatenko to the Moskovsky District Station, where they beat him again, demanding that he make a confession. By kicking and beating him, they forced him into signing some protocols, printed on a typewriter. On January 6, around 4pm, Ignatenko was released. Releasing him, the police officer threatened Ignatenko, that if he told anyone what had happened to him, they would make him suffer, or even kill him.

1.2. CONCLUSIONS FROM SOCIOLOGICAL RESEARCH

Within the framework of the project '*Campaign against torture and cruel treatment in Ukraine*' one of KHRG's partners – the Kharkiv Institute for Sociological Research³³ – has finished the first stage of its sociological research concerning the use of torture in police offices. Below is the summary of the main results of this research stage.

The research conducted so far has shown that unlawful coercion is widely used in the activities of the Ukrainian police. During their lifetime, 23% of those surveyed had encountered situations, where police, in principle, could inflict on them beatings, torments, and torture (placing them in a pre-trial detention centre or a temporary detention facility, being taken as a suspect to a police station, being detained and / or frisked on the street by a police patrol, receiving a summons to appear at police station either as suspect or witness). One third of the respondents, who had had such dealings with the police (7.3% of those asked) had been subjected to unlawful coercion in order to uncover or provide information about a crime.

Of those surveyed, 3% had been victims of unlawful coercion by police officers within the last 12 months; 6% – earlier. 10 to 12% had at least one person among their family members, relatives, or close friends, who had suffered from unlawful coercion by police officers.

The likelihood of becoming a victim of unlawful coercion by police officers, according to the research, is fairly high: for those held in pre-trial detention centres there was a 65% likelihood, in temporary

³³ The following people contributed to the research: Professor V.A. Sobolev, Doctor of Sociology (PhD); Professor I.P. Ruschenko, Doctor of Sociology (PhD); Lecturer Yu.A. Svezhentseva, Candidate of Sociology (PhD); Yu.L. Bilousov, Candidate of Sociology (PhD).

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detention facilities – 57%, for individuals brought to a police station as a suspect – 36%, for those detained on the street and frisked – 31%, while for a witness, summoned to appear at a police station – the likelihood was 8%. Even, if a person had never encountered such a situation, there was still a 1% probability that he or she would become the victim of unlawful coercion by police officers.

The most common forms of physical coercion during detention are ill-treatment, torture, and beatings, while in the course of criminal investigations the most common are beatings, inflicting of bodily injuries, to a lesser extent, torture and torture using special means or techniques. The most common forms of psychological coercion are degrading treatment; intimidation; threats, including towards close relatives; blackmail.

Of all those surveyed:

- 52% believe that unlawful coercion must not be used under any circumstances;
- 31% believe that it is justified in exceptional cases;
- 14% consider the use of unlawful coercion to certain groups or categories of people justified;
- 3% believe that police cannot operate without it.

The main reasons of unlawful coercion, in popular opinion, are as follows:

- impunity of those police officers, who use unlawful methods in their work (48%);
- low professional and educational level of police officers (38%);
- poor staff recruitment, when people with sadistic inclinations fill the police ranks (35%).

The main measures how to prevent unlawful physical and psychic coercion, according to the public, should include:

- severely punishing police officers for any incidents of unjustifiable coercion, brutality, torture (52%);
- improving staff recruitment to the police (50%);
- improving training of police staff at the respective educational institutions (40%).

However, only a small number of respondents feel optimistic that unlawful coercion could be eradicated from police practice within the next three years.

Among the main flaws, which are pertinent to the personality of a police officer, all those polled listed:

- use of official position for personal material gain (49%);
- unwillingness to help «ordinary people» (39%);
- low educational level (39%);
- brutality, callousness (33%).

The main flaws, pertinent to the personality of a police officer, are perceived in a more or less similar way by the public as a whole and by victims of unlawful coercion, although among the latter there is a higher percentage of those, who refer to use of official position for personal material gain, brutality, callousness, and an unhealthy inclination to aggression and humiliation of other people.

Among the main flaws, which are pertinent to the police as a state institution, all those polled listed:

- corruption, extortion of bribes from citizens (50%);
- arbitrariness, exceeding of power and authority (38%);
- cover-ups, protection of police officers, who breach the law (35%);
- poor control over police work on the part of higher authorities (30%).

Respondents, who suffered from unlawful coercion, mentioned the following flaws:

- corruption, extortion of bribes from citizens (61%);
- cover-up, protection of police officers, who breach the law (49%);
- arbitrariness, exceeding of power and authority (42%);
- use of physical and psychological coercion as admissible practices (38%);
- internal corruption, paying to be appointed to a particular position (35%).

As to the main flaws in the work of the police, according to the poll, public opinion put the use of physical and psychological coercion as admissible practices in eighth and ninth place as to importance. Even such flaws as red tape and bureaucracy were seen by the public as a greater evil than unlawful coercion. For victims of unlawful coercion, those practices rise to fourth place of importance.

Perception of the widespread use of unlawful coercion in the police work greatly undermines public trust in the police, in the State on the whole, in the President, etc. To a slightly less extent, this perception influences public willingness to help the police.

Among those, who believe that unlawful coercion is widespread in the work of the police:

- 54% do not trust the police;
- 49% do not trust the Ukrainian state at all.

Among those, who do not consider it to be widespread:

- 15% do not trust the police;
- 22% do not trust the State.

According to contributors to the research, the practice of unlawful coercion in the police work is widespread: 7% of those polled, have experienced it themselves, and within the immediate circle of every tenth respondent, there is, at least, one person, who has suffered from coercion. Public opinion adequately reflects the picture of the wide use of this practice. Half of those surveyed believe that unlawful coercion in the police work is inadmissible, the other half believe the use of unlawful coercion to be justified in some cases, but in no circumstance are they seen as serving to improve police work. Those surveyed also do not accept unlawful coercion as a temporary measure to fight crime. However, unlawful coercion is not seen by the public as one of the main flaws of police work.

2. ANALYSIS OF CAUSES OF THE WIDESPREAD USE OF TORTURE

2.1. USE OF CONFESSIONS IN THE COURSE OF LEGAL PROCEEDINGS

Ukraine's Constitution and the Criminal Procedure Code prohibit the use of confessions obtained «by breaching legislation on criminal procedure». This provision has been repeated many times in resolutions of the Plenary Assembly of the Supreme Court of Ukraine (PSCU). However, in the practice of a criminal investigation, the use of confessions, which are unlikely to have been given without duress, is quite widespread.

This can be partly explained by the fact that, aside from the above-mentioned general provision concerning the inadmissibility of evidence obtained in breach of the law, there are no special rules or criteria as to the determination of that admissibility, in particular, whether the confession was made voluntarily. The rather weak development of the law on evidence has its historical explanation.

For a very long time, assessment of evidence was based upon the virtually unlimited personal conviction of a judge, which was, in turn, based on a «socialist sense of justice». In the doctrine of criminal procedure, the development of a theory of evidence was restrained by the spectre of a restoration of the «system of formal evidence». As a result, the term «due procedure» gradually lost any practical meaning. This lack of respect for procedural issues can be noticed, if one analyzes the practice of the highest judicial authorities and compares the number of resolutions from PSCU or published decisions from the highest judicial authorities devoted to issues of due criminal procedure with issues of material criminal law. The latter are astonishingly more numerous, although in recent years more and more attention is being given to the question of due criminal procedure.

As a result, in criminal procedure there are to this day no reasonably well-developed criteria for determining whether a confession was made voluntarily, nor is there any procedure for the exclusion of questionable confessions from case evidence. Courts hold to rather primitive tests to determine whether the confession was voluntary, usually failing to take into account the specific circumstances, under which defendants are forced, including through the use of torture, to confess.

Courts, in particular, assume erroneously that the use of torture or other kinds of coercion used to force a confession must be established by a court decision in order to declare a given confession inadmissible. Court practice shows that a well-grounded doubt as to whether a confession was made voluntarily is not sufficient to have it excluded from the evidence.

In cases, when a court considers that there are serious grounds for believing that «unlawful investigative methods» were applied to the defendant, the court instructs a prosecutor's office to examine the relevant claims made by the defendant. As a rule, this examination is carried out by the same unit of the prosecutor's office, which supported the case in court. In most cases, such examination results in a refusal to initiate a criminal investigation. Once courts receive the decision made by the prosecutor's office refusing to initiate a criminal investigation or, when applicable, a decision to suspend a criminal investigation, they do not, in general, investigate the defendant's claims of torture any further, and explain the claims away as being an attempt to avoid answering for their actions.

Such an approach by the courts to investigating and assessing defendants' claims about the use of torture takes into account neither Ukraine's international obligations, nor the existing system in Ukraine for examining claims that torture has been applied. Under the international obligations, in particular, accord-

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ing to Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, rules as to whether confessions are to be excluded from admissible evidence should be governed by the shifting of the burden of proof that a confession was given freely on to the prosecution. The mere fact that, according to international standards, any claim that torture was used must be officially investigated suggests that a person who has been subjected to torture, will not be able to prove their claim on their own, still less to prove them «beyond reasonable doubt». Yet the standards for evidence actually used by courts, do not take this fact into account.

This means that at present the onus of proving «beyond reasonable doubt» that a confession was made under duress is on the defendant. Such a shifting of the burden of proof that a confession was not voluntarily given results in the fact that a great number of confessions made under duress are not excluded from admissible evidence, and this, in turn, encourages further use of torture and other means of applying unlawful duress on defendants.

Furthermore, the problem with regard to determining the admissibility of a confession is exacerbated by the fact that this approach makes no distinction between proving that torture did actually take place, and proving the personal guilt of those responsible. Thus, the defendant, who tries to prove that his or her confession was obtained by using torture, can do this only after criminal prosecution of the specific perpetrators has been completed.

2.2. IMPUNITY OF THOSE WHO RESORT TO ILL-TREATMENT

The doctrine of positive obligation of the State to ensure effective investigation of claims by victims about the use of torture or other forms of ill-treatment has been significantly developed in the legislation of the Council of Europe, especially since the European Court of Human Rights judgments in cases *McCann and Others v. the United Kingdom*³⁴ (judgment of 27 September 1995) and *Assenov and Others v. Bulgaria*³⁵ (judgment of 28 October 1998).

The positive obligation of the State includes:

- 1) the criminalization of torture in wording, which corresponds to the definition of torture in international law, in particular Article 1 of the UN Convention against Torture and Inhuman or Degrading Treatment or Punishment;
- 2) the creation of a system to effectively investigate claims of the use of torture and ill-treatment.

2.3. CRIMINAL RESPONSIBILITY FOR ILL-TREATMENT

Criminal responsibility for actions, which have elements of torture in the meaning of Article 1 of the UN Convention against Torture, has been substantially developed in the last few years.

Until the new Criminal Code came into force on 1 September 2001, there was no recognition in legal terms of the crime of «torture». Actions, which fell under the definition of Article 1 of the UN Convention against Torture, in relevant cases, could be classified as criminally «exceeding one's power or authority» or «compelling somebody to testify». Even in the most serious cases of torture, the elements of torture were absorbed into a charge of aggravated «exceeding of power or authority», according to section 365 (part 2) (section 165 of the «former» CCU), specifically by such elements as «coercion, use of weapons, or actions, which are painful or degrading for the victim».

In the new Criminal Code, criminal liability for torture is provided in section 127, which defines the crime as follows:

«Torture, that is, the intentional inflicting of severe physical pain or physical or psychological suffering by means of beatings, torment or other coercive actions in order to force a victim or other person to commit actions against their will».

Although Ukraine had clearly taken this step in order to fulfil its obligations under the UN Convention against Torture, the formulation of this section did not fully comply with the tasks set out by the Convention.

The subject of the crime under Article 127 of CCU was any person. Therefore, by taking into account the rule *lex specialis*, this provision was not applied in the case of officials, in particular of law enforce-

³⁴ ECHR, *McCann and Others v. the United Kingdom*: Judgment of 27 September 1995

³⁵ ECHR, *Assenov and Others v. Bulgaria*: Judgment of 28 October 1998

ment officers who had used torture or other forms of ill-treatment. Therefore, this section failed to become a special tool intended to prevent the use of torture by agents of the State.

The term of punishment, – from 3 to 5 years deprivation of liberty, – provided by that section did not comply with international obligations either. Only if the crime was committed repeatedly or through the prior conspiracy of several people, was the possible punishment 5 to 10 years deprivation of liberty.

The practice of using criminal punishment against law enforcement officers, as before, was based on provisions, which established criminal liability for exceeding power and the authority vested in them (section 365 of CCU). This is confirmed by the Fifth Report of the Ukrainian Government to the UN Committee against Torture, which states that: «law enforcement officers who commit such actions shall face criminal prosecutions under sections, which establish liability for crimes committed in their official capacity» (section 365 'Exceeding of power or authority' and others)».

However, the above-mentioned section contains a classification of crime, which could cover a wide range of offences. The dilution of the term «torture» into a wider term «exceeding power» makes it possible to conceal the actual extent to which torture has spread and impedes effective control over implementation of the obligations under the UN Convention against Torture concerning the severity of punishment and use of amnesty. It also interferes with the effective use of provisions under the criminal law to accomplices of individuals, who use torture.

A number of actions, which are qualified by the UN Convention against Torture as torture or ill-treatment can fall under section 373 of UCC «compulsion to testify». Paragraph 2 mentions «use of coercion or humiliation of the person» as elements of this and provides 3 to 8 years deprivation of liberty as punishment.

Convictions of State law enforcement officers for using torture remain rare. Furthermore, punishments meted out by the court in the case of conviction do not correspond to the gravity of the crime. Convicted officers often receive conditional sentences. Nevertheless, there have been some quite severe sentences:

For example, two former police officers in the Kherson Region were sentenced to 7 years, and a third to 5.5 years, deprivation of liberty, along with confiscation of their personal property and prohibition from holding any positions in law enforcement bodies. They had been found guilty of using torture to a suspect in order to obtain his confession. As the author of the report on the case points out, «during the entire period of Ukraine's independence, this is the first case in the Kherson Region, when police officers have been sentenced to realistic terms of deprivation of liberty specifically for the use of torture».³⁶

In another case, the Chernihiv Regional Court sentenced Police Captain Valeriy Stashko to 14 years deprivation of liberty. His accomplice, Senior Sergeant Mykola Reshotko, was sentenced to 5 years deprivation of liberty with a 3-year probation period. The Supreme Court of Ukraine upheld the sentence. In his address to the court, Prosecutor Anatoliy Lavrinenko said, «Stashko inflicted open cerebral injury on Ivashov, fracture of the sublingual bone, closed neck injury, which resulted in the death of the victim».³⁷

Not only are convictions of law enforcement officers still rather rare, but so are even the bringing of charges against officers whose involvement in torture has been claimed by victims.

As far as one can deduce from press reports, it is only in isolated cases that charges have been laid.

For example, a charge was brought against Mykola Gurin, head of a criminal investigation unit at the Solomyansky District Police Station in Kyiv, who, in the early hours of 25 June 2003, was accused of torturing his former colleague suspected of murdering his wife. Earlier, under this case, the court had sanctioned the arrest of four top officers of the Solomyansky department – A. Gavrilenko, V. Otsalyuk, S. Deripapa, and Y. Martynyuk. All of them have been accusing of exceeding their authorities, and the investigation into the case is being carried out by the General Prosecutor's Office.³⁸

In another case, an investigation department of the Kyiv City Prosecutor's Office submitted to court a criminal case, where three officers were accused of beating a detainee in order to calm him down. They have been charged with exceeding their power and official authority, leading to serious consequences.³⁹

One more example: «three police officers have been charged with exceeding their power and official authority by torturing a suspect. The case has been submitted to a Kyiv court».⁴⁰

³⁶ Newspaper «Novy Den'» [«New Day»] (Kherson), 22 April 2004

³⁷ Newspaper «Vecherni Visti,» [«Evening News»] 22 June 2004

³⁸ Newspaper «Svoboda», [«Freedom»] No. 5, 10-16 February 2004

³⁹ Newspaper «Sevodnya» [«Today»] No.96, 29 April 2004

⁴⁰ Newspaper «Sevodnya», №100, 7 May 2004 p.

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According to information from the Fund for professional assistance to victims of torture, in 2004 charges were brought against the Head of the Criminal Investigation Department of the Vovchynetskiy district police department in Ivano-Frankivsk and an operations officer of the same unit for exceeding power, illegal imprisonment and a number of crimes committed against Oleksy Zakharkin.

It is not possible to carry out a detailed analysis of court practice with regard to convictions for using torture since the actions which include features of 'torture' as defined in the Convention against Torture are not singled out in court statistics.

Ukraine's Law No. 2322-IV of 12 January 2005 introduced amendments to Article 127 of the Criminal Code. The components of the crime, set out in part 1 of this Article were changed in the following way:

«Torture, that is, the intentional inflicting of severe physical pain or physical or psychological suffering by means of beatings, torment or other coercive actions in order to force a victim or other person to do something against their will, such as to obtain from him/her or another person information, testimony or a confession, to punish him/her for actions, which he/she has committed or is suspected of having committed, or to intimidate him/her or other persons...»

In addition, this section was supplemented by part 3, which defines a «law enforcement officer» as a special subject, and by part 4, which categorizes causing death as a result of the use of torture as an aggravated circumstance.

Part 3 provides punishment from 10 to 15 years of imprisonment, part 4 – from 12 to 15 years imprisonment or a life sentence.

These amendments leave certain discrepancies in the law.

Firstly, in the proposed version, the mark of 'torture' is a «violent act». This narrows the scope of that section compared to the definition of Article 1, which defines as torture «any act by which severe pain or suffering... is intentionally inflicted». Even though the narrowing of the definition of torture by the introduction of the element of «violent actions» may seem unimportant from the point of view of inflicting pain, it is very important with regard to suffering, which can be caused not only by violent action, but also by the creation of certain circumstances. These circumstances in some cases could be created by actions, which, in themselves, are not violent.

Secondly, the definition in Article 1 of the UN Convention against Torture is aimed only at representatives of the State. Yet the Law presents a definition of torture in part 1 of section 127, which covers a general subject, or perpetrator, of the crime. This creates a certain lack of logic which can be seen in the example of an indicator such as «obtaining a confession». Only a representative of the State needs a «confession» in the technical meaning, in which it is used by the Convention. If we applied the purpose of «obtaining a confession» to a general subject, this would widen the meaning of «confession» far beyond the boundaries of its usual meaning. The same to some extent holds true for the purpose «to punish for actions».

Despite these shortcomings, the amendments to section 127 of UCC constitute a significant step forward in implementing provisions of the UN Convention against Torture. The fact that torture applied by law enforcement officers is placed in a separate part of section 127, leads one to hope that in the future, we will be able to obtain statistical data as to the implementation of this provision.

3. INVESTIGATION OF TORTURE

Until a mechanism to ensure effective investigation into complaints about torture is created, the problem of how to prevent torture will not be solved. Ineffective investigations into claims of torture being applied by law enforcement officers still pose a problem in Ukraine's legal system. It creates the impression that law enforcement officers can torture with impunity, and significantly contributes to the fact that torture and ill-treatment are perceived by many such officers not as a crime, but as a routine element of their fight against crime.

Human rights organizations, which have joined forces within the framework of «Campaigning against Torture and Cruel Treatment in Ukraine», monitored claims of torture over a period of one and a half years (from July 2003 to December 2004). During this time, the partners tried to initiate investigations in over 25 cases. Although one can succeed in having a criminal investigation launched, it takes considerable effort and results in late investigations.

3.1. INITIATING AN INVESTIGATION

In accordance with case practice of the European Court of Human Rights, there is a legal obligation to conduct an investigation, if a Prosecutor's office receives trustworthy information from any source about possible ill-treatment of a detainee.⁴¹

In Ukraine, the only way to initiate a criminal investigation against law enforcement officers, who have used torture, is to address a complaint to a Prosecutor's office, the latter having sole authorization to investigate this crime (section 112 of Ukraine's Criminal Procedure Code (CPC)).

Although, according to section 97 of the CPC, «A Prosecutor, investigator, detective inquiry unit, or judge are obliged to accept claims and reports about crimes committed or being prepared, including cases, which do not fall within their jurisdiction», Offices of the Prosecutor have a lot of discretion on deciding whether to initiate an investigation. Although this wide discretion is not directly recognized by legislation or doctrine, it exists as a result of the unlimited margin in assessment, whether enough *grounds* are in place to begin a criminal investigation. Offices of the Prosecutor very cleverly use provisions of section 94 of CPC, which reads that «an investigation can be opened only in those occasions, when there is enough data suggesting the elements of a crime».

Moreover, in practice, such power of discretion is also determined by the insufficiently strong guarantees for complaints to the court, which would make it possible to immediately reverse unwarranted decisions by an Office of the Prosecutor. This subject will be discussed below.

The check which is carried out by the Prosecutor on receiving a complaint about torture is usually extremely superficial. Most often it is limited to questioning the law enforcement officers mentioned in the complaint. This questions ends with a written «explanation», in which the law enforcement officer in formulaic expressions denies the very possibility of the use of torture.

In most cases, these «explanations» are used to refuse to initiate a criminal investigation on the grounds that there is «insufficient data indicating the elements of a crime». Due to the fact that in the majority of cases no measures are taken by prosecutor's offices to obtain «sufficient data», the numerous refusals to launch criminal investigations demonstrate the general belief of the Prosecutor's office personnel that it is the victim, who is obliged to present sufficient data.

For the consideration of a complaint, the legislators have allocated three days, and if the claim needs examination, ten days; then a resolution must be made, whether to launch or to refuse to launch a criminal investigation. As a rule, these time limits are not kept, and a victim can be waiting for official notification about the decision reached for a month or longer.

For example, Ivan Nechiporuk's lawyer and relatives submitted a complaint to the office of the prosecutor alleging that Nechiporuk had been subjected to torture on 26 May 2004. A decision concerning the complaint was made only on 18 June 2004, 23 days after the complaints were submitted.

Andriy Yatsuta submitted a complaint about torture to the prosecutor's office on 26 May 2004, however a decision concerning the claim was made only on 27 September 2004.

Prosecutor's offices are also slow in providing copies of their resolutions to suspend a criminal investigation (or to refuse to open a criminal investigation). On virtually every occasion, the office of the Prosecutor fails to send a copy of the respective resolution, or limits itself to sending a letter, informing that the investigation has been suspended, or that the request to open a criminal investigation has been turned down.

For example, a resolution by the Kharkiv Regional Prosecutor's Office to refuse to initiate a criminal investigation concerning a complaint by K. Kucheruk was issued on 1 November 2004. Kucheruk's representative received a copy of the resolution at the beginning of January 2005, after making a written request. Before that, neither K. Kucheruk, nor her representative had been informed about the progress of the examination.

In the case of Ivan Nechiporuk, the decision to refuse to launch a criminal investigation concerning Nechiporuk's complaint was issued on 18 June 2004. He has still not been sent a copy of this resolution.

If one takes into consideration the high frequency and uniformity, with which prosecutor's offices procrastinate over providing notification of the results of their investigation, copies of resolutions and

⁴¹ See, for example, ECHR, *Labita v. Italy*: Judgment of 6 April 2000, § 131; ECHR, *Assenov and Others v. Bulgaria*: Judgment of 28 October 1998, § 102

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documents explaining the grounds for their decisions, it can be concluded that the use of these and other methods are deliberate ploys aimed at sabotaging the investigation into claims of torture.

Section 236-1 of CPC sets out the procedure for appealing a refusal to launch a criminal investigation in the courts. The judge should consider any appeal against such resolutions within 10 days from the moment it is filed in court. However, in practice, consideration of appeals can drag on for months.

For example, Gennady and Valery Vladimirov (from the city of Bakhchisarai) lodged an appeal against the refusal to launch a criminal investigation on 17 May 2004. The appeal was considered by the court only on 30 June 2004, i.e. more than a month after the appeal had been lodged.)

Yevhen Bocharov (from Kharkiv) appealed the refusal to initiate a criminal investigation on 14 July 2004. As of February 2005, more than 7 months later, the appeal had still not been considered.

On 13 April 2004, K. Kucheruk lodged an appeal against a decision of the Head of the Kharkiv Pre-Trial Detention Centre, No. 27. The appeal was only considered on 1 October 2004.

The very delay in launching an investigation in most cases deprives the investigation of any effectiveness, and, as a rule, leads to its lack of success.

The European Court of Human Rights in its case-law has established that Article 3 of the Convention includes an obligation on the part of state institutions to initiate investigations even if there is no formal complaint by a victim or members of his/her family, where there are other circumstances, which give grounds for suspecting the use of torture.⁴²

The European Committee for the Prevention of Torture has also recommended that in cases where people suspected of a crime, on their arrival in court, complain about ill-treatment from law enforcement officers, the judge is obliged to record the complaint, order an immediate medical examination and take all necessary measures in order to conduct a due investigation concerning the complaint. This approach must be followed regardless of whether or not that person has visible bodily injuries.⁴³

As practice demonstrates, judges, prosecutors, and investigators, to whom law enforcement bodies bring detainees, pay little attention to formal complaints by the detainees about the use of torture to them, let alone taking initiative in clarifying the circumstances behind their having received visible bodily injuries. In some cases, the results of medical examination, obtained after a detainee was brought to court and took part in court hearing show that the detainee already had visible bodily injuries at the point of his or her first court appearance.

According to Viktor Kopcha, «On 30 November 2003, I was brought to court, where it was to be decided, whether I would be placed in custody or released. The judge asked me only one question, 'What can you say in your defence?' I said that I was innocent, that I had an alibi, that I had not been allowed to see my lawyer. The judge ordered that I be taken out and announced, 'Give him seven more days.' She did not respond to my request to conduct an interrogation».

In addition, for those victims, who remain in the custody of a law enforcement agency, it is even more difficult to complain about the use of torture or ill-treatment, because of their vulnerable position. Section 97 of CPC reads that «if there are relevant grounds which suggest that there is a real threat to the life and health of a person, who has stated that a crime has been committed, one must take necessary measures to provide security of the applicant, as well as members of his/her family, if by means of threats or other illegal actions against them, somebody is attempting to influence the applicant». Although practically in all cases, when allegations about torture come from a person, who is held in the custody of a law enforcement agency, one could assume some related risks, the Kharkiv Human Rights Group are not aware of any case, when this power has ever been used by prosecutors or judges. Moreover, established practice, in which the «examination» of a claim starts with questioning the law enforcement officers, possibly involved in the use of torture and ill-treatment, heightens still further the risk to the victim.

Detainees also do not often make formal complaints to the judge about ill-treatment meted out to them because they are, as a rule, usually brought to the court by exactly those people who possibly the day before subjected them to bad treatment. These officers threaten the detainees with more torture if they make any kind of complaint. In view of the fact that legislation allows a judge to extend detention in police custody, detainees are well aware of the possibility that they will remain under the control of the same people whom they complained about after the court hearing is over.

If we take into account that a judge has no authority to launch a criminal investigation, no legal obligation⁴⁴ to order a medical forensic examination, as well as the absence of real ways of protecting a de-

⁴² See, for example: ECHR, *Denizci and Others v. Cyprus*: Judgment of 3 May 2001 § 359

⁴³ Fourteenth General Report of the European Committee for the Prevention of Torture, § 29

⁴⁴ The very fact that a judge has such authority could be doubtful.

tainee from the revenge of those against whom he or she complains – for example, by transferring him or her to other place of detention, – detainees consider expressing their complaints as a futile effort, which can only put them under threat of being subjected to even worse forms of ill-treatment.

One of the factors that has contributed to such a situation is the substantial reduction in the court's competence after amendments to CPC were introduced in the summer of 2001. According to those amendments, the right to launch a criminal investigation was removed from the court's jurisdiction.

This narrowing of a judge's jurisdiction was confirmed by a decision made by the Plenum of Ukraine's Supreme Court of 27 December 2002 (on reversing judgments by the Kyiv City Appeal Court of 15 October 2002, and that of 13 November 2002 on launching criminal investigations against President of Ukraine Leonid Kuchma).⁴⁵

This excessively inflexible approach by both the legislators and the Supreme Court to the problem in practice leads not to the impartiality of the court, but to indifference and excessive self-restrictions on the part of courts. In any case, as far as investigations into allegations of torture are concerned, such an approach shows itself to be especially flawed.

Such features of the legal system do not encourage courts and prosecutor's offices to take decisive measures, where there are indications of ill-treatment, but, on the contrary, in many cases, hamper not only any effective response to complaints, but also the very submission of such complaints by victims, especially those who are already held in custody.

3.2. INDEPENDENCE OF INVESTIGATION

According to section 112 of CPC, the investigation of cases concerning a crime in which law enforcement officers are implicated is in the exclusive jurisdiction of the Offices of the Prosecutor.

In some cases this section of CPC makes it possible to infringe standards of impartiality. For example, according to point 3 of Article 112, possible ill-treatment on the part of «servicemen of the Ukrainian Armed Forces» at the first stage will be investigated by a commander of the military unit. According to point 5 of the same Article, a complaint about ill-treatment by an officer of «a penal institution, pre-trial detention centre, corrective labour and treatment centre, and corrective labour settlement» will be considered by a head of the respective facility. Only if those officials launch a criminal investigation, does the prosecutor's office take over.

For example, Volodymyr Kucheruk was held in Kharkiv pre-trial detention centre (PTDC) No. 27 from 16 April 2002 to 17 July 2002. Although a forensic medical examination established that he was suffering from a worsening of his psychiatric disorder, he was held there for over one and a half months. On 8 July 2002, the PTDC personnel violently suppressed his inadequate behaviour, and, at the decision of the PTDC head, he was put in a disciplinary cell, where he was held handcuffed for a week. Kucheruk's mother submitted a complaint to the Kharkiv Regional Prosecutor's Office however the examination was carried out by the head of PTDC No. 27, who refused to initiate a criminal investigation. After this refusal was appealed, the same official conducted an additional inquiry – with the same result. Only after a second appeal, did the judge overturn the resolution by the Head of the PTDC to refuse to launch a criminal investigation and sent the case-file to the regional Prosecutor's office for an investigation to be organized. However, because the Prosecutor's office started its inquiry only in the fall of 2004, a major part of its conclusions was based upon materials of the inquiry made by the Head of the PTDC.

3.3. SLOWNESS OF INVESTIGATION

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

For example, an investigation into a claim by Viktor Yatsenko (Kharkiv) began in April of 1997 and is still in process.

Oleksy Afanasyev (Kharkiv) lodged his claim in April 2000. The investigation is still continuing.

An investigation into a claim by Yevhen Bocharov (Kharkiv) began in April of 2002, but was terminated again in May of 2004. Bocharov's complaint concerning the termination of the investigation, submitted to the court in July 2004, is yet to be considered.

⁴⁵ Journal «Yuridichny Visnik Ukrayiny», No. 1-2, 4-17 January 2003.

Investigation concerning Volodymyr Kucheruk's complaint is yet to begin. In December of 2004, a complaint about another refusal to open a criminal case was submitted.

3.4. ACCESS TO EVIDENCE

It is especially vital when investigating claims of torture to obtain timely and high-quality medical evidence. Doctors' records, reports of medical examinations and conclusions of medical forensic experts can serve as evidence.

However, within the legal system, the possibility of obtaining an independent expert opinion is extremely limited.

In the first half of the 1990s, trends in legislation led us to hope that an alternative (non-governmental) expert examination would gradually develop, thereby laying the groundwork for the creation of wider access to independent expert opinion of people involved in legal proceedings.

At the end of 1992, the Basis for Ukrainian legislation on healthcare was adopted.⁴⁶ Article 6 of the Basis stipulated the citizen's right «to have an independent medical examination conducted» in cases where he or she disagrees with the conclusion of the State medical examination, the imposition on him/her of measures of forcible treatment and in other instances». Article 73 specifically addressed this alternative medical examination: «In cases where a citizen disagrees with the conclusion of the state medical examination and in other instances prescribed by the law, at the demand of the citizen, an alternative medical (medical social, medical military, medical forensic, forensic psychiatric) examination or post mortem examination shall be conducted... Citizens shall themselves select an examination institution or experts...».

At the beginning of 1994, the Law of Ukraine «On forensic examination»⁴⁷, as well as the Law of Ukraine «On the introduction of amendments to Basis for Ukrainian legislation on healthcare»⁴⁸ were adopted. A citizen, disagreeing with the conclusions of experts who were assigned by an investigating authority or court, was limited to the option of *requesting* an investigating authority or court to order an additional or other examination, the latter bodies not being obliged to agree to assist..

By the Law of 23 December 1993⁴⁹, the Criminal Procedure Code of Ukraine was amended in such a way as to stipulate that a lawyer should be given «the right to collect information about facts, which could be used as evidence in a case, in particular... to obtain written conclusions by professionals on any issues requiring special expertise». However, the status of those conclusions, which were to be obtained at a lawyer's request as evidence acceptable in court, was and remains unclear. In any case, these conclusions cannot replace the conclusions by experts, appointed by an investigating authority or court, and, at best, can lead to the ordering of another examination.

Nonetheless, from 1992 to 2000 in Ukraine there were a large number of non-State medical, forensic and other experts, and many non-State expert bureaus were set up.

On 1 June 2000, Section 4 of the Law of Ukraine «On entrepreneurship»⁵⁰ was amended, as a result of which, part 2 of this section read: «activity connected with conducting forensic, medical forensic, forensic psychiatric examinations... can be carried out only by State enterprises and organizations».

Then finally, in 2004, the Law of Ukraine «On forensic examination» was amended so that several examinations, the conclusions of which are decisive in a criminal investigation, could be carried out only by «specialized state institutions».

According to the current text of Article 7 of the Law of Ukraine «On forensic examination», «forensic and expert activity connected with conducting forensic, medical forensic and forensic psychiatric examinations are carried out exclusively by State specialized institutions».

The same Article contains a list of agencies, under which these specialized institutions can operate. In particular, the «State specialized institutions» include:

- research institutions of forensic examination under the Ukrainian Ministry of Justice;
- research institutions of forensic examination, medical forensic and forensic psychiatric institutions under the Ukrainian Ministry of Healthcare;
- expert services of Ukraine's Ministry of Internal Affairs, the Ministry of Defence, the Security Service, and the State Border Service.

⁴⁶ Newsletter «Vidomosti Verkhovnoyi Rady Ukrainy», 1993, No. 4, Article 19

⁴⁷ Newsletter «Vidomosti Verkhovnoyi Rady Ukrainy», 1994, No. 28, Article 234.

⁴⁸ Ibid., section 236.

⁴⁹ Newspaper «Golos Ukrainy», 1994, No. 39.

⁵⁰ Newsletter «Oficialnyi visnyk Ukrainy» of 21 July 2000, No. 27, p.1, Article 1109.

Such an approach by the legislators aimed at maintaining control over the conducting of forensic examinations is hardly justifiable from the point of view of effective legal proceedings. According to an analysis carried out by the Supreme Court of Ukraine, «a great number of cases are not being considered for a long time because the examinations ordered by courts take months or even years». Such a situation shows that the number of experts and expert institutions is not sufficient.

However this approach is even more dangerous from another point of view. This turn in the legislation leads to a monopoly of «specialized State institutions» in the field of conducting expert examinations. This means not only that people involved in legal proceedings lose any possibility of seeking an independent expert opinion, but also seriously undermines the guarantees of independence of experts, who work in such «specialized institutions».

Firstly, the legislation does not set out any procedure for creating, reorganizing or closing such «specialized state institutions», nor for the criteria which govern such institutions.

Secondly, the legislation does not provide experts with safeguards adequate to protect them from unlawful pressure by their management. Guarantees of hiring and firing experts are the same as the general guarantees for hired employees, provided by Ukraine's labour legislation. Professionally sound experts, whose work could contradict «instructions» from their management, have insufficient guarantees that they will not be dismissed. In view of the monopoly of «specialized institutions», for a forensic expert, his or her dismissal from one such institution would virtually destroy any possibility of practicing as a forensic expert. Thus, the guarantees provided by the labour legislation are not sufficient to secure his or her independence.

Therefore, the management at such specialized institutions has enormous scope for influencing the work of an expert and, in this way, for undermining the impartiality of examinations conducted or conclusions drawn.

It must be noted that in order to obtain expert status, it is necessary to receive professional attestation. However, such attestation is only available for employees of specialized institutions. Hence, employment in such an institution becomes a prerequisite for having the general possibility to obtain expert status and to conduct expert examinations. The monopoly of «specialized institutions» allows their management to establish «special» staff recruitment at the stage of taking on specialists. As there is no independent agency responsible for staff recruitment and attestation of experts, considerations of loyalty of a given specialist could outweigh considerations about his or her professional skill during recruitment by management.

Moreover, a part of the «specialized institutions», as before, are within the system of the Ministry of Internal Affairs, the offices of which take the side of the prosecution in most criminal cases. This fact alone, from the point of view of impartiality, could raise doubts in experts' objectivity among participants in the legal proceedings.

In view of the nature of legal proceedings in Ukraine, and the lack of competition between expert examinations, the abovementioned flaws in the system of «specialized» expert institutions could lead and are leading to a fall in the quality of expert conclusions, loss of skills and scientific impartiality among experts, to manipulation of expert knowledge in order to fulfil objectives very far-removed from the task of objectively establishing the circumstances of a case.

Together with the vulnerable position of the victim of torture and ill-treatment, such a situation with expert examinations has a highly detrimental effect on the possibility of preventing torture and ill-treatment and of punishing its perpetrators.

3.5. PARTICIPATION OF VICTIMS IN THE INVESTIGATION OF TORTURE

The European Court of Human Rights believes that adequate participation of the victim or his / her close relatives in the investigation of the case is a basic guarantee of public control. For example, in the case *Anguelova v. Bulgaria*, the Court noted: «There must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests».⁵¹

⁵¹ ECHR, *Anguelova v. Bulgaria*: Judgment of 13 June 2002, § 140

Effective participation of victims of torture is seriously complicated by the fact that before the criminal investigation is formally initiated, they have no definite procedural status as far as the investigation is concerned given that the checks which are conducted before a decision whether to launch a criminal investigation take place «outside procedure». So, he or she cannot in any way influence the direction of investigation; at this stage, the rights of a victim of torture, in particular, the right to a lawyer are not available.

If we take into account the practice of delaying an inquiry, as well as the fact that prosecutor's offices have wide discretionary powers as regards the decision to launch a criminal investigation, this flaw in many instances proves to be fatal for the effectiveness of an investigation.

In addition to the decision to launch a criminal investigation, the law requires a separate action on the part of the investigating authority to recognize the plaintiff as victim. This provision is stressed in one resolution by the Plenum of the Supreme Court:

«In accordance with Part 2 of Article 49 of CPC, a person who has suffered moral, physical, or material damage from a crime acquires the right to participate in the process, as prescribed by the law, only after he/she is recognized as victim. The recognition of a person as victim in a case or refusal to recognize them as such must be procedurally recorded by a resolution issued by a detective inquiry unit, investigator, prosecutor, judge or a court decision».⁵²

The prevailing doctrine gives the criminal investigation units additional possibilities for manipulation in order to prevent a victim, his/her relatives or a lawyer from participating in the investigation. Participation of a lawyer in this case is of decisive importance, because in many cases at the time of investigation, a victim is held in custody, thereby he/she is physically restricted in his/her possibility to take part in the investigation.

Delay in recognizing a person as victim is a common phenomenon. This is confirmed by the fact that the Plenum of the Supreme Court has specifically noted in its resolution:

«In accordance with Part 2 of Article 232 of CPC, courts are obliged to respond to disclosed facts of unwarranted delays in recognizing a person as victim (when the harm resulted from a crime is evident), caused a detective inquiry unit or criminal investigation, separate decisions (resolutions)».⁵³

Another important issue concerning effective representation of a victim is worth mentioning. If a victim from torture is held in custody, then his/her legal representation is complicated by several formal hurdles.

According to CPC and the Law on Preliminary Detention (section 12), only the defending counsel, in the meaning that is attributed to this term in Article 44 of CPC, has the right of access to a detainee. A legal representative of the person, who has submitted a complaint about the use of torture to him/her, is not covered by this regulation. Consequently, if the victim from torture continues to be held in custody, he/she has no possibility of meeting with his/her legal representative, unless this legal representative and the defending counsel in the criminal investigation, where the victim is defendant, are one and the same person. In addition, the same provisions of the Law on Preliminary Detention stipulate that permission from «the person or body conducting the case» must be obtained in advance. Since, in the legal system, a «criminal investigation» begins at the moment when a formal decision to launch such an investigation is taken, a meeting between the victim, who is held in custody, with his/her legal representative is virtually impossible.

Close relatives can be representatives of victims (Article 52 of CPC). Procedurally, it is possible to 'replace' a person, who died in the course of investigation, with a close relative. In this connection, there could be complications with recognizing the person as victim, if the causal link between events in question and death is the subject of investigation. Relatives of a victim of torture, who died, possibly as a result of the torture, could end up in a vicious cycle: they would be unable to obtain the status of victim until it is established that the victim's death was the result of the actions which are the subject of the complaint; at the same time they would be unable to effectively participate in the investigation, which is intended to establish this fact.

The list of close relatives determined by the law is restricted (Article 32 of CPC). This list includes parents, a spouse, siblings, grandparents, and grandchildren.

3.6. ACCESS TO MATERIAL ON THE CASE

One of the most adverse consequences of the lack of legal representation at the stage before a criminal investigation is formally initiated is the complications this creates in gaining access to the material on the case. Here too there are a range of formal impediments.

⁵² Resolution No. 13 of 2 July 2004 of the Plenum of the Supreme Court of Ukraine «On practice of court use of the legislation, which provides rights of victims from crimes», point 2.

⁵³ *Ibid.*, point 5.

For example, on 8 January 2003, on the premises of the Leninsky District Police Station in Vinnytsa, Anatoly Komakha received severe bodily injuries to the head, which, according to the conclusion of a medical expert, constituted severe bodily injuries in terms of their danger to life. Komakha approached the Vinnytsa Regional Prosecutor's Office with an application to have a criminal investigation initiated into this matter. In order to protect his rights and interests during the investigation, he turned to a lawyer and made an agreement about receiving legal assistance.

Concerning this case, the Vinnytsa Regional Prosecutor's Office issued several resolutions to refuse to open a criminal case. When, after another refusal to open a criminal case, Komakha's representative asked the Prosecutor's office for access to the material which had formed the grounds for such a decision, she was denied it. An investigator of the Prosecutor's office explained this by saying that legislation did not allow for interested parties and their lawyers familiarizing themselves with the material of the inquiry.

The investigator's argument is not unfounded, since CPC does, indeed, lack a clear norm, which would provide for such a right. This right is enshrined in Article 59 of the Constitution of Ukraine and in the Ruling from 16 November 2000 by the Constitutional Court of Ukraine. This Ruling states that «by fixing the right of any individual to legal assistance, the constitutional norm 'Everyone is free to choose the defender of his or her rights' (Part 1 of Article 59 of the Constitution of Ukraine)», in its meaning is general and applies not only to a suspect, accused person or defendant, but also to other individuals, who are guaranteed the right to freely choose defending counsel in order to defend their rights and lawful interests... The general meaning of the provisions in Article 59 (1) of the Constitution of Ukraine is confirmed by provisions in Article 63 of the Constitution, which separately affirms the right of a suspect, accused person or defendant to defence» (Part 5).⁵⁴

However, it would be highly desirable to directly provide clear provisions in CPC in order to secure effective participation of a legal representative of the victim of torture or ill-treatment, especially, when such a victim continues to be held in custody. This is also required by the Basic Principles on the Role of Lawyers adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1990) which reads: «It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time». (Principle 21)⁵⁵.

3.7. ACCESS TO MEDICAL DOCUMENTS

At the present time it has become common for victims, having turned to a medical forensic expert institution and undergone medical forensic examination, to not be able to receive the relevant certificate. Very often, as well, it is impossible to obtain documents from medical institutions, where a victim was examined or treated. Medical institutions refuse to give such information referring to some instruction by prosecutor's offices, but it is impossible to find out more about the subject matter of this instruction.

For example, Andriy Yatsuta, detained on 24 May 2004 by police officers, on 27 May turned to the Kharkiv Bureau of Medical Forensic Examination where he underwent examination. He was then treated in two medical institutions in Kharkiv. In July 2004, Yatsuta turned to the Bureau of MFE, asking them to provide him with a copy of the medical forensic certificate, as well as to both medical institutions, asking them to give him his medical documents. His lawyer also submitted the same requests. Yatsuta's requests for the documents were turned down. In his response, the Deputy Head of the Kharkiv Bureau of Medical Forensic Examinations wrote the following:

«We cannot give you a copy of the medical forensic examination certificate because all examinations (or research certificates) are material of preliminary inquiry and, in compliance with the Order of the Ministry of Healthcare from 17 May 1995 (point 2.21.1), a medical forensic expert is not entitled to make public data of a medical nature, which he/she has become aware of in the course of fulfilling his/her official and professional duties. A copy of the medical forensic examination certificate can be obtained only by court and investigating authorities on a request in writing».

⁵⁴ Decision by the Constitutional Court of Ukraine No. 13-пн/2000 of 16 November 2000 (Case No. 1-17/2000) in the case concerning a constitutional claim by Mr. Gennadiy Soldatov as to the official interpretation of provisions in Article 59 of Ukraine's Constitution, section 44 of Ukraine's Code of Criminal Procedure, sections 268 and 271 of Ukraine's Code of Administrative Offences (case about the right of free choice of a defender).

⁵⁵ Basic Principles on the Role of Lawyers Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

Complaints about unlawful actions on the part of the expert institution and two medical institutions were submitted to court. At present, the complaint to one of the medical institution has been recalled, because the latter, albeit with a delay, provided the necessary documents.

This practice entirely contravenes legislation. Moreover, on a similar issue, a decision by the Constitutional Court of Ukraine was made in the case of Ustimenko,⁵⁶ according to which «the constitutional human and civil rights to information, its free access ... in the amount needed for every person to exercise his/her rights, freedoms and lawful interests are fixed and guaranteed by the current legislation»; «medical information, i.e. information about a person's health, his/her medical history... is information with restricted access. A doctor is obliged, at the patient's request ... to give (him/her) such information in full and accessible form».

The response by the deputy head also vividly illustrates how distorted the perceptions of different professional groups involved in criminal proceeding are over what constitutes investigation confidentiality. It is worthy of note that the Deputy Head of the Bureau refers to investigation confidentiality, even though in that case there was no criminal investigation to which the medical documents pertained, and the victim wanted them for the specific purpose of initiating such an investigation.

4. RECOMMENDATIONS

1. To clearly define the scope of the crime «torture» in Chapter XVIII «Official crimes» of the Criminal Code of Ukraine, and to agree the elements of this scope of the crime with the conceptual apparatus of the General Provisions of the Criminal Code;

2. To introduce statistics in courts and law enforcement agencies concerning crimes, which contain elements of «torture» in the meaning of Article 1 of the UN Convention against Torture;

3. To create legislative provisions, which make it impossible to apply amnesty and parole for people who have committed actions, which have elements of «torture» in the meaning of Article 1 of the UN Convention against Torture;

4. To create effective mechanisms of public control over investigations into complaints about torture and ill-treatment, which take place in law enforcement agencies and other closed institutions;

5. To review the legislative framework of forensic examination in order to provide the involvement of non-state experts and expert bureaux;

6. To exclude from legislation those provisions which make it impossible or complicated for victims and their legal representatives to obtain documents containing medical information concerning victims, including conclusions by medical experts, regardless of the title and nature of those conclusions;

7. To review the provisions of evidence law, which are present in the Criminal Procedure Code of Ukraine and court practice in order to 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, as that of conclusions made by experts assigned by an investigator or court;

8. To amend legislation in order to provide legal aid for people on low incomes, who seek to have criminal investigations and other legal proceedings concerning alleged torture and ill-treatment initiated;

9. To introduce provisions into the legislation stipulating that it is inadmissible to use as evidence any testimony from an accused (suspected) person, obtained at pre-trial stages of a criminal investigation without the assistance by lawyer. Before these amendments are introduced, it would be desirable, if the Supreme Court develop regulations concerning admissibility of confessions and procedures for examining whether they were given voluntarily. Such regulations should provide for the following:

– when there is a claim by a defendant concerning the involuntary nature of his/her confession made during a pre-trial investigation, it should be excluded from the evidence, unless a prosecutor proves the opposite beyond reasonable doubt;

– when determining whether a confession was voluntary, the court should take into account all circumstances, which accompanied the obtaining of the confession: the conditions and period of being held in custody by a law enforcement agency, access to a lawyer, possibility to communicate with outside world, etc.;

⁵⁶ Decision by the Constitutional Court of Ukraine in the case of the official interpretation of sections 3, 23, 31, 47, 48 of the Law of Ukraine «On Information», and section 12 of the Law of Ukraine «On the offices of the prosecutor» (case of K.G. Ustimenko).

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- the fact of bodily injuries should always entail the obligation on the part of a prosecutor to prove beyond reasonable doubt that no official was involved in inflicting these bodily injuries, or that the obtained confession was not connected with events, which resulted in the bodily injuries;
- absence of medical evidence concerning the use of torture or other forms of ill-treatment cannot as such exclude the trustworthiness of the claim about such treatment;
- when assessing why medical evidence is absent, the court should take into account the possibility for a defendant to approach a doctor or expert of his/her own choosing in timely manner, his/her access to a lawyer, the possibility to communicate with outside world, etc.;
- in cases, when a defendant earlier did not claim about extortion of her or his confession with the use of any form of ill-treatment, a prosecutor should prove that the defendant had a real opportunity to claim it shortly after the respective events, taking into account, among other things, access to a lawyer, period of detention without court control, grounds for delay in his/her bringing to a judge after arrest, etc.;
- assessing the trustworthiness of defendant's claim about the use of any form of ill-treatment meted out to him or her, the court should assess the due diligence of the investigation into his/her claim, if such an investigation was conducted, in particular, the time of ordering expert examinations and conducting other investigations in order to determine whether the defendant received sufficient and practical possibilities to make the necessary claims and provide necessary evidence;
- to give the necessary instructions to prosecutors and judges to take measures for providing protection to individuals who claim that they have been subjected to torture. In particular, if this person is held in custody, to provide for his/her transfer to another place of detention;
- to exclude from the legislation the opportunity for the judge to «extend detention» of suspects held in police custody, or, at least, to 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;
- to introduce into legislation an enforceable right of access to an independent doctor and independent expert of the detainee's own choosing, especially for persons, who are held in custody, and to create appropriate procedure;
- to review provisions of current legislation in order to provide the right to legal representation to people who submit claims about the use of torture, regardless of whether or not a criminal investigation is launched;
- to give clear instructions to prosecutors and judges concerning immediate consideration of claims and complaints related to investigations into torture.

IV. THE RIGHT TO LIBERTY AND SECURITY⁵⁷

1. GENERAL COMMENTS

Ukraine is a signatory to many international treaties, which set down standards for protecting the right to liberty and to security of person, in particular, the International Covenant on Civil and Political Rights and the European Convention on Human Rights and Fundamental Freedoms of 1950 (hereafter, the European Convention).

Certain steps have been taken in Ukraine to meet the obligations of these international agreements. The most significant influence to standards protecting these rights was the reform of June 2001 ('the small judicial reform')

The main features of this reform relating to protection of the right to liberty were as follows.

On 28 June 2001, the provisions of Article 29 of Ukraine's Constitution and Article 5 of the European Convention came into force in full. Reservations, which had been in force until then and which retained the old procedure for detention and choice of preventative measures, ceased to be valid. To accommodate this, amendments were introduced to the Criminal Procedure Code of Ukraine (CPC) by laws from 21 June 2001 and 12 July 2001.

In particular, a person now had to be brought before a judge as soon as he or she was detained. As a consequence of this, one of the most important guarantees of procedure was introduced into legislation – the personal participation of the detainee in the legal proceedings, since previously the appearance of a detainee before the Prosecutor had been at the unlimited discretion of the latter, unless the detained person had not attained the age of majority

Certain principles of court procedure were created in legislation for issues pertaining to remand in custody or release from custody (Articles 165 -2, 165-3 of the CPC).

The norm which had provided for detaining a person in custody on the basis of the gravity of the crime which the person was accused of was removed from the Criminal Procedure Code.

The law set out limitations on the discretion of the judge in questions relating to remand in custody: the judge was obliged to release a person accused of a crime, the penalty for which was less than 3 years deprivation of liberty.

However, the reform in the area of detention, remand in custody (pre-trial detention) and extension of the period of remand in custody provided less effective than had been anticipated, and did not achieve the aim for which they were implemented, that being to reduce the number of suspects (accused) held in custody.

The report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereafter: ECPT) on the results of a visit in 2002 (§ 12) states that contrary to information given in the previous response of the Ukrainian Government, the Committee had found that institutions of the Ministry of Internal Affairs (MIA) were overcrowded⁵⁸.

According to statistics, in 2002 courts of general jurisdiction received 66,176 applications from pre-trial investigation bodies for remand in custody, 91.7% (60,708 applications) of which were satisfied. The investigation bodies asked for extensions to the time period for remand in custody in 16,199 cases, and in 97.8% of them (15,851 cases), the periods were extended. Garrison military courts considered 285 applications to sanction remand in custody, of which they satisfied 71.9% (205 applications).⁵⁹

⁵⁷ Prepared by lawyer Arkadiy Buschenko, expert of the Kharkiv Human Rights Protection Group on criminal procedure and the European Convention on Human Rights.

⁵⁸ The Report of the ECPT can be found at: www.cpt.coe.int

⁵⁹ Analysis of the work of courts with general jurisdiction in 2002, according to court statistics, prepared by the Department of Court Practice Generalization and Analytical Work on the Issues of Implementing legislation at the Supreme Court of Ukraine // www.scourt.gov.ua

In 2003, of 62,100 applications to sanction remand in custody, 89.7% (55,600 applications) were satisfied. Of the total number of applications to extend terms for remand in custody (16,200) 97.3% (15,800) were satisfied.⁶⁰

It is interesting to note that in 2002, 61,013 people were sentenced to deprivation of liberty.⁶¹ Thus, the number of people who were deprived of their liberty without guilt having yet been established exceeded the number of those actually convicted and sentenced to periods of deprivation.

It should be noted that in 2003, out of 55,600 sanctions for remand in custody, around 5.6% (3,100) were appealed. Of the 2,900 of these considered, over 20% (608 appeals) were satisfied.⁶²

As this information shows, courts, when deciding whether a person should be remanded in custody or released pending trial, are in the vast majority of cases inclined to decide in favour of custody.

In this connection, it is important to analyze in detail the amendments to legislation and corresponding changes in administrative and court practice. This will enable us to assess the extent to which the amendments have influenced practice and to what degree this practice is in keeping with the standards established by international institutions (for example, the UN Commission on Human Rights, the UN Committee against Torture, the European Committee for the Prevention of Torture) both in their general comments and in their recommendations specifically addressed at the Government of Ukraine. The following analysis will deal mainly with the right to liberty in the context of criminal legal proceedings.

2. LEGISLATIVE REGULATION OF DETENTION AND PRACTICE

2.1. DETENTION WITHOUT A WARRANT IN CONNECTION WITH A CRIMINAL PROCESS

The institution of detention without a court warrant on suspicion of having committed an offence («criminal-procedural detention») remains insufficiently developed.

The general legal basis for such detention is set out in Article 29 of the Constitution of Ukraine⁶³ and Article 5 of the European Convention.

Article 29 of the Constitution provides for a compulsory court warrant for any deprivation of liberty, foreseeing detention without warrant as an exception from a general rule. Part 3 of Article 29 of the Constitution provides the necessary condition, under which detention without warrant can be applied: «*In the event of an urgent necessity to prevent or stop a crime*».

The same provision establishes a time limit for police detention without a court warrant: «The detained person shall be released immediately, if he or she has not been provided, within seventy-two hours from the moment of detention, with a substantiated court decision in regard to the holding in custody».

While Article 29 of the Constitution does not directly stipulate the requirement to ensure the appearance of detainees in court, Paragraph 3 of Article 5 of the European Convention on Human Rights states that a detainee must be immediately brought before «the competent legal authority».

Paragraph 1(c) of Article 5 of the European Convention also stipulates one of the key requirements for the lawfulness of detention without a court order, namely reasonable grounds for suspicion.

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

The reason for this is that the legislators have failed to incorporate into current laws the principle of protecting the right to freedom, imbedded in Article 29 of the Constitution and in Article 5 of the European Convention. As a result of this, the long-entrenched practice of law enforcement officers, who consider that considerable powers to enforce detention are an integral part of their activity, remains intact.

In legislation the institution of detention without a court warrant is formed by several laws.

⁶⁰ Analysis of the work of courts with general jurisdiction in 2003, according to court statistics, prepared by the Department of Court Practice Generalization and Analytical Work on the Issues of Implementing legislation at the Supreme Court of Ukraine // www.scourt.gov.ua

⁶¹ Statistics of convictions and imposition of criminal punishment were prepared by the Department of Court Practice Generalization and Analytical Work on the Issues of Implementing legislation at the Supreme Court of Ukraine // www.scourt.gov.ua

⁶² Unfortunately, from the court statistics, it is impossible to find out which specific rulings were rejected, those sanctioning remand in custody or those opting for release pending trial.

⁶³ This provision of the Constitution came into force on 28 June 2001

The law «On the Police», in Article 11 stipulates:

The police, in order to fulfil the duties which have been vested in them, are given the right:

...

5) to detain and hold in specially designated premises:

...

people suspected of having committed a crime, people accused of a crime who are attempting to abscond from the (detective) inquiry unit, the criminal (pre-trial) investigation department⁶⁴ or the court, people convicted who are attempting to avoid punishment – for periods and according to procedure established by the law

The provision in itself contains no rules as such and in its substance refers to ‘procedure established by the law». This flaw in the law «On the Police» affects administrative practice, as the provision which an officer of the police is expected to adhere to is, even after considerable perusal, difficult to define.

In the area of a criminal investigation, the most detailed – effectively the only – legal provision formulating detention without court order is Article 106 of the Ukrainian Criminal Procedure Code (CPC). Parts 1 and 2 of this article contain a comprehensive list of situations in which a state representative is given authority to detain a suspect.

A body of inquiry unit shall be entitled to detain a person suspected of having committed a crime for which deprivation of liberty can be imposed as punishment subject to the existence of one of the following grounds:

- 1) if the person was discovered committing the crime or immediately after committing one;
- 2) if eyewitnesses, including the victims of the crime, directly identify the given person as having committed the crime;
- 3) if there are clear traces of the crime on the suspect or on the clothing which he or she is wearing or which is kept at his home.

If there are other data which constitute grounds for suspecting the person of committing an offence, he may be detained only if he attempts to escape, or if he has no permanent place of residence, or if the identity of the suspect has not been established.

In a strict interpretation of these provisions, the situations stipulated in part 1 of section 106 can be considered as situations of «*urgent necessity to prevent a crime or stop it*».

However, these provisions are vaguely formulated and allow a myriad of arbitrary interpretations. For example, the criterion «the person was discovered committing the crime» fails to give a clear answer to the question: who should discover a person committing the crime? Hence, a police officer or investigator can rely on this provision, when some other person discovered a suspect at the scene of the crime. Similar comments could be given as to the formulation of other grounds for detention, specified in part 1 of Article 106 of CPC.

In detention reports, the points of this provision are often simply quoted. In fact, these restrictions in such formulation and with the interpretation which they have taken on in practice, have lost any restraining power, and detentions are carried out on the basis of any information held by a detective inquiry unit or criminal investigation department, regardless of whether or not the person taking the decision as to detention is in the situation of an «urgent necessity to prevent a crime or stop it».

Thus, the restrictions on detention without a court order, as set out in part 3 of Article 29 of the Constitution, have effectively been ignored by criminal procedure legislation and the practice of detaining without an order has remained unchanged.

Moreover, this provision has, to a large extent, lost any meaning as a norm regulating the lawfulness of the actual detention, and has shifted its application to the extension of custodial detention, since the legislation lacks a clearly defined moment, from which the detention of a person is to be counted.

In accordance with established practice, «criminal-procedural detention» begins at the moment of compiling a detention protocol. However the definition of this moment is entirely at the discretion of the official leading the investigation. Therefore, in practice, the term of detention is not counted from the moment when the person was in fact deprived of his or her liberty, but from the moment when the official who was responsible for the detention completed all necessary formalities.

There is a provision in legislation which makes it clear that the initial moment of detention is in fact the moment of actual apprehension. This is section 44 of PCP, which reads: «a defending lawyer shall be allowed to participate in the case... from the moment when the detention protocol is given to the suspect...

⁶⁴ There are two separate departments in Ukraine: the (detective) inquiry unit [дiзнання] concentrates on whether or not a crime has been committed and who is responsible; the (pre-trial) investigation department [слiдство] is involved later, once there is an actual suspect, or person charged, in gathering evidence, etc, to gain a prosecution (*translator's note*.)

but no later than twenty four hours from the *moment of detention*». Thus, the law does not link the beginning of detention with the moment when the protocol for such detention is compiled.

However, the police pay little attention to this provision and law enforcement bodies retain a practice, whereby between the actual moment of detention of a suspect and the preparation of the protocol for detention a certain amount of time elapses, ranging from several hours to – on occasion – several days. This has even had an impact on the organisational work of regional departments of the police which have rooms for ‘people brought in’, which are intended to hold in custody people brought in to the regional department, but «not yet detained».

This was noted by the European Committee for the Prevention of Torture in Article 15 of their Report on their visit to Ukraine in 1998: «*During the first 24 hours, the bodies of the inquiry (diznania) i.e. officers of the criminal Militia, must undertake urgent operational and investigatory duties concerning the case, carry out an initial questioning of the apprehended person and establish a protocol of detention ...*»⁶⁵

This situation is of great importance in assessing how well guarantees of the rights of detainees are implemented, guarantees which theoretically are provided by the legislation, because even formally these guarantees come into force only after several hours, and sometimes several days after a person has come under the control of a law enforcement agency.

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

A number of examples from the practice of the *Fund for the Professional Support to Victims of Torture and Inhuman Treatment* confirm that detention in police custody without the preparation of a protocol of detention is practiced:

Ivan N. (from Khmelnytsky) was detained by law enforcement officers on 20 May 2004 near his home and was held in a district police station without a formal record of detention until May 21, when a protocol of detention on suspicion of having committed an administrative offence was compiled.

Yevgeny B. (from Kharkiv) was detained by officers of a crime detection unit in the morning of 11 April 2002. Only in the evening, in the district police station was a protocol of detention on suspicion of committing an administrative offence prepared. During the whole day, B. was held by officers of the investigative operations unit.

Viktor K. (from Kriviy Rig) was detained at 6 in the morning of 25 November, 2003 by officers of the department for fighting organised crime. He was held in detention on department premises. Only in the evening of 27 November was a protocol of his detention on suspicion of having committed a crime compiled.

Mikhailo K (from Chernihiv) was detained around 6 p.m. on 14 August 2001 and taken to one of the regional police stations. He was released late that evening. No protocol of detention was prepared.

Oleksy Z (from Kalush, Ivano-Frankivsk region) was detained at around 4 p.m. on 17 May 2003 and taken to a regional police station. It was not until 10 in the evening that a protocol of administrative detention was issued.

Courts also often encounter the situation where, during a court hearing, it becomes clear that the individual was detained considerably earlier than is recorded on the protocol of detention.

One reason for the use of such ‘shadow’ detention is that there are virtually no independent criteria in legislation for defining legal detention. In an order of the Ministry of Internal Affairs, we read:

Within 10 days from the day when a breach of the law is established, to carry out an internal investigation into each instance:

...

where individuals were released from temporary cells because suspicions were not confirmed or if the period of detention has expired;

...

⁶⁵ Report to the Ukrainian Government on the visit to Ukraine carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 8 to 24 February 1998.

[in the case] of an acquittal or suspension of a criminal investigation concerning individuals, who were detained in custody.⁶⁶

Thus, this order identifies as a breach of the law *any* detention, which does not later become remand in custody. This can lead to two equally fatal consequences as far as law enforcement activity is concerned:

On the one hand a police officer may unjustifiably refrain from detaining a suspect if there seems the smallest chance that the suspicion which initially warranted the detention could prove later to be unfounded;

On the other hand – with this being more likely – a police officer will resort to any means, including those which are illegal, to ensure that the detention does lead to remand in custody.

It is hardly surprising that, faced with such a choice, police officers resort to «informal» detention, in order to avoid being held liable for a detention which later proved to be unwarranted.

If we consider the regulatory meaning of Article 106 of the Criminal Procedure Code, which it has taken on in practice, it transpires that legislation contains virtually no norm which sets out conditions for lawful detention without a court order.

One can thus draw the conclusion that Ukrainian legislation lacks a provision which, on the one hand, clearly defines the conditions for lawful «actual» detention, while on the other hand, regulates the legal relations which arise during the period between «actual» detention and the formal presentation of a protocol of detention.

In 2004 the question was raised several times as to whether to introduce for the second reading the Draft of the new Criminal Procedure Code of Ukraine.

The regulations proposed in the Draft Code do not, however, resolve the problems present in current legislation.

For example, Part 2 of Article 118 of the Draft broadens the grounds for detention without a court warrant, using, odd as this may seem, the formulation from Article 29 of the Constitution. In point (1) of this Article, the Draft allows for detention without court warrant in cases of «urgent necessity to prevent a crime or stop it». Although this repeats the provision of the Constitution, the authors of the Draft have, however, entirely distorted the meaning of this constitutional restriction. Whereas in the Constitution this is a norm limiting the possibility of detention without court order, the authors of the Draft have presented it as yet another («supplementary», «together with other cases») instance where the State is permitted to deprive a person of their liberty without prior consent of the court. According to the logic of the Constitution, *any* provision of the law which allows for detention without a court order should be first checked from the point of view of whether it is constitutional, that is, whether the said law does not give the State greater powers than allowed for by Article 29 of the Constitution.

Similar comments could be made concerning Part 2 (5) of Article 118 of the Draft. Here the possibility is allowed for of detention without court order «in order to bring a person to a crime detection unit, a pre-trial investigation unit or to the court on the basis of well-founded suspicion that the person has committed a crime or actions which can be dangerous to the public». This provision of the Draft is somewhat reminiscent of the formulation of Paragraph 1(c) of Article 5 of the European Convention on Human Rights. However, Article 5 § 1(c) of the European Convention, in the first place, stipulates that the person be brought before a «competent legal authority», while Part 2 (5) of Article 118 of the Draft demands that a person be brought not to a «judicial body», but only to some kind of «place for carrying out» detective inquiry work, pre-trial investigation or the court. These are fundamentally different demands. Moreover, any detention on suspicion of having committed a crime, not only detention in accordance with Part 2 (5) of Article 118 of the Draft can be carried out only for the purpose of bringing a person before the court.

2.2. BRINGING THE PERSON DETAINED BEFORE A JUDGE

The Criminal Procedure Code (CPC) provides for the mandatory bringing before a judge of a person who could be detained for more than 72 hours. In accordance with Article 106 of CPC:

Within 72 hours of detention, the detective inquiry unit shall:

⁶⁶ Joint Order by Ukraine's Ministry of Internal Affairs and State Penal Department No. 300/73 of 23 April 2001 «On measures to secure legality during the detention of persons suspected of having committed a crime, decision on preventive measures in the form of remand in custody of such a person and adherence to legally stipulated time limits for detention and detention in custody during pre-trial investigation», point 2.5.

1) release the person detained if the suspicion that the person committed a crime is not confirmed, if the period established by law for detention has expired, or if the detention was carried out with infringements to parts 1 and 2 of this article:

2) release the person detained and choose another preventive measure in regard to this person, but not involving detention in custody;

3) bring the person detained before a judge with a request to grant an order to remand the individual in custody.

Given that under Article 29 of the Constitution, a detained person must be released if there is no court order within 72 hours, it is clear that the person must be brought before a court leaving reasonable time for the court hearing and deliberation within this maximum period. In this respect, the formulation of section 106 of CPC could lead to a violation of this constitutional requirement, because this section considers the moment of *bringing somebody before a judge* as being the end of this period and not the moment of providing the detainee with a motivated court decision.

In addition, due to the fact, that the period of detention is calculated from the moment of compiling a protocol of detention (see above), a suspect can, in fact, be held in police detention without a court order for a period which exceeds that allowed for in the Constitution by several hours or even days.

For example, Victor K. (from Kryvy Rig) was detained at 6 a.m. on the morning of 25 November 2003 and brought before a judge only on 30 November 2003, since the protocol of detention had been compiled only on 27 November.

Law enforcement officers consider 72 hours to be the period during which they have entirely unlimited authority to hold a person in custody. Judges, before whom a detained person is brought, do not demand that the law enforcement officers provide proof that the person could not have been brought before them within a shorter period. The Kharkiv Human Rights Protection Group does not know of a single occasion when a detainee was brought to a judge on the day of or on the day after his or her detention.

In order to extend the period of detention, the Police combine a case of detention on suspicion of being guilty of an administrative offence (see section 2.5.) with detention on suspicion of having committed a crime. In such cases, the suspect is held for up to 3 days in accordance with Article 264 of the Code of Administrative Offences, and when this period has expired, in accordance with Article 115 of the CPC. As illustration of this, we can cite the following examples from our practice:

Ivan N. (from Khmelnytsky) was detained by police officers on 20 May 2004, and brought before the judge only on 26 May 2004. From the moment of detention to 21 May, he was held in detention without any protocol. From 21 to 23 May – on the basis of a protocol referring to an administrative offence. Detention on suspicion of having committed a crime was formalized only on 23 May 2004.

Oleksy Z. (from Kalush, Ivano-Frankivsk Region) was held in detention without being brought before a judge for six and a half days. On 17 May 2003, he was detained under procedure for administrative offences and taken to a district police unit. Then on May 20, a protocol of detention on suspicion of committing a crime was compiled. In total, he was in the custody of the police without court control up to the morning of May 24.

This practice is only possible due to the insufficient incorporation into special legislation of the demands of Article 29 of the Constitution, which provides for deprivation of liberty on the basis of a court warrant, or – in exceptional cases – with a court order received within 72 hours from the moment of detention, regardless of legal grounds used to justify this deprivation of liberty. Administrative practice concerning detention should be based on the requirements of Article 5 § 1(c) and 3 of the European Convention on Human Rights which do not differentiate between suspicion of having committed an administrative offence and suspicion of having committed a crime.

Often in order to extend detention in custody, the police use a method, whereby law enforcement officers if a court has turned down their request for a detention order and has released a detainee, in the court building itself or on the way out, detain the suspect on a suspicion «held in reserve».

Such a method is possible only due to the excessively broad interpretation, which the terms in Article 106 of CPC have taken on in the practice of law enforcement officers and judicial practice (see section 2.1. Detention without a warrant in connection with a criminal process)

The provisions of Part 4 of Article 165-2 of CPC give grounds for serious concern:

If the application is for a warrant to take into custody a person at liberty, the judge is authorized to sanction the detention of the suspect or accused and have him or her brought before the court. Detention in this case cannot last longer than seventy two hours, or when a person is located outside the court's jurisdiction, – *no longer than forty eight hours from the moment of bringing the detainee to this place.*

Since no limitations are imposed on the period for bringing the person to the necessary «populated area», the time spent in police detention without court control could theoretically last any amount of time.

On 14 October 2003 in Simferopol, Mr N. was detained on the basis of a court order, issued by the Pechersky regional court in Kyiv in accordance with Part 4 of Article 165-2 of CPC. He was detained in the building of the Central District Court of Simferopol where he had gone to take part in a detention hearing on the application of the Prosecutor's office of the Crimea. After his detention, Mr N. was brought before a judge of the Pechersky regional court in Kyiv only on 7 November 2003, that is, 24 days from the moment of detention. Before his appearance before the judge, he was held in a temporary detention facility in Simferopol.

2.3. EXTENSION BY A COURT OF DETENTION IN POLICE CUSTODY

Part 8 of Article 165-2 of the CPC gives a judge the authority to postpone detention hearings for up to 10 days, and – at the request of the person detained – up to 15 days, if the judge considers that «to decide on the choice of preventive measures, it is necessary to additionally study information about the detainee or clear up other circumstances which may have significance in taking a decision on this question»

A number of researchers and practicing lawyers have suggested that «this legal provision presents ... a guarantee from groundless detention»⁶⁷. However, this idea can scarcely be justified theoretically, since such an approach makes it possible for a law enforcement agency to detain a person without sufficient grounds. A stronger guarantee from groundless detention would be a clearly established obligation of the court to release a detainee, if the prosecution have failed to present sufficient reasons for his/her continued detention.

Furthermore, in practice, having detention extended can increase the risk for a detainee, because in such a case he/she remains in police detention and is not transferred to a pre-trial detention centre. By law, a court decision to extend police detention is not a basis for placing a detainee in a pre-trial detention centre, because according to section 3 of the Law on Pre-trial Detention «the basis for pre-trial detention is a motivated court decision *to remand a person in custody*, made in accordance with both the Criminal Code and the Code of Criminal Procedure of Ukraine».

Quite often the prosecution asks to extend the period of temporary detention specifically to avoid a detainee being transferred to a pre-trial detention centre, because this could complicate «the success of the investigation» and «effective work with the suspect».

As a rule, a detention hearing resulting in a decision to extend the detention period is conducted in a very superficial manner.

Viktor K., who was detained in Kryvy Rig, described his detention hearing as follows:

«I was brought to court, where it was to be decided, whether I would be remanded in custody or released. The judge asked me only one question, 'What can you say in your defence?' I said that I was innocent, that I had an alibi, that I had not been allowed to see my lawyer. The judge ordered that I be taken out and announced, 'Give him seven more days.' She did not respond to my request to hold an interrogation».

According to the conclusions of research, «the absolute majority of case files, which contain court decisions on choosing remand in custody as preventive measure after the expiry of a 10-day period of detention, do not contain any new documents obtained during the extended period, nor are there any references to them in the court decisions».⁶⁸

According to an analytical summary of court practice undertaken by the Zaporizhye Regional Appeal Court: «One can identify a shortcoming in the work of courts in the fact that courts, while making decisions on extending detention, fail to record in their decisions, which particular circumstances need to be clarified and which specific actions are to be made in connection with an additional clarification of these circumstances, and sometimes they use the right to extend detention not in order to determine whether it is expedient to keep the person in custody, but rather to 'help' investigators to gather necessary evidence in the case, this being inadmissible».⁶⁹

⁶⁷ Report on the results of the research conducted at the Kyivskiy District Court in Kharkiv in the framework of a pilot research project «Police arrest and pre-trial detention in Ukraine» (chief researcher – Professor V.S. Zelenetsky, Doctor of Law, Corresponding Member of Ukraine's Academy of Legal Sciences).

⁶⁸ Ibid.

⁶⁹ Analytical summary of the court practice of detention hearings in the Melitopol City-District Court, Priazovskiy, Akymovskiy, and Veselovskiy District Courts. (The summary was made by Judges G.I. Aleynikov and M.I. Galyanchuk of the Zaporizhye Appeal Court).

The conclusions of this study confirm yet again, that extension of detention is used not to ensure a more considered judge's decision as to whether to release a person pending trial or to remand them in custody, but rather to prolong the time he or she is held in detention by law enforcement officers.

Such a state of affairs leads to additional risk of the use of torture and ill-treatment not only because, during the extended period of detention, a suspect (accused) could again be subjected to torture, but also because prolonged detention precludes timely reporting about ill-treatment and complicates subsequent investigation into the relevant complaints.

Unfortunately, the draft of the new Criminal Procedure Code of Ukraine retains a similar provision in part 3 of Article 148.

2.4. ARREST ON SUSPICION OF HAVING COMMITTED AN ADMINISTRATIVE OFFENCE

There is still much uncertainty as to the basic principles of detention in connection with investigation into administrative offences.

According to Part 3 of Article 29 of the Constitution, detention without a court warrant is permissible only in connection with a criminal process. This is clearly deduced from the following provision:

«In the event of an urgent necessity to prevent or stop a crime, bodies authorised by law may hold a person in custody as a temporary preventive measure».

Ukraine's legislation makes a clear distinction between the concepts «crime» and «administrative offence». Legal doctrine also clearly differentiates between two types of offence: a «crime» which always means a «criminal offence» and an infringement of the law in the narrow sense of the word, that is, an «administrative offence».

Thus, Part 3 Article 29 of the Constitution does not permit detention without a court order in cases involving «offences», as opposed to «crimes», even when there is an «urgent necessity» to prevent or stop them. The fact that such is not in contravention of Article 5 of the European Convention on Human Rights is irrelevant in this case. Firstly, according to Article 8 of the Constitution, constitutional provisions hold ultimate legal authority on the territory of Ukraine. Secondly, Article 5 of the European Convention considers admissible only detention, which is conducted «in accordance with a procedure prescribed by [national] law».

However, Ukraine's Code on Administrative Offences (CAO), as before, contains provisions, which allow detention without a court warrant. This authority is based on the following provisions of the CAO: Article 259 «Bringing in an offender»; Article 266 «Procedural measures in cases of administrative offences»; Article 262 «Agencies (officials) authorized to conduct administrative detention»; Article 263 «Periods of administrative detention».

Special attention should be paid to Article 259, which determines the procedure for so called «bringing in» a person suspected of having committed an administrative offence. It provides virtually unlimited authority to detain and bring a suspect to a unit of a law enforcement agency. Although the period of detention is limited to one hour, the period for bringing in the person is not limited by law and is regulated only by a general instruction: «An offender should be brought in within the shortest possible period».

Moreover, if we look at the legislation system in Ukraine on the whole, such «bringing in» is not considered to be a deprivation of liberty at all. For example, unlike «detention» in the narrow sense of the word, there is no criminal liability for unlawful «bringing in». Nor can unlawful «bringing in» be grounds for redress according to the *Law of Ukraine «On the procedure for compensation of damage caused to the citizen by unlawful actions of bodies of inquiry, pre-trial investigation, prosecutors and courts»*.⁷⁰

As to administrative detention in the narrow sense, here too there is a certain degree of uncertainty in legislative regulation.

Point 5 of Article 11 of the Law «On the Police» allows police officers the right to detain «individuals who have committed administrative offences, for a period of up to three hours, in order to prepare a protocol or to consider the essence of the case ... if these issues cannot be resolved on the spot, ...». Thus, according to this provision, an officer of the police has authority to detain a person suspected of committing *any* kind of administrative offence.

However, Article 262 of CAO, which addresses this issue, limits the authority of the police to detention in cases involving a certain range of offences, these being listed in full in the said Article.

⁷⁰ Law of Ukraine No. 266/94-BP of 1 December 1994 (Vidomosti Verkhovnoyi Rady, 1995, No. 1 p.1)

The clash between the aforementioned provisions of the Law «On the Police» and Ukraine's Code of Administrative Offences does not make it possible to clarify the scope of police authority to detain those suspected of an administrative offence. This lack of clarity is exacerbated by the lack of correspondence of certain definitions of offences in Article 282 of CAO to those of the material articles of the same code.

2.5. PROLONGED ADMINISTRATIVE DETENTION

Although the rules stipulate that administrative detention should not last more than 3 hours, law enforcement officers retain considerable authority to extend such detention for a longer period.

The Law of Ukraine «On the Police» in point 5 of Article 11 foresees, that «in cases where this is necessary in order to identify a person or establish the circumstances of an offence» the police have the right to detain a person and hold him or her in custody *«up to three days, with notification of this in writing to the prosecutor within 24 hours from the moment of detention»*.

Article 263 of CAO gives the police even more authority. The article states that «people who have infringed regulations concerning the use of narcotics and psychotropic substances» can be detained «for a period of up to 10 days with the sanction of the Prosecutor, if the offender does not have documents which identify him or her».

This provision of CAO manifestly violates Article 29 of the Constitution, which requires that the lawfulness of a person's detention be examined by court within 72 hours.

Viktor G. (from Kirovohrad Region) was detained by police officers on 10 July 2003 on suspicion of petty hooliganism (Article 173 of CAO). He was brought before the court to review the case on its merits only on 14 July 2003. From the decision of the judge, it is clear that the detention had only been formally registered on 11 July, that is, the day after the actual detention.

The absence of clear conditions for lawful detention, the greater restrictions, as compared with criminal law, on the rights of a person detained for an administrative offence lead to administrative detention being widely used for the purpose of criminal prosecution. The Committee for the Prevention of Torture in its report after its 2002 visit (§16) noted that law enforcement agencies use provisions of CAO and the Law «On the Police» to have the opportunity to interrogate a detained person without the safeguards and time limits, prescribed by the Criminal Procedure Code.

It is quite clear that the widespread use of this ploy by law enforcement officers is the result of the introduction of court control in the criminal process. However, due to an unsystematic approach to legal regulation, amendments were not made to legislation that would make it impossible for law enforcement officers to elude court control.

2.6. LIABILITY FOR UNLAWFUL DETENTION

Law enforcement officers who detain a person in breach of section 106 of CPC face virtually no risk of adverse consequences.

According to point 11 of Resolution № 4 of the Plenum of the Supreme Court from 25 April 2003, «recognition that the detention is unlawful shall not be grounds for turning down an application to remand a person in custody»

In view of the extremely unclear wording in Article 106 of CPC, the prospects for charging somebody who carried out an illegal detention with criminal liability appear very bleak. Neither agents of the State individually, nor the State as a whole are under threat of civil liability either, since the opportunities for victims to seek redress for unlawful detention are very limited.

The Kharkiv Human Rights Protection Group is unaware of any cases of conviction under Article 371 of the Criminal Code, which foresees liability for clearly unlawful arrest, detention, or compulsory appearance before a court.

2.7. DETENTION OF VAGRANTS AND HOMELESS PEOPLE

The detention and holding in custody of vagrants is governed by Article 11 of the Law «On the Police». For such detention, the law, as before, requires no warrant: it is sufficient if a law enforcement agency informs a prosecutor. This allows law enforcement agencies to widely use such detention without sufficient grounds or even use it dishonestly. On 3 September businessman K. was apprehended in Kryvy Rig by of-

ficers of the Department for Fighting Organized Crime (UBOZ) in connection with the terror attack in Beslan (Russian Federation). After Mr. K had spent a few hours on the premises of UBOZ, at the decision of the head of the district police station in Kryvy Rig, which was sanctioned by the prosecutor's office, he was placed in a centre for the reception and allocation of vagrants for a period of 30 days. The police officers knew that he had a family and permanent residence. Nonetheless, he spent 20 days in the detention centre and was released only on 22 September after his lawyer intervened and submitted a complaint to court.

2.7. DETENTION FOR THE PURPOSE OF EXTRADITION

In accordance with Part 3 of Article 25 of the Constitution the extradition of Ukrainian nationals to other countries is prohibited. Extradition of foreign nationals and stateless people is allowed by Ukrainian legislation only if such extradition is provided for by the international treaties ratified by Ukraine (section 10 § 2 of the Criminal Code of Ukraine).

In Ukraine, detention for the purpose of extradition is regulated by the 1957 European Convention on Extradition and 1975 Optional Protocol to it, the 1959 European Convention on Mutual Assistance in Criminal Cases and 1978 Optional Protocol to it, the 1983 Convention on the Transfer of Sentenced Persons, the 1993 Convention on Legal Aid and Legal Relations in Civil, Family and Criminal Cases (the Minsk Convention), as well as by bilateral agreements.

The above treaties provide for detention of the individual whose extradition is sought after obtaining an application for extradition, or in certain cases, temporary detention until obtaining such an application.

According to Ukrainian legislation, the General Prosecutor's Office has authority to make decisions concerning extradition. Traditionally the General Prosecutor's Office has dealt with all issues connected with the extradition process, in particular detention and remand in custody for the purpose of extradition. Legislation lacks any procedure concerning either the principal decision or those supplementary to it. A person whose extradition is sought has no legal possibility to participate in the consideration of these decisions and present his/her objections.

The clear lack of compliance of such procedure for deprivation of liberty for the purpose of extradition to Article 29 of the Constitution of Ukraine, and the absence of any procedure for court consideration of this issue have led to inconsistent practice in this area. This in turn elicited a reaction from the Supreme Court of Ukraine, which at its Plenary Session of 8 October 2004 adopted Resolution No. 16 «On some issues as to the application of legislation, which regulates procedure and period of detention (arrest) in the course of considering issues of extradition». This resolution partly fills the gap in regulating the issues involved. Nevertheless, this resolution is not sufficient to harmonize the practice with the requirements of the Constitution and European Convention on Human Rights.

For example, the Plenum noted that «taking into account that in Ukraine a person can be held in custody for over three days only with a motivated court decision, and taking into consideration that according to Part 2 of Article 29 of the Constitution, such a decision can be made only by an authorized Ukrainian court, courts must accept and consider on their merits the applications from prosecutors or from authorities sanctioned by prosecutors, which are executing applications from other countries for extradition, provide the warrant for the detention of the person and his or her escorting to a competent authority of a foreign state» (point 3).⁷¹

However, this resolution, although it obliges courts to *accept* for consideration applications from competent authorities of the executive, cannot oblige the executive to *submit* such applications to courts. That is, if a prosecutor's office does not submit to court an application to detain a person for extradition, then this person could be held in custody without a court decision.

This could lead to a situation whereby competent authorities of the executive would not appeal to court procedure if it is likely that they would get an adverse result.

This situation is mitigated by the fact that, according to point 6 of the Plenum's resolution «courts must admit and consider the merits of complaints submitted by persons detained following a request for extradition from other state alleging that the detention was unlawful, as well as complaints by the defenders and legal representatives».

⁷¹ The Plenary Session of the Supreme Court to a certain degree weakened the restrictions of Article 29 of the Constitution. It is clear that not only detention for over 3 days, but also detention for extradition without preliminary court warrant are in contravention of Article 29 of the Constitution. An application from another State for extradition of a suspected offender does not create a situation of «urgent necessity to prevent a crime or terminate it», so the detention requires a preliminary court decision. A similar approach should be applied to temporary detention prior to obtaining an application for extradition.

According to the interpretation by the Plenum, such complaints are considered under procedure provided by Parts 7 and 8 of Article 106 of CPC, which, in turn, refer to Article 165-2 of CPC.

Thus, to decide on issues concerning the lawfulness of detention, the Supreme Court adapted a procedure provided by Articles 106 and 165-2 of CPC. However such an approach raises several questions:

First, according to Article 106 of CPC, in the interpretation of the Plenary Session of Ukraine's Supreme Court in its Resolution No. 4 of 25 April 2003 «*On the practice of use by the courts of remand in custody, and the extension of periods of remand at the stages of detective inquiry and pre-trial investigation*», recognition that detention is unlawful does not lead to release from custody. Moreover, in accordance with procedure, foreseen in Article 106 of the CPC, only the lawfulness of the initial detention by a law enforcement agency, but not the extended detention, is the subject for consideration.

For example, if a person detained for extradition is remanded in custody on the basis of a court decision after consideration of the prosecutor's request, then the court which is considering a complaint by the detainee will in any case consider the period of detention before the initial court decision, if there was such a period.

Secondly, the Plenum ignored the issue of the use of other means for securing an extradition procedure beside custodial detention, even though there could be circumstances, in which it would be possible to secure the presence of a person during extradition process without detaining him or her. It must be taken into account that the system, which provides for mandatory detention or because of its nature leads in practice to such an outcome, is in contravention of the obligations of Ukraine under Article 5 of the European Convention on Human Rights.

In addition, the possibility to appeal in court the lawfulness of the whole period of detention for extradition would create additional safeguards against abuse, in particular, against unreasonable delay in extradition procedure. According to European Court case-law «any deprivation of liberty under Article 5 § 1(f) will be justified only for as long as [extradition] proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 § 1(f)»⁷²

On 23 August 2004, Mr. K., a citizen of the Russian Federation, was detained in Kyiv without any legal grounds. While in a district police unit, it was discovered that law enforcement agencies of the Republic of Kazakhstan had issued a warrant for his arrest. Mr. K. was detained at the district station until September 13. On that day, he was brought before a judge who decided to detain him for 30 days. After the term imposed by court expired, he was not released, but continued to be held in pre-trial detention centres, first in Kyiv, then in Kharkiv.

Mr. S. was detained on 29 December 2004, on the basis of a decision to detain him made by law enforcement agencies in the Republic of Belarus. Mr. S. was held in custody at the Pechersky district police station in Kyiv without court control until 11 January 2005. On January 11, the Pechersky District Court in Kyiv decided to detain Mr. C. in order to secure his possible transfer to a competent authority, provided that the application for his extradition to the Republic of Belarus was upheld. After the term imposed by court expired, Mr. S. submitted a complaint about unlawful detention, but the court, while recognizing the detention unlawful, refused to release him.

2.9. DETENTION OF ALIENS

Detention at a Border Guard post is regulated by Ukraine's Law on the State Border Guard Service of Ukraine⁷³ and the Instruction «On the procedure for detention of persons detained by units of the State Border Guard Service of Ukraine under the administrative procedure for violation of legislation on the State border of Ukraine and on suspicion of having committed a crime (approved by Order No. 494 of 30 June 2004 by the Administration of the State Border Guard Service)»⁷⁴

The above Law and Instruction refer to the Constitution of Ukraine and the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human rights, the UN Convention on Refugees as the legal basis for the activity of officials at detention facilities of the Border Guard.

However, a few points in the Law and in the by-law Instruction give grounds for serious concern.

⁷² ECHR, *Quinn v. France*: Judgment of 22 March 1995, Series A no. 311, § 48; ECHR, *Chahal v. the United Kingdom*: Judgment of 15 November 1996, Reports of Judgments and Decisions 1996-V, § 113

⁷³ This Instruction replaced Instruction No. 176 of 12 April 1996 «On procedure for the detention and guarding of detained persons at the Border Guard of Ukraine», approved by the Head of the State Committee, the Commander of the Border Guard Forces of Ukraine.

⁷⁴ This law came into force on 1 August 2003 replacing the Law «On the border guard forces of Ukraine»

Despite the adoption of the Border Guard Law, the situation with detention periods remains unchanged, since the Law in itself contains no restrictions, but rather refers to other laws. A number of these laws, including the relevant sections of Ukraine's Code of Administrative Offences (CAO) have been analyzed above (see section 2.5). Given that these laws have not been amended, units of the Border Guard, as before, retain the right to detain people for up to 10 days without a court warrant.

Individuals, who have violated border regulations, can be detained for up to 3 days, provided that the prosecutor is notified within 24 hours. In addition, detention can be extended, if sanctioned by the prosecutor, for up to 10 days.

In addition to power provided by section 263 of CAO, Article 20 of the Law on the Border Guard (point 14) makes it possible to detain those who have illegally crossed the border and whose transfer to the border guards of a neighbouring state is planned, for such time as is «necessary for their transfer».

It is important to note that in all the above-mentioned cases, no court decision is necessary; although the wording of these provisions allow detention for over 72 hours, it is sufficient for such detention to obtain a sanction from the prosecutor. This clearly creates the possibility of violating Article 29 of the Constitution and weakens the guarantees of the person detained.

The 6-month limit on detention for the purpose of deportation prescribed by the Law on the Legal Status of Aliens and Stateless Persons is a positive step⁷⁵; it is a response to comments by the European Committee for the Prevention of Torture (ECPT) in their Report on their visit in 2002.

The Law on the State Border Guard Service of Ukraine does not allow for the possibility for appealing detention in court. Nor is such a possibility provided in the Instruction of 2004. This violates Paragraph 5 of Article 29 of the Constitution of Ukraine and Paragraph 4 of Article 4 of the European Convention on Human Rights both of which guarantee the right of judicial review with regard to the lawfulness of any individual's detention.

The Instruction of 2004 does not include the decision of the court among the grounds for release, (point 6.1). Hence, it is possible that a court decision to release somebody might only be effected if one of the executive bodies listed in the Instruction «authorized» the court decision. This situation cannot enhance the authority of court decisions and protection of detainees' rights.

We should note, however, a few positive amendments to the legislation, probably introduced in response to criticism from the ECPT.

Unlike the Instruction of 1996, the Law on the State Border Guard Service and the Instruction of 2004 provide for informing relatives about the detention of a person, who has been arrested by the Border Guard on suspicion of committing an administrative offence.

In addition, the Instruction of 2004 sets out the obligation to inform the relevant diplomatic missions or consulates about the detention of an alien. As a factor enhancing discipline, the provision is made for the reference number of an outgoing message to a consulate being put on the initial notification of prosecutor about detention.

There is also the obligation to provide the detainee with written information about his/her rights in a language understandable to him/her (point 3.6). The Instruction regulates issues of detainees' registration in more detail (point 3.5). The person detained undergoes a compulsory medical examination before he/she is placed in custody (point 3.8).

According to the Instruction, the detainee's correspondence with the Prosecutor, the Human Rights Ombudsperson, and the European Court of Human Rights is not subject to censorship (point 7.2). His/her correspondence with other people, including that with a lawyer may be censored.

The censorship of correspondence with a lawyer, certainly, hampers the exercising by a detainee of his/her rights and to a great extent reduces the positive effect of uncensored correspondence with the aforementioned authorities.

One should mention a very progressive element in the Instruction of 2004, which cannot be found in national legislation elsewhere. According to point 14.11 of the Instruction, a meeting with a lawyer is granted «on the oral or written request of a detainee or request by his/her close relatives, or representatives of civic organizations». In this case, the permission of the investigator or person conducting the inquiry is not mentioned as a condition for granting the meeting.

While it remains unclear how this provision corresponds with a provision of point 14.7 of the Instruction, which, with regard to any meeting, stipulates that permission must be obtained from «the official (de-

⁷⁵ Section 32 of the Law on Legal Status of Aliens and Stateless Persons was amended in November of 2003.

tective, investigator, judge, prosecutor), who is in charge of the case». However, according to point 4(E) of the Ukrainian Government's Response to the Report by the ECPT after its visit of 2002, no additional permission is indeed required. Nonetheless, in view of the long-established practice as to access to a lawyer, it would be desirable to formulate more clearly the possibility of meeting with a lawyer whether or not the investigator permits this, in order to avoid arbitrary interpretations of the provisions of this Instruction by officials responsible for the detention.

3. COURT PROCEDURE FOR REMAND IN CUSTODY

The amendments of 2001 to the legislation on criminal procedure were, in fact, limited to institutional transformations and reduced to only shifting the power to detain person from the prosecutor to a judge. The approach to procedure and assessment as to whether remand in custody is justified have remained largely unchanged.

The system for judicial review of the grounds for remand in custody to a great extent copies the earlier system of prosecutor control.

Depending on the duration of remand in custody, the legislators attempt to safeguard the right to liberty by raising the rank at which the decision is made. This is to the detriment, however, of the procedural rights of a detainee (see Chapter 3.3.4). For instance, the participation of an arrested person in a detention hearing concerning the extension of remand in custody for a period over 2, 4, and 9 months is left to the discretion of the judge. The resolution of the Supreme Court of Ukraine reads:

The issue of the defendant's participation in the hearing must be resolved in each individual case by a judge who shall consider all submitted appeals. The accused is brought to court, for example, when specific circumstances can be clarified only through his/her questioning (health, grounds for his/her claims about wrong or unreasonable delay in the investigation of the case, his/her willingness and ability to provide financial guarantees to be released on bail, etc.).⁷⁶

It is difficult to imagine how one could establish whether a defendant's claims are of substance, if he/she is not given the opportunity to substantiate them.

Thus, the legislators, as before, underestimate the safeguards of the principle of competition as providing guarantees from arbitrariness, and prefer hierarchical method of control.

3.1. OBSTACLES FOR RELEASE FROM CUSTODY PENDING TRIAL

On the basis of provisions in Article 165 of CPC, the situation in practice has arisen where a decision concerning pre-trial detention taken by a court may only be overturned by a court. This shows a certain misunderstanding of the specific features of court decisions on pre-trial detention on suspicion of having committed a crime. In practice, such an approach makes the courts less inclined to release defendants from custody. Moreover, it places the judge, «the traditional guardian of personal liberties» in a somewhat strange position, where he or she may decide in favour of pre-trial detention even in a situation, where the prosecutor is seeking the release of the defendant.

For example, in 2002, the courts satisfied only 93.1% of applications from investigating authorities to terminate remand in custody. In 2003, this number was 92.6%.

This means, therefore, that in 6.9% of cases in 2002 (7.4% in 2003), regardless of the fact that the law enforcement agencies considered that it was safe to release a defendant, the courts still chose in favour of pre-trial detention.

It is entirely possible that, in following this approach, the courts were attempting to resist some other negative phenomena, such as corruption in law enforcement agencies, however such a purpose cannot vindicate the adverse effects for the pre-trial detention policy.

On 20 January 2005, the following amendment was introduced to section 165 of CPC:

In the event of discontinuation of a criminal investigation, the expiry of the remand in custody time period, if this period is not extended in accordance with procedure prescribed by law, and in other cases, the release from custody of the person during pre-trial investigation is carried out on the basis of an order from the detective inquiry unit, or investigator in charge of the case, or by a prosecutor, provided that they

⁷⁶ Resolution No. 4 of 25 April 2003 «On the use of pre-trial detention and its extension», point 18.

immediately inform the court which detained the accused. Release from custody in criminal cases, which are already in court, is effected only by a decision of the court or judge.

A corresponding amendment was introduced into section 20 of Ukraine's Law on Preliminary Detention.

Although this law is intended to simplify the procedure for release, the norm created by the provision – «In the event of ... the expiry of the remand in custody time period, if this period is not extended in accordance with procedure prescribed by law, ... the release from custody of the person during pre-trial investigation is carried out on the basis of an order from the detective inquiry unit, or investigator in charge of the case, ... or by a prosecutor» – has quite the opposite effect. Before this amendment, a norm of Article 20 of the Law of Ukraine on Preliminary Detention was in force, according to which «in the event of ... the expiry of the remand in custody time period, if this period is not extended in accordance with procedure prescribed by law», the person in charge of pre-trial detention institution was obliged to «immediately release the defendant».

3.2. THE RIGHT TO PERIODIC REVIEW OF DETENTION

Ukrainian legislation does not provide for such an important guarantee for detainees as the right to periodic review of the grounds for their detention, although such guarantee is set out in Paragraph 4 of Article 5 of the European Convention on Human Rights and Article 29 of the Constitution.

The right «to take proceedings» set out in Article 5 § 4 of the European Convention has been developed in detail in the case law of the European Court. The Court interprets Article 5 § 4 of the European Convention as a safeguard in any case of deprivation of liberty:

«Everyone who is deprived of his liberty» lawfully or not, is entitled to a review of lawfulness by a court; a violation can therefore result either from a detention incompatible with paragraph (1) or from the absence of any proceedings satisfying paragraph (4), or even from both at the same time.⁷⁷

The Court also developed a concept of «periodic» review of the lawfulness of deprivation of liberty:

«...to protect the individual against arbitrariness... implies not only that the competent courts must decide «speedily», but also that their decisions must follow at reasonable intervals».⁷⁸

The Court applies the most stringent standards of intervals between reviews to detention on suspicion of committing a crime:

«The nature of pre-trial detention calls for short intervals; there is an assumption in the Convention that pre-trial detention is to be of strictly limited duration (Article 5 § 3), because its *raison d'être* is essentially related to the requirements of an investigation which is to be conducted with expedition».⁷⁹

«Article 5 § 4 requires that a person held in custody must be able to take proceedings at reasonable intervals to challenge the lawfulness of his detention. In view of the assumption under the European Convention that such detention is to be of strictly limited duration, periodic review at short intervals is called for».⁸⁰

In one of its judgments, in response to a Government's argument that it was not «reasonable» for the applicant to lodge his second application as to the lawfulness of his detention barely a month after the dismissal of the first, the Court determined that «in the present case an interval of one month is not unreasonable».⁸¹

Thus, one can conclude that the Court, speaking about «periodical review with short intervals» under definition «short» meant the period of one month.

In Ukraine, the legislators fail to ensure the right, provided by Article 29 of the Constitution, «of each detainee» «at any time to appeal his/her detention in court» as well as the «right for review» provided by Article 5 § 4 of the European Convention on Human Rights.

The review, provided by Paragraph 7 of Article 106 of CPC, is limited by a short-term period of so called criminal-procedural detention (police custody) and addresses only the circumstances of this detention.

Appeal against the decision of a judge as to pre-trial detention (section 165-2 § 7; section 165-3 § 4), clearly does not constitute the protection mechanism foreseen in Article 5 § 4 of the Convention. Such a

⁷⁷ ECHR, De Wilde, Ooms and Versyp v. Belgium: Judgment of 18 June 1971, Series A no. 12, § 73

⁷⁸ ECHR, Herczegfalvy v. Austria: Judgment of 24 September 1992, Series A no. 244, § 75

⁷⁹ ECHR, Bezicheri v. Italy: Judgment of 25 October 1989, Series A no. 164, § 21

⁸⁰ ECHR, Assenov and Others v. Bulgaria: Judgment of 28 October 1998, Reports of Judgments and Decisions 1998-VIII, § 162

⁸¹ ECHR, Bezicheri v. Italy: Judgment of 25 October 1989, Series A no. 164, § 21 This decision was included in the collection of standards concerning detention. (See: Professional Training Series No 3. Human Rights and Pre-trial Detention. A Handbook of International Standards relating to Pre-trial Detention. Centre for Human Rights, Geneva, Crime Prevention and Criminal Justice Branch, Vienna, United Nations. New York and Geneva, 1994. These standards were published in Russian – Kharkiv: Konsum, 1997, – and in Ukrainian: – Kyiv, 2000.)

consideration by its very nature cannot provide the review of «those conditions, which, in accordance with the European Convention, are crucial for the «lawful» detention of a person».⁸²

As concerns the substance of the appeal, a higher level court should consider only the basis of the decision taken by a lower level court. However the basis of the decision which has been appealed does not in any way mean the justification for the pre-trial detention at the time of the appeal review, «since the circumstances which justified the original detention may change to such an extent, that they cease to exist».⁸³ Having recognized the decision of the court under appeal correct, the court of appeal may not release the defendant, even if the circumstances, which justified that correct decision, have disappeared. Moreover, the submitting of an appeal is limited by a term of 3 days and a complaint submitted after that time will be turned down without consideration of its merits; but the doctrine of «periodical review» secures the very possibility of review within a certain period after the previous decision, when it is reasonable to assume changes in the circumstances.

This limitation by the legislators of a detained person's right of review of the lawfulness of his/her deprivation of liberty contradicts Ukraine's Constitution and its international obligations. The explanation for such an approach can be found in an unjustifiable narrowing by commentators of the meaning of the word «detention» in the text of article 29 of the Constitution. According to the doctrine of criminal process, «detention» has always meant detention by a law enforcement body before the taking of a decision about remand in custody. This narrow meaning was automatically used for the interpretation of the text of Article 29 of the Constitution.

However, in Article 29 of the Constitution, it is hard to find any indication that its guarantees, including that in part 5, are limited by some particular form of «detention», leaving other forms without guarantees. Moreover, if we turn to so-called «criminal-procedural detention», then as it is of short duration, the right of appeal will virtually always turn into a counter claim to the application of the prosecutor. It is difficult to assume that the Constitution is guaranteeing such a purely technical point of procedure as the possibility of making a counter claim. Even this disproportion between the legal status of the guarantee and its subject matter shows that Part 5 of Article 29 of the Constitution means something very different. It is therefore unjustified to equate the meaning of the word «detention» in Article 29 § 5 of the Constitution, which encompasses any forms of deprivation of liberty, with the highly specific meaning, which «detention» has gained in the doctrine of a criminal process.

It is clear that our legislation, which, by its design, provides for a single detention review, does not correspond to the concept, imbedded in the text of Article 29 § 5 of the Constitution and Article 5 § 4 of the European Convention. As a result, people who are detained in connection with criminal prosecution are deprived of one of the most important guarantees of the right to liberty – the possibility to appeal to the court at reasonable intervals to have the lawfulness of their detention reviewed.

This situation is slightly mitigated by the fact that section 165-3 of CPC provides for an *ex officio* review of the justifiability of pre-trial detention.

However this article foresees intervals between reviews of five, or even nine, months. Such periods of pre-trial detention without review of their justifiability would be hard to reconcile with the meaning of «short intervals», which the European Court demands. Certainly court practice can rectify this situation if the courts use their authority in a well-considered manner, and extend periods of remand in custody not to the limits permitted, but based on the specific circumstances of a case. However, taking into consideration the heavy caseload of the courts, an opposite trend seems more likely, a trend towards the maximum use of their power to extend remand in custody in order to reduce the workload of the courts.

3.3. THE NATURE OF COURT REVIEW

3.3.1. The retention of presumptions in favour of remand in custody

Before the amendments to legislation on criminal procedure were introduced in 2001, a decision on remand in custody or release depended mainly on the gravity of the crime in question. Depending on the gravity, crimes fell into three categories: The first category – crimes, which fell under part 2 of section 155 of the former CPC, where the very charge of having committed one of the crimes listed there, provided sufficient ground for detention. The second category included crimes, which might entail imprisonment for up to

⁸² ECHR, *X v. the United Kingdom*: Judgment of 5 November 1981, Series A no. 46), § 58, ECHR, *Weeks v. the United Kingdom*: Judgment of 2 March 1987, Series A no. 114), § 59

⁸³ ECHR, *Van Droogenbroeck v. Belgium*: Judgment of 24 June 1982, Series A no. 50, § 49

one year, when pre-trial detention was admissible only in exceptional cases. The third category fell somewhere between the other two categories, so here a decision was at the discretion of the decision-maker (at that time, the prosecutor).

In 2001, the legislator took an important step forward by excluding paragraph two from section 155 of CPC, thereby admitting that a decision regarding pre-trial detention cannot be based purely on the consideration of the gravity of the criminal charge. This brought legislation into line with the case law of the European Court, according to which «pre-trial detention may be justified in a given case only where there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty».⁸⁴

Another important step, which could have significantly influenced practice of pre-trial detention, was a significant change in the «margin» of judges' discretion. In 2001, the legislator provided for the mandatory release from custody by a judge of a person charged of a crime, if the possible punishment for it did not exceed three years of imprisonment (Article 155 § 1 of CPC). This change in the legislation was based on the concept that sometimes the right to liberty could outweigh public interests in the right course of legal procedure, and «the state, on the basis of reasonable policy, could sacrifice a certain number of evasions in cases [concerning less serious crimes], but protect liberty of its citizens as an unconditional right, independent of a judge's discretion».⁸⁵ This provision, however, was substantially weakened by the possibility of deviating from the rule «in exceptional cases» (Article 155 § 1 of CPC).

However, this approach was not supported in court practice. The fairly high «margin» of judge's discretion, provided by the legislator, prompted the court practice to look for definitions, which would adapt this novelty to the prevailing perception of the balance between the right to liberty and public interests.

This is why the Plenum of the Supreme Court of Ukraine in its resolution wrote: «pre-trial detention... is used... when a person is suspected or accused of having committed a crime, which is punishable in law by deprivation of liberty (Article 155 § 1).⁸⁶ The conditions, under which pre-trial detention can be used are defined by the Plenum as follows: «detention... is chosen only if there are grounds to believe that other (less severe) preventive measures... *could fail* to secure fulfilment by a suspect or accused of their procedural obligations...». If one analyses this definition, one can come to the conclusion that in order to detain a person, it is sufficient for a judge to have a mere doubt in the possibility of using other measures.

Thereby the Plenum establishes a presumption in favour of pre-trial detention, since the purpose of any presumption is to artificially resolve a situation of irresolvable doubt. Although, theoretically, it is a refutable presumption, in practice it could be refuted only in exceptional cases. Since the onus is placed on the accused to disprove a judge's absolutely speculative doubts, in practice, he/she will be forced to prove such circumstances, which under any conditions whatsoever would exclude «breach of his/her procedural obligations». On the basis of such an approach, a defendant could be released pending trial in highly exceptional cases, where it seems even impossible to conceive of such «a breach».

In this connection, one can recall the European Court's judgment against Bulgaria, where Article 5 of the European Convention was held to have been violated, because the authorities had acted on the basis of the presumption in favour of arrest, established by Bulgaria's Code of Criminal Procedure and the practice of Bulgaria's Supreme Court, which «was only refutable in very exceptional circumstances where even the hypothetical possibility of absconding, re-offending or collusion was excluded due to serious illness or other exceptional factors. It was moreover incumbent on the detained person to prove the existence of such exceptional circumstances, failing which he was bound to remain in custody throughout the proceedings».⁸⁷

3.3.2. Circumstances for and against detention

Legislation has formulated the following risks, the need to avoid which could justify pre-trial detention:

- absconding from criminal investigators or from the court;
- obstructing the establishment of the truth in the case;
- pursuance of criminal activity;
- failure to comply with procedural decisions.

This provision gives scope for ambiguity. The vagueness in wording of the first three provisions allowing for remand in custody has been repeatedly criticized by commentators.

⁸⁴ ECHR, Kalashnikov v. Russia: Judgment of 15 July 2002, § 114

⁸⁵ Lyublinskiy P. Personal liberty and criminal process. Means for securing attendance of accused person during criminal proceedings. Saint-Petersburg (Russia), 1906

⁸⁶ Resolution No. 4 of 25 April 2003 «On the use of pre-trial detention and its extension», point 3.

⁸⁷ ECHR, Ilijkov v. Bulgaria: Judgment of 26 July 2001, § 83

Particular concern is given by the creation of an additional justification for detention created by the legislators, – «to ensure correct behaviour» – which is concealed in the definition of bail (Article 154-1 of CPC). The extreme ambiguity of the very term «correct behaviour» makes it impossible to consider this provision as a norm of the required quality, since it does not give any possibility of foreseeing with a satisfactory level of certainty the legal consequences of any particular behaviour.

3.3.3. The impact of lawfulness (unlawfulness) of detention on decisions regarding remand in custody

Another important problem, which is yet to be adequately resolved in legislation and court practice, is the impact of the lawfulness of criminal-procedural detention on subsequent decisions as to remand in custody.

According to the analytical summary of court practice, «the subject of court investigation», among other things, «should be... the appropriateness of the detention of the individual (if it took place)...»⁸⁸

However, according to the resolution of the Plenum of Ukraine's Supreme Court, «recognition of detention as unlawful shall not be grounds for turning down an application for remand in custody»

The total exclusion by the Plenum of the Supreme Court of Ukraine of the lawfulness of detention by law enforcement officers from the list of circumstances, which could influence the outcome of a decision as to remand in custody leads to adverse consequences for legal practice.

Such a situation effectively allows law enforcement agencies to carry out arbitrary detention. The detention of an individual by a law enforcement agency without grounds as set out in legislation, or side-stepping procedure stipulated there, will have no consequences as long as before the court review it obtains the necessary information to have the person held in custody.

This leads to the evermore widespread practice of arbitrary arrests and slows down the development of clear legal criteria for lawful detention without a court order.

3.3.4. Procedural rights of the parties

Legislation, as before, does not allow for the fundamental rights of the accused (the suspect) during court hearings held in order to decide whether to remand the person in custody or to release him or her pending trial.

According to case law of the European Court of Human Rights, in decisions involving deprivation of liberty, the detainee has the right to judicial procedure. A court considering an appeal against detention must ensure guarantees of judicial procedure. The review must be adversarial and 'equality of arms' between the parties, the prosecutor and the detained person must be ensured»⁸⁹ «in view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, proceedings conducted under Article 5 § 4 of the Convention should in principle also meet, to the largest extent possible under the circumstances of an on-going investigation, the basic requirements of a fair trial, such as the right to adversarial procedure. While national law may satisfy this requirement in various ways, whatever method is chosen should ensure that the other party will be aware that observations have been filed and will have a real opportunity to comment thereon».⁹⁰

The European Court has developed fairly well-established standards as to the guarantees for judicial procedure, which a detainee should have.

These include the right to personally participate in the hearing,⁹¹ and, in some cases, the right to effective legal assistance.⁹² The very concept of effective participation provides for a number of guarantees: the right to know the arguments of the other party⁹³, the right of access to those documents in the investigation file which are essential to effectively challenge the lawfulness of detention⁹⁴, the right to have sufficient time for preparation of one's position and the right to respond to additional arguments, presented by the prosecution in the course of judicial procedure.⁹⁵

⁸⁸ Analytical summary of the court practice of detention hearings in the Melitopol City-District Court, Priazovskiy, Akymovskiy, and Veselovskiy District Courts. (The summary was made by Judges G.I. Aleynikov and M.I. Galyanchuk of the Zaporizhye Appeal Court)..

⁸⁹ ECHR, *Niedbała v. Poland*: Judgment of 4 July 2000, § 66

⁹⁰ ECHR, *Schöps v. Germany*: Judgment of 13 February 2001, § 44

⁹¹ ECHR, *Sanchez-Reisse v. Switzerland* : Judgment of 21 October 1986, Series A no. 107, § 51

⁹² ECHR, *Megyeri v Germany* : Judgment of 12 May 1992, Series A no 237-A, § 25

⁹³ ECHR, *Ilijkov v. Bulgaria* : Judgment of 26 July 2001, § 104

⁹⁴ ECHR, *Lietzow v. Germany* : Judgment of 13 February 2001, § 44

⁹⁵ ECHR, *Kawka v. Poland* : Judgment of 9 January 2001, § 60

Our legislation on criminal procedure has failed to develop those elements which are crucial in transforming detention hearings into judicial procedure. This weakens the efficiency of the legal means of protection foreseen by Articles 165-2 and 165-3 of CPC, which can be considered a violation of both the Constitution and Ukraine's obligations under the European Convention on Human Rights.

The requirement for personal participation of the detainee provides in the first place for bringing him/her to court. The Convention particularly stresses this point in Article 5 § 3. The requirement for presence and participation of a detainee at the hearing has several purposes: the prevention of cruel treatment towards the suspect during his/her detention; providing the possibility to follow the course of the hearing and to take adequate steps to argue one's position and to refute the arguments of one's adversary; providing a possibility for a judge to see the detainee directly, and not purely from the case file presented by the prosecution.

In our legislation, participation of a suspect or defendant in an initial detention hearing is obligatory (Article 165-2 of CPC).

However, his/her participation in a hearing on the extension of remand in custody is left to the judge's discretion (Article 165-3 of CPC). This inconsistency of the legislators could lead to violation of the obligations under the Convention.

It should be taken into consideration that a decision to extend detention for over 4 months must be taken by a judge of the appeal court, and for over 9 months by a judge of the Supreme Court of Ukraine. Under these conditions, it is difficult from a logistical point of view to ensure the defendant's (suspect's) participation in court hearings.

Neither Article 165-2, nor Article 165-3 of CPC provide for the right of the accused and/or of his/her lawyer to be made aware in sufficient time about the reasons for a detention request and, consequently, they do not describe procedure for such notification.

Article 165-2 reads:

After a judge obtains a request, he/she studies the case-file, presented by the detective inquiry unit, the criminal investigation (pre-trial) department or the prosecutor; questions the suspect or accused, and, if necessary, receives explanations from the person in charge of the case, listens to the opinion of the prosecutor, the defending lawyer, if the latter has appeared, and issues a resolution:

- 1) to turn down the application for remand in custody, if there is no basis for it;
- 2) to remand in custody the suspect or accused.

The Plenum of the Supreme Court in its resolution⁹⁶ has also failed to solve this issue. To a certain extent, it is possible to assess the Plenum of the Supreme Court's approach to the guarantee of effective participation of the defendant in the detention hearing on the example of access to case files.

Although the right to know the arguments and evidence of one's adversary is one of the most important elements of the «equality of arms», in national practice, this right clashes, like in many other instances, with the issue of the secrecy of the criminal investigation.

The needs of the criminal investigation, which, undoubtedly, could justify keeping some evidence secret in national judicial practice have become wildly distorted. The defending counsel often finds the most fundamental requests for information about the prosecution's case turned down.

Legislation fails to give an exact answer to the question as to whether a detainee and his/her lawyer are entitled to study the materials, which a prosecutor presents to court along with a request to detain the accused (suspect). The lawyer's right of access to these materials could be deduced from an interpretation of Article 165-2 of CPC in conjunction with Article 48 of CPC, which in part 1 reads:

«From the moment he/she is permitted to participate in the case, a lawyer is entitled:

- ...
- 3) to study the materials, which justify the suspect's detention, pre-trial custody, and charge...»⁹⁷

However, according to the interpretation of Resolution No. 4 of 25 April 2003 «On pre-trial detention and its extension», neither the accused, nor a suspect, nor his or her lawyer have this right. The Plenum concludes:

According to Article 165-2 of CPC, the material of the criminal investigation is given to a judge for consideration by a detective inquiry unit, criminal investigator or prosecutor. These materials are not registered in court, and the judge should study them in such a way as to prevent disclosure of pre-trial investiga-

⁹⁶ Resolution No. 4 of 25 April 2003 «On pre-trial detention and its extension».

⁹⁷ Notably, section 43 and 43-1, which contain a list of accused and suspect's rights, do not provide for a similar right.

tion data. In this case, the law does not allow for the studying of the case file by a suspect, defendant, their lawyers or legal representatives in court.⁹⁸

Courts apply this resolution of the Plenum of the Supreme Court, so the defence, in practice, has no access to the materials, which substantiate an application for remand in custody or its extension.

This situation contradicts the provisions of Article 5 §§ 3 and 4 of the Convention, because it fails to provide the accused (suspect) with guarantees of judicial procedure.

The principle of «equality of arms» means that parties in the process know which arguments each of them is going to bring to court, and have a reasonable opportunity to prepare their objections and evidence in order to refute their adversary's arguments. If the circumstances of the case remain unknown to the parties, «then the very idea of parties withers»⁹⁹

The access to a case file is seen by the European Court as an integral part of the concept of «equality of arms» in judicial hearing.

The right to legal representation in the course of a detention hearing is considered by legislation to be an integral part of the general right to defence against a charge. Legislation lacks any special provisions regarding the obligations of a judge or officials from a law enforcement agency to provide legal assistance during a detention hearing.

Also, the notification of the accused or his/her lawyer about the date and time of a detention hearing is not provided for. In the absence of these basic guarantees, the lawyer's participation is made dependant on sheer chance: «if he/she appeared». Since neither court, nor prosecutor, nor investigator are obliged to inform the lawyer about a hearing, or even to give him/her this information at his/her request, the lawyer's participation in the hearing becomes dependant on the prosecutor or judge's inclination to give the lawyer any information.

The guarantees of judicial procedure are closely interconnected: personal participation in the hearing, right to assistance by a competent lawyer, and access to the case file – these are fundamental guarantees, which, altogether, provide the possibility for effective defence against violations of the right to liberty.

3.4. LIMITATIONS IN THE JUDGE'S AUTHORITY TO CONSIDER AN APPEAL TO EXTEND THE PERIOD OF REMAND IN CUSTODY

There is uncertainty as to the judge's authority at a hearing on extension of the period of remand in custody, in particular: whether the judge may, after he/she turns down a resolution to extend the period of remand in custody, release the detainee, applying another preventive measure.

The problem is that Article 165-2 of CPC reads: «After the court has rejected remand in custody, it is authorized to impose on a suspect or accused a preventive measure, other than remand in custody».

Article 165-3 of CPC, which regulates the procedure of extension of the period of remand in custody, does not provide this authority directly.

On this issue, the Plenum of the Supreme Court of Ukraine said the following:

After establishing the grounds for changing (terminating) remand in custody, a judge, by his/her resolution, dismisses the application for extension of remand in custody and can change (terminate) this preventive measure.¹⁰⁰

However, uncertainty in legislation gives rise to opposite interpretations even among judges of the Supreme Court; this could lead to the situation, where practice narrowly interprets the scope of judge's authorities in the course of detention hearings.

With this interpretation, a judge faces only two alternatives: either to extend remand in custody, or to unconditionally release the detainee. The absence of the possibility to release under reasonable guarantees is an additional restraining factor against making a decision about release, because a judge, who has doubts about the possibility of unconditional release, would be forced to prolong defendant's detention.

3.5. TERMS OF PRE-TRIAL DETENTION

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

⁹⁸ Resolution No. 4 of 25 April 2003 «On pre-trial detention and its extension», point 6.

⁹⁹ Foyntskiy, I Ya., Course of Criminal Procedure, Vol. 1, p. 95

¹⁰⁰ Resolution No. 4 of 25 April 2003 «On the use of pre-trial detention and its extension», point 20.

In its analysis, the Supreme Court of Ukraine admits that «red tape is still widespread in court hearing... of cases. Of special concern are the cases, when it is allowed in relation to defendants, who are remanded in custody».

3.6. ALTERNATIVES TO DETENTION. BAIL

Ukraine's Criminal Procedure Code provides for several alternatives to detention:

- a written undertaking not to abscond;
- a personal surety;
- the surety of a public organisation or labour collective;
- bail;
- remand in custody;
- supervision by the command of a military unit.

One of the effective measures, which could reduce the recourse to pre-trial detention, is bail. According to court statistics, in 2002, 105 people were released on bail¹⁰¹, in 2003 – 110 people¹⁰². The Supreme Court concluded that courts inadequately use this measure because of citizens' poor financial condition».¹⁰³

However, the problem of inadequate use of bail depends not only on the financial condition of suspects. A number of other factors have much greater impact.

In Ukrainian legislation, bail is designed as a separate preventive measure, not as a condition of pre-trial release. On the basis of such logic of the law, bail can be used in cases, when there are no adequate grounds for detention. However, the Plenum of Ukraine's Supreme Court offered an interpretation, which corresponds more closely to the legal meaning of bail: «A court should... choose this preventive measure instead of remand in custody...».¹⁰⁴

A substantial shortcoming of the bail regulation is that the amount of the bail depends on the possible amount of the material claim by a victim, because part 2 of Article 154-1 reads: «In all cases, the amount of the bail cannot be lower than the amount of a civil suit, substantiated with sufficient evidence». This norm is supported by provisions of part 7 of Article 154-1 of CPC, which reads «the bail deposited by a suspect or accused can be designated by a court for execution of the sentence as a part of material penalty».

According to the European Court case law, «...concern to fix the amount of the guarantee to be furnished by a detained person solely in relation to the amount of the loss imputed to him does not seem to be in conformity with Article 5 (3) of the Convention. The guarantee provided for by that Article is designed to ensure not the reparation of loss but rather the presence of the accused at the hearing. Its amount must therefore be assessed principally by reference to him, his assets and his relationship with the persons who are to provide the security, in other words to the degree of confidence that is possible that the prospect of loss of the security or of action against the guarantors in case of his non-appearance at the trial will act as a sufficient deterrent to dispel any wish on his part to abscond».¹⁰⁵

In addition, the legislation lacks clear provisions about the procedure of bail hearing. The law fails to answer the question, what to do with a defendant (suspect) after the decision to release him or her on bail has been taken, but the bail has yet to be deposited. Also, the law does not regulate the procedure for the defendant's (suspect's) release after he/she has deposited the bail. In view of practical conditions for the use of this preventive measure, the absence of clear regulations leads to a situation where judges award bail extremely reluctantly as a means for securing the due course of legal proceeding, and this, in turn, unjustifiably increases the number of people facing prosecution (suspects), who remain in custody pending trial, even though in some cases, bail could well have achieved the same objective.

The Plenum of the Supreme Court in its resolution¹⁰⁶ has tried to resolve some procedural issues; but these are only the first steps toward establishing clear and transparent rules.

However, a few provisions of the resolution by the Plenum of the Supreme Court «On the use of bail by courts» could serve as a basis for detaining a person accused, even if the deposited bail guaranteed atten-

¹⁰¹ The analysis of work of general jurisdictions' courts in 2002, according to the court statistics, prepared by the Department of Court Practice Generalization and Analytical Work on the Issues of Implementing the Law at the Supreme Court of Ukraine // www.scourt.gov.ua

¹⁰² The analysis of work of general jurisdictions' courts in 2003, according to the court statistics, prepared by the Department of Court Practice Generalization and Analytical Work on the Issues of Implementing the Law at the Supreme Court of Ukraine // www.scourt.gov.ua

¹⁰³ The analysis of work of general jurisdictions' courts in 1st half of 2002, according to the court statistics, prepared by the Department of Court Practice Generalization and Analytical Work on the Issues of Implementing the Law at the Supreme Court of Ukraine // www.scourt.gov.ua

¹⁰⁴ Resolution No. 6 of 26 March 1999 «On the use of bail by courts», (along with amendments of 6 June 2003), point 2.

¹⁰⁵ ECHR, *Neumeister v. Austria* : Judgment of 27 June 1968, Series A no. 8, § 13–14.

¹⁰⁶ Resolution No. 6 of 26 March 1999 «On the use of bail by courts».

dance of the accused during legal proceeding, but breached formal requirements of the law. In point 1 of the Resolution, the Plenum says: «If at the pre-trial stage of the investigation, bail was imposed on an accused, a court, during a preliminary hearing of the case, must verify, if that decision meets the requirements of Article 154-1 of CPC. In cases where serious violations of the law took place, the court must eliminate them (for example, by balancing amount of the bail with requirements of Article 154-1 of CPC) or replace one preventive measure with another...».

Such an instruction comes from the legislative requirements as to the minimum amount of bail. However, this might lead to detaining the accused (suspect), even if the amount of bail, lower than the legislative minimum, proved to be sufficient for securing the due course of legal proceeding.

The Plenum has also created an overly rigid standard for proving that the bail is sufficient to meet the objectives of legal proceeding. According to the Plenum's instruction, a court may choose this preventive measure instead of detention «only when there are *all* grounds to believe that it could secure the defendant's correct behaviour and fulfilment of his/her procedural obligations, as well as execution of the sentence».¹⁰⁷

Absence of clear procedures for the use of bail makes the acceptance of bail in non-monetary form especially complicated. Because of the generally low standard of living in Ukraine, the overwhelming majority of people accused (suspects) do not have spare cash, sufficient to meet the minimum amount of bail, established by the law. The possibility of offering bail in the form of real estate or other property could become a good solution for many of them.

Nevertheless, courts are reluctant to accept bail in non-monetary form. This is influenced also by the Plenum of the Supreme Court's instruction in Resolution No. 6 of 26 March 1999 (point 5): «The property should have such characteristics, such quality, and such legal status, so that execution of a court decision to deprive a accused, suspect, or surety of his/her property rights on it would not be fraught with *any difficulties*».

Although, undoubtedly, courts should verify the enforceability of extracting bail, the instruction to prevent «any difficulties» could lead to unreasonable reluctance on the part of judges to bail. It is worth citing an excerpt from the European Court's judgment in a case against Poland:

«Regard must be had to the fact that the authorities at a certain point refused to allow that the bail be deposited in the form of a mortgage.... This, in the Court's view, implies that the authorities were reluctant to accept the bail, which, in case of the applicant's non-appearance for the trial, would require undertaking certain formalities in order to seize the assets. This in itself, in the Court's opinion, cannot be regarded as sufficient grounds on which to maintain for four months pre-trial detention which had already been deemed unnecessary by the decision of a competent judicial authority».¹⁰⁸

Also the use of bail could be complicated by provisions of Article 154-1 § 4 of CPC, which reads: «until the case is sent to court, bail concerning a person, who is held in custody, may be chosen only if permitted by the prosecutor, who sanctioned the arrest, and after the case has reached the court, only if permitted by the court».

This creates some uncertainty concerning the authority of a judge following a detention hearing to independently, not if «permitted by the prosecutor», replace detention with bail.

In practice, there are some organizational difficulties: inaccessible rules of bail hearing for a detainee and other persons, who can and want to deposit a bail; often inaccessible information about depository accounts of law enforcement agencies and courts, where money can be deposited.

RECOMMENDATIONS:

- to introduce amendments into the legislation, which would exclude the practice of detention without a warrant in cases, which are not provided for by Article 29 § 3 of the Constitution, in particular, to provide a clearer formulation of circumstances, in which a law enforcement officer is empowered to detain a person without warrant;
- to adjust the period of bringing a person before a judge, provided by Article 106 of CPC with the requirements of Article 29 of the Constitution, taking into account the time, necessary for a detention hearing;

¹⁰⁷ Resolution No. 6 of 26 March 1999 «On the use of bail by courts», (along with amendments of 6 June 2003) point 2.

¹⁰⁸ 96 ECHR, Iwańczuk v. Poland : Judgment of 15 November 2001, § 69

- to determine a starting point for detention on suspicion of committing a crime or an administrative offence depending on factual circumstances, which confirm the actual time when a person was first deprived of their liberty, not the decision of a law-enforcement officer, or, at least, extend the guarantees, given to a detainee, to persons, who are being held in the custody of a law enforcement agency as having been 'brought' there;

- to define in the law separate criteria of legality for detention and remand in custody (pre-trial detention) and annul provisions in point 2.5 of the Joint Order by Ukraine's Ministry of Internal Affairs and the State Penal Department No. 300/73 of 23 April 2001, which consider a detainee's release, when the suspicion is not confirmed, or when the term of detention has expired, as breach of the law, and other similar instructions;

- to include in the subject matter of detention hearing circumstances, which address reasons for arrest without warrant, including:

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

- reasons for the period, which a person is held in custody of a law enforcement agency until he/she is brought before a judge;

- to establish a clear presumption in favour of a person's release and provide that the onus of providing proof about grounds for detention be shifted to the prosecution;

- to introduce provisions, which would exclude remand in custody or its extension on the basis of purely hypothetical assumptions that a person could abscond, hamper the establishment of truth in the case, or continue his or her criminal activity;

- to 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 defence;

- to exclude from the law provisions, which allow remand in custody for carrying out possible procedural decisions (Article 148 of CPC) and securing correct behaviour (Article 154-1 of CPC), as these provisions fail to meet the criteria of clarity and predictability;

- to introduce provisions, which would exclude the practice of detaining a person after his/her release by a judge, on the basis of «concealed» accusations;

- to exclude from legislation the institution of «detention extension» by a judge, or, at least, introduce necessary amendments to the legislation, in order to exclude the practice of returning a person to a police unit after a detention hearing;

- to introduce amendments into Article 165-2 § 4 of CPC, in order to exclude detention without judicial control over the period established by Article 29 § 3 of the Ukraine's Constitution;

- to entitle persons, who are detained to seek periodic review of the basis of their detention;

- to establish clear and detailed procedural rules for detention hearings and provide, in particular:

- mandatory participation of the person, who is deprived of liberty, in any detention hearing;

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

- the right of the accused and his/her lawyer to study the materials, which justify the request for his/her remand in custody or extension of custody;

- to work out procedures, which would encourage the use of bail instead of detention;

- to determine 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;

- to shorten the maximum term of detention during pre-trial investigation;

- to introduce into legislation a maximum term of detention during court hearings;

- to exclude from Article 1176 of the Civil Code of Ukraine and section 2 of the Law of Ukraine «On the procedure for compensation of damage caused to the citizen by unlawful actions of bodies of inquiry, pre-trial investigation, prosecutors and courts» formulations, which prevent any person, who has suffered unlawful deprivation of liberty, from compensation for damages;

- to adjust rules of administrative detention with the requirements of Article 29 of the Constitution;

- to introduce amendments into the legislation, which would exclude the use of administrative detention for the purpose of criminal investigation, for example, by providing obligatory release of a suspect in committing an administrative offence pending a trial of the case;

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- to introduce amendments into Ukraine's Code on Administrative Offences (in particular, into Article 263 of CAO) and other legislative acts, which would exclude police custody of a person without a court order for over 72 hours;
- to provide procedure for court hearings concerning the detention of vagrants, or, at least, enable them to appeal such detention and provide rules for a judicial procedure;
- to provide, that detention and subsequent remand in custody of a person pending extradition must be enforced exclusively on the basis of a court decision, as well as the right of a person to periodic review of detention pending extradition;
- to re-establish a legal provision, which obliges the head of a pre-trial detention centre or other detention facility to release on his own decision a person, if there is no court decision in force to hold this person in custody.

V. THE RIGHT TO A FAIR TRIAL¹⁰⁹

The rule of law is one of the key elements in protecting human rights. A central aspect of this is the definitive role played by independent and impartial judges who act within the framework of the legal system.

These very principles are declared in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which stipulates the right to a fair court hearing. This Article and additionally ratified Protocols to the Convention correspond in their content to Articles 8 and 10 of the Universal Declaration of Human Rights and Article 14 of the International Covenant on Civil and Political Rights. These Articles play a special role in the system of legal norms on human rights and fundamental freedoms since they guarantee the most reliable and effective system of protecting rights and freedoms – the mechanism for judicial defence.

As has been seen on countless occasions, it is not difficult to make pronouncements about the existence of human rights and fundamental freedoms. Much more difficult is the actual securing of these rights and freedoms. In this regard, ensuring access to institutions of justice which meet the requirements of fairness, can give much more than any declaration, provided that the decisions of the court are adequately implemented. The European Court of Human Rights (hereafter, the European Court) has frequently stressed the vital role which the right to a fair trial plays in a democratic society. It is worth mentioning that the many claims lodged at the European Court are often specifically connected with violations of Article 6 of the Convention. This is explained in particular by the fact that claims about the violation of other articles of the Convention often arise as a result of violations of the demand to fair judicial proceedings.

Ten out of fourteen cases against Ukraine addressed to the European Court that were judged on in 2004 were based on violation of Article 6 of the Convention. They were the following cases: «*Piven' vs. Ukraine*», «*Trehubenko vs. Ukraine*», «*Sem Merith vs. Ukraine*», «*Svitlana Naumenko vs. Ukraine*», «*Voytenko vs. Ukraine*», «*Zhovner vs. Ukraine*», «*Shmalko vs. Ukraine*», «*Romashov vs. Ukraine*», «*Bakay and others vs. Ukraine*», «*Derkach and Palek vs. Ukraine*»¹¹⁰

Last year eleven applications were admitted to the European Court. Most of them also deal with the right to a fair trial and violations during execution of court decisions. The following applications were considered admissible: «*Koval' vs. Ukraine*», «*Lieshchenko and Toilupa vs. Ukraine*», «*Skubenko vs. Ukraine*», «*Timotiyevych vs. Ukraine*», «*Stryzhak vs. Ukraine*», «*Falkovych vs. Ukraine*», «*AgroTechService vs. Ukraine*», etc.¹¹¹

In this report we will consider the compliance of provisions in Ukrainian legislation to those of Article 6 of the Convention, as well as cases of human rights violations in Ukraine in order to analyze the situation as regards implementation of the right to a fair trial in Ukraine in 2004, and to highlight the most burning and problematical issues in this direction.

To conduct this analysis we have identified a set of rights and principles of court procedure, which represent the core of the right to a fair trial and which are the most controversial in Ukrainian legislation and law enforcement.

1. ACCESSIBILITY OF JUSTICE

Article 55 of the Constitution of Ukraine states that «Everyone is guaranteed the right to challenge in court the decisions, actions or omission of bodies of state power, bodies of local self-government, officials

¹⁰⁹ Prepared by Vitaly Razik, expert of the Ukrainian Helsinki Human Rights Union and using material of the Union, unless another source is indicated directly in the text.

¹¹⁰ Available on the European Court of Human Rights website: <http://www.echr.coe.int/Hudoc.htm> (original text), on the human rights RUPOR website <http://www.rupor.org> (Ukrainian text), and on the official webpage of the Ministry of Justice of Ukraine: <http://www.minjust.gov.ua>.

¹¹¹ Ibid.

and officers. ... Everyone has the right to protect his or her rights and freedoms from violations and illegal encroachments by any means not prohibited by law». The Constitution of Ukraine in Article 8 § 3 guarantees the right to appeal to the court in order to defend one's constitutional rights and freedoms.

Ukraine has progressed significantly in the area of accessibility of justice during the years of its independence. Yet legal reform remains rather slow and inconsistent, and the population does not have a high level of confidence in judicial bodies.

Ukrainian legislative regulation of access to court is of a generally permission-based character, and guarantees the right of appeal to court to challenge the decisions of authorities and officials. However, these wide constitutional provisions are not accordingly supported by direct regulation.

One can cite the common example of the issue of physical access to buildings of judicial bodies: the possibility of getting into court buildings, submitting documents and supplements to these, not to speak of the difficulties experienced by people with disabilities. There are a number of issues which have not been regulated, and which in fact are simply ignored.

The courts have jurisdiction over all legal relations which can arise in a State. However, the expansion of court competence, the development of social relations and complications arising from their regulation have led to an overloading of the judicial system. Therefore, judges not infrequently create artificial barriers to access to justice by dismissing complaints and even covering them up. Their large workload leads to infringements of reasonable time limits for court decisions. At the present time, there are no legal mechanisms that would make it possible to legally challenge the inaction of judges, in particular, procrastination over settling cases. The only way to influence a judge in such a situation is by applying to those who have the right to initiate disciplinary proceedings.

Accessibility of justice means that courts must not refuse to consider cases and are obliged to defend the violated rights of a person, if this is within their jurisdiction. We cannot consider courts accessible when the very court system remains complicated and cumbersome, and makes it difficult to determine which court is competent to deal with any specific case. Court expenses should not prevent legal defence. Public accessibility of information on court organization and activities is also a necessary condition for accessibility of justice, but in Ukraine this accessibility is far from ideal.

In any nation the factors of accessibility of justice are as follows:

- absence of groundless barriers for court access and prompt judicial remedies;
- popular awareness of the judicial system, the procedure for appeals and court practice;
- availability of an optimum system of court expenses and well-developed mechanisms to provide legal assistance to the poorest layers of society;
- the enforcement of judicial rulings.

The information required for an appeal to the court is often inaccessible and hard for the average person to understand. The judges often consult citizens themselves during their reception hours. Moreover, it is not uncommon for judges to express their opinion about the outcome of a particular case.

Texts of court judgments are usually not accessible to those who are not the immediate parties to a case. Court rulings are published selectively and in unofficial manner.

Due to lack of court premises, judges often consider cases in their offices, this making them unavailable to the public. Court expenses often prevent the poorest layers of society from seeking judicial remedies. Exemptions for poorer citizens from paying state duty on appeals to the court are virtually unheard of. These problems are especially acute with regard to ensuring the ability to take somebody to court in a civil case. The mechanisms for providing state assistance with court costs in civil and administrative cases are ineffective. For example, free legal assistance is provided by the State only in criminal cases. Lawyers providing such type of assistance also work almost for free, which causes a generally very low level of legal assistance. Despite the pitifully low fees for lawyers, the payments for the assistance allowed for are effectively not paid, and regional justice departments do not even use the small funds in the state budget that are allocated for legal assistance.

A significant problem has arisen as a result of the amendments to legislation related to the calculation of state filing duty in cases involving moral damages. On the one hand, this has decreased the number of law suits against the mass media, but on the other, access to court of those whose cases deal with compensation of moral damages for the unlawful actions of authorities or with compensation to employees for injuries or damage incurred while performing their duties, has become more complicated.

The principle of specialization defined in the Constitution of Ukraine as the basis for a whole system of courts of general jurisdiction has been only partially implemented. Courts of general jurisdiction cannot be considered specialized, despite the fact that they specialize in the consideration of largely civil or crimi-

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nal cases. Moreover, the specialization of judges in specific categories of cases remains rare in general courts. The situation results in an unequal distribution of cases between judges, who are now required to master a wide range of matters, making the process of judges' consideration even more drawn-out.

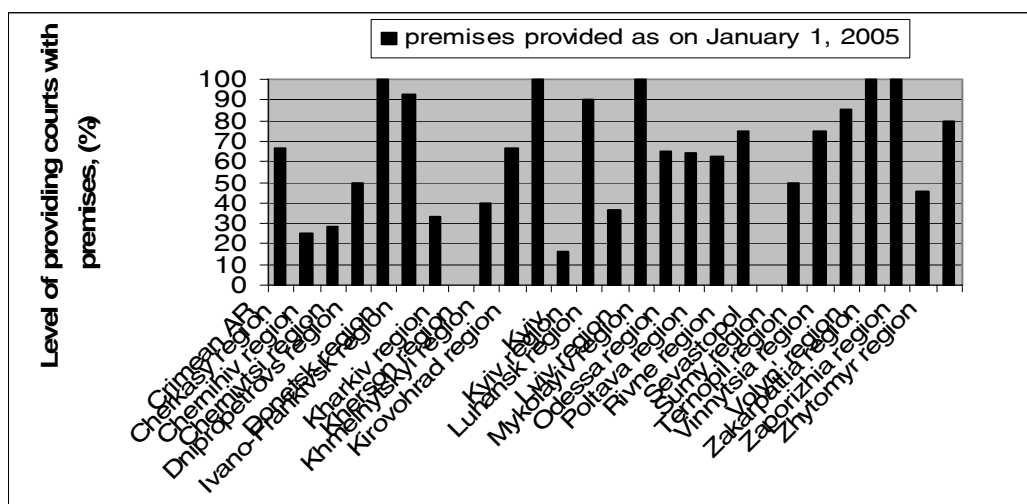
Judicial protection of human rights and fundamental freedoms receives too little attention from State executive bodies and bodies of local self-government. When considering disputes between State bodies and citizens, judges are often dependent on executive bodies, and are susceptible to their pressure largely due to their financial dependence. A system of administrative courts has yet to be created despite the fact that the need for such administrative courts and administrative jurisprudence has been acknowledged at an official level.

One of the major problems of Ukraine's legal system remains the inadequately supplied and financed state of courts of general jurisdiction. A lot of courts, especially local ones, do not have adequate premises, they lack computers and the technical means for recording judicial proceedings, stationery, etc.

According to data provided by the State Judicial Administration within the framework of measures planned for regional programs, as of 1 January 2005, 127 courts had been provided with premises, this being 68.3% of the figure planned. The original plan of providing courts with premises had been fully implemented in the following regions: Volyn, Transcarpathia, Dnipropetrovsk, Kirovohrad, and Lviv. Courts in Vinnytsa, Donetsk, Zhytomyr, Kyiv, Rivne, Ternopil regions and in the city of Sevastopol, are each still waiting for one more building.

Furthermore, the condition of premises which are designated for use as courts is often very poor and does not always render normal exploitation feasible. Thus, of the overall number of buildings transferred to courts, 95% are in need of repair, more than half (53 %) have less than the necessary minimal space, and the premises do not meet the requirements established for judicial proceedings. Sometimes these are simply the working areas of businesses that went bankrupt. Measures for providing courts with premises can be characterized as extremely unsatisfactory in the following regions: Kharkiv, Kherson, Cherkasy, Chernihiv, and the city of Kyiv.

The provision of courts with premises within the framework of measures envisaged by regional programs, as on January 1, 2005¹¹²



The State Judicial Administration also informs that 28 courts were not provided with premises due to lack of money, and 26 courts were left without premises due to failings or inactivity of local executive bodies. Territorial Departments of the State Judicial Administration of Ukraine (SJAU) point to this factor in Vinnytsia, Zhytomyr, Zaporizhia, Mykolayiv, Poltava, Sumy, Kherson, Chernihiv regions, and in the city of Kyiv.

Funds have not been allocated for re-equipment of premises. One therefore sees the situation where, on paper, and in their report to the State Judicial Administration, a court has received premises, however court hearings continue in the old premises because the new building is not ready for use. Thus the situation remains blocked rather than being improved.

¹¹² Level of fulfilment of Regional Programs of Organized Financing of Judicial Activities during 2003-2005 as on January 1, 2005. State Judicial Administration. Available from State Judicial Administration of Ukraine webpage: www.courts.gov.ua

The fulfilment by the chairperson of a court of his or her managerial functions can also influence accessibility to the court. Under these circumstances, the chairperson of the court may have no time left for legal proceedings. One can also observe the dependence of a court chairperson on the President of Ukraine and his or her Administration, since the President, in contravention of the Constitution of Ukraine appoints judges to the position of chair of the courts. It would seem expedient for the court chairperson to be elected by the judges of each given court.

In comparison with previous years, expenditure on the judiciary has significantly increased, however it still does not cover all court needs. A substantial part of expenditure is on the salaries of judges, court staff and on social security. Experts have estimated that less than 50 percent of the financial needs of the judiciary are presently covered.

We should also mention the conclusions of the Accounting Chamber of Ukraine as to fulfilment of the State Budget of Ukraine and utilization of budgetary funds. These conclusions state that: «lack of proper management of monetary and material resources in the State Judicial Administration of Ukraine have led to budgetary offences, inefficient use of state funds, and a loss to the budget of 8.1 million»¹¹³ – this at a time when there is a catastrophic deficit of funds!

Starting in 2003, there has been a slight improvement in the situation as far as financing court activities is concerned. On 16 June 2003, the Cabinet of Ministers of Ukraine adopted a State Program for Administrative Financing of Judicial Activities during 2003-2005¹¹⁴ prepared by the State Judicial Administration. The program has clear objectives and measures for financing judicial activities, resolving issues of social security, safety, and the independence of courts.

Spending on the maintenance of the judicial system has also increased. According to data from the Ministry of Finance of Ukraine, in 2003 as compared with 2000, the general level of financing of the judiciary increased almost 2.5 times, with judges' salaries 2,2 times higher¹¹⁵. Expenditure allocated by the State Budget of Ukraine for 2003 was paid in full. In 2004 financing of the courts increased, in comparison with 2003, by more than a third.¹¹⁶ One should however take into consideration the increase in the number of judges and courts, and the corresponding objective need for an increase in funding.

During the conference «Financing the Judiciary of Ukraine and Independence of Legal Proceedings» which was held by the Chernihiv Public Committee of Human Rights Protection Group and the Parliamentary Committee on Legal Policy, judges complained of a 600 UH decrease in their (monthly) salary last year; the salary of some judges had halved. The reason for this was the introduction of profit tax for judges and changes in the way salary is calculated. These changes had been adopted at the end of last year, and thus they could not have been considered when formulating 2004 budget. Although the Ministry of Finance of Ukraine reports 100 percent financial coverage of planned budget expenditures, and the State Judicial Administration confirms this, the sum allocated in the budget for judicial needs was less than that needed.¹¹⁷

Such positive figures cited in the reports of state authorities do not take into account the real financial needs of the judiciary and disregard additional circumstances that decrease real funding.

2. PUBLICITY OF THE PROCEEDINGS

Judicial procedure can be considered fair only when it is aimed at ensuring the rule of law and is based on legality, equality of parties before the law and court, competition; when it is accessible, public, open, and when it has mandatory mechanisms for carrying out court decisions. Any restrictions of these basic elements are possible only as exceptions and in cases foreseen by legislation and justified as necessary in democratic society.

The legality of court decisions is guaranteed by the consent of the interested parties, and also by parties having the right to challenge a decision and to a review of this decision in a higher court. Here it is worth noting as an example that the ruling of the Supreme Court of Ukraine on the refusal by the State

¹¹³ Available from the human rights website RUPOR: <http://www.rupor.org/index.php?id=1085042799>.

¹¹⁴ Decree of the Cabinet of Ministers of Ukraine «On Adoption of the State Program for Administrative Financing of Judicial Activities during 2003-2005» dated June 16, 2003 // Official Herald of Ukraine. – 2003. – №25. – p. 1197.

¹¹⁵ The financing of the judicial system is increasing from year to year – Ministry of Finance, Information Agency IAT «Liga», news published on the Internet, 22 January 2004, 09:17, <http://www.liga.net/news>.

¹¹⁶ Resolution of a joint extended sitting of the Presidium of the Supreme Court of Ukraine, the Councils of Judges of Ukraine and the Collegium of the State Judicial Administration of Ukraine «Summing up the work of the State Judiciary Administration of Ukraine in 2003, and the priorities for directions in the management of provisions for the activities of the courts in the current year» from 20 February 2004 // Visnyk of the Supreme Court of Ukraine. – 2004. – №5 (45). – C. 9-11.

¹¹⁷ Available from the human rights website RUPOR: <http://www.rupor.org/index.php?id=1098084859>

Committee dealing with religious issues to register a religious organization cannot be challenged since the Supreme Court, in reviewing the case alone, is the court of the first and last resort.

Judiciary rules should not be burdened with unnecessary formalities. In order to ensure the right of the individual to have his or her rights reinstated promptly, especially in uncomplicated cases, it is expedient to simplify court procedure in such a way that the simplification will not infringe upon the interests of the parties with regard to a just solution to their case. It is necessary to prescribe effective mechanisms for avoiding dishonest use by the participants in the judicial proceeding of their procedural rights, and also liability for when procedural obligations are not carried out.

The need to be public and open requires that the court ensures the right of the parties to be informed of the time and place of a judicial hearing into their case, the right to be heard in the court, and the right to know all the decisions made in their case. Non-public hearings would deprive the parties and other participants of a judicial procedure of any guarantees as to proving the justification of their position.

Openness of judicial procedure gives those not participating directly in the case the right to be present at judicial sittings. There can be no faith in a court where there is no open access to its hearings. This demands from judges as the representatives of the judiciary that they behave in a responsible and ethical manner to deserve public respect. Situations when press representatives are asked to leave a court hearing are not uncommon. For instance, a journalist of the Kherson newspaper «Vhoru» («Upwards») was forced to leave the court chambers during proceedings into a case, which had been declared as public.

Access to judicial statistics and court decisions should also be open. In many almost analogous cases court decisions are very different, even to the point of being quite opposite. Here, a fundamental failing is the lack of access to court decisions for anyone but the direct parties to a case. The Commercial Procedure Code (paragraph 3 of part one of Articles 111-15) already has norms permitting an appeal to the Supreme Court of Ukraine in cases when the Higher Commercial Court of Ukraine interprets the same clause in legislation or other statutory acts differently when deciding similar or analogous cases. People now also have the ability to access some decisions of commercial courts.

Access to court decisions is also problematical in the area of civil and criminal justice. A regulation similar to that described above would positively influence the fairness of court decisions and concordance of judicial practice. Accessibility of court decisions while meeting the requirements of personal privacy and confidentiality of corporate information would effectively influence the quality of court decisions and legal protection of the parties during judicial procedure.

Legal distinctness is one of the fundamental attributes of a fair trial and is achieved in the main through lack of ambiguity and clarity of legislation. At the same time, the court, applying the provisions of the law, should take into consideration its purpose and give the interpretation which affirms the rule of law. Open access to court decisions should become one of the most effective forms of public control over the judiciary. Moreover, openness of court decisions will also contribute to a more uniform application of laws and predictability of the outcomes in analogous cases. Restrictions on the openness of court decisions can be imposed only in cases defined in legislation aimed at protection of confidential personal data or other secrets, which are protected by law.

3. HEARINGS WITHIN A REASONABLE TIME

Article 6 of the European Convention entitles everyone to hearings «within a reasonable time». This means that judicial proceedings should occur without delays that might challenge court effectiveness and public confidence.

The criterion of «a reasonable time» is important because it guarantees the passing of judgment within a reasonable period, establishing in this way a time limit to the state of uncertainty which a person is in as a result of a criminal charge or through being involved in a civil legal dispute.

The beginning of the state of uncertainty for a person in connection with a legal investigation and trial proceedings comes with the formal charge, or if the person was detained, or if preventive measures were applied, from the corresponding first moment. The end of the state of uncertainty is the moment when sentence is passed or a decision comes into force or the charge is dropped (the closing of a criminal investigation). Therefore, the period between the bringing of a charge and the final verdict should meet the criterion of a «reasonable period».

Before we begin our analysis of Ukrainian legislation, it is important to note that «investigation» is a process which has its own stages or levels. Although the legislator does not specifically define how long a

person can remain in a state of legal uncertainty as a result of criminal prosecution, he does, however, often specify the periods for specific stages in the criminal process, or for various procedural activities. Even if specific periods (time frames, duration) of stages of the criminal process or procedural activities are not defined, then the procedure, rules for this procedure and sequence for carrying out specific procedural activities are set out.

One of the problems with keeping to a timetable for review of cases is that further investigation may be demanded, this significantly increasing the duration of criminal investigation. During preliminary consideration, a judge may remit a case for supplementary investigation if mistakes have been made in the preliminary investigation or if the law on criminal procedure has been infringed, and these infringements cannot be eliminated during judicial sittings.

The grounds for sending a case back for further investigation after preliminary consideration of the case, in accordance with Article 246 of the Code of Criminal Procedure of Ukraine are:

1) significant breaches of the requirements of the law on criminal procedure or mistakes in detective enquiry or pre-trial criminal investigation, which cannot be eliminated during court hearings, but which make court consideration impossible;

2) the presence in the case of grounds for bringing charges against the accused, which have not thus far been laid;

3) the presence of grounds for bringing criminal charges against other individuals, where a separate review of the case with regard to them is impossible.

When remitting a case for further investigation, the judge is obliged to indicate in his/her decision which particular circumstances need to be clarified and what investigative action should be taken to this end. When sending a case back for further investigation, the judge must decide on the preventive measure to be taken with regard to the accused.

It is interesting to see how court employees view certain aspects of the application of law in Ukraine. Thus, the majority of those asked – 60 % – considered that the principle of further investigations did not conflict with the principle of the presumption of innocence.¹¹⁸

Such a position is, at very least, curious, since, in accordance with Article 62 of the Constitution of Ukraine the presumption of innocence is affirmed and all doubts as to the proof of guilt of the accused should be interpreted in his or her favour.

Guilt which has not been proven is, in accordance with criminal process doctrine, treated as proven innocence. However, most court employees hold a different point of view. They consider that further investigation, which is clear evidence of the incompleteness of criminal investigation and the lack of certainty as to guilt are not infringements of the principle of presumption of innocence. The prosecution is thus given a second chance to prove guilt, which from the point of view of the possibilities of the investigation apparatus, violates yet another principle of justice – that being the equality of arms.

The practice of sending a case back for further investigation is a flagrant example of the violation of not only the periods for review of a case, but also directly of a person's human rights in the area of defending their rights.¹¹⁹

A considerable number of claims to the European Court relating to violations of Article 6 of the European Convention deal with infringement of the right to consideration of one's case within 'a reasonable time'.

According to the «Report on consideration of criminal cases by courts of first instance», in 2004, the Supreme Court of Ukraine, appeal, local and military courts sent 1499 cases involving crimes against life or health back for further investigation. 510 of these cases involved premeditated murder and 554 – aggravated assault. An additional 360 cases dealing with crimes against electoral, labour or other individual human rights and freedoms, and 6688 cases regarding crimes against property were also sent back for further scrutiny. Thus, using the general figure provided of 219, 873 criminal cases which were brought to court through 2004, 14,273 cases were returned for further investigation, this being 6,5 % of the overall number.

An additional 3.3 % of criminal cases had not been considered within 6 months, without taken into account cases which were terminated.

¹¹⁸ О.Сорочкін, А.Бурій, В.Разік, З.Сірик. Відповідність законодавства України статті 6 Конвенції про захист прав людини та основних свобод / О. Sorochkin, A. Buriy, V. Razik, Z. Siryk. Conformity of Ukrainian Legislation and Article 6 of the European Convention on Human Rights and Fundamental Freedoms. – Lviv, 2003. p. 137.

¹¹⁹ Interim resolution Res DH(2004)14 with regard to court decision of the European Court of Human Rights dated July 25, 2002 (final resolution dated November 6, 2002) in the case «Sovtransavto-Holding vs. Ukraine» (adopted by the Cabinet of Ministers during the 81st meeting of the Ministers on February 11, 2004).

The abolition of the system of Courts of Cassation, and slow progress on creating higher courts has led to the Supreme Court of Ukraine becoming seriously overloaded. At the beginning of 2004, approximately 20 000 cases were awaiting attention, by the end of 2004, this number had increased by 10 000.

An example of violation of the «reasonable time» requirement is seen in the European Court decision in the case «Sem Merith vs. Ukraine»¹²⁰ dated March 30, 2004. The essence of this case is as follows. Mr. Merith, a citizen of Israel, was involved in commerce in Ukraine. On suspicion of crimes involving abuse of power by an official, a criminal investigation against him was launched, and in 1998 he was detained. Initially he was kept in custody as a preventive measure. This all happened in 1998. Although later other preventive measures were chosen: first, he gave a written undertaking not to leave his place of residence, then an undertaking to appear before the investigating authorities and courts when requested and was allowed to leave the country. Criminal investigation continued, all his property remained under arrest, despite 6 years having passed since the beginning of the case,

The European Court ruled that in this case the rights, guaranteed in Article 6 («a fair and public hearing within a reasonable time») and Article 13 (absence of an effective remedy before a national authority to challenge such timing of the case) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, had been violated. Ukraine was ordered to pay 2,500 Euros in moral damages to the plaintiff and 1500 Euros court costs.

In the viewpoint of the European Court, hearings in cases that involve criminal charges should be conducted within a reasonable time frame. This notion is rather broad, so over the years of its activity the European Court has developed a set of criteria to define «reasonable time of hearings»: the complexity of the case, behaviour of the plaintiff, and behaviour of the authorities.

It is clear from the facts of this case that a criminal investigation lasting six years could not meet the requirements of the European Court for «a reasonable time» of hearings. However, as well as stating that the time period had been unreasonable, the European Court made another comment regarding Ukraine, noting that Ukrainian legislation lacks effective ways of protecting a person from violation of reasonable periods for consideration of a case, and does not allow for the possibility of obtaining compensation if such a violation takes place.

Ukrainian legislation should, therefore, be supplemented with norms that:

- ensure the right of any individual or legal entity to get compensation from the State if the reasonable period for dealing with their case in courts of general jurisdiction have been violated;
- consolidate procedure for making a complaint about violations of reasonable time scales and for receiving compensations for damages incurred;
- state the sources of financing the compensation for damages caused by the violation of the reasonable time requirement.

Another interesting case on reasonable time is «Trehubenko vs. Ukraine». Here the European Court ruled unanimously that Ukraine had violated paragraph one of Article 6 of the European Convention, in the context of having the possibility to lodge a protest to a judge of the Supreme Court of Ukraine over a court decision that had already come into force.

Taking into consideration the financial and social status of the applicant, his age, and health, the Court decided that nullification of the given decision was a disproportionate interference in his rights to enjoy his possessions. That gave grounds for the unanimous decision of the European Court that the case included violation of Article 1 of Protocol № 1 of the European Convention for Protection of Human Rights and Fundamental Freedoms.

The European Court awarded 3,536 Euro to the plaintiff as compensation for material damages, and 5,000 Euros for moral damages.

The European Court of Human Rights decision in the case of Trehubenko challenges the entire procedure for supervision and the functions of the Supreme Court as an overseeing body that can review court decisions which have already come into force.

There seems little doubt that the partial restoration of the procedure of general surveillance of the Office of the Prosecutor, which was included in a recently adopted Constitutional reform will also violate a person's right to a fair trial and be in contravention of Article 6 of the European Convention.¹²¹

The Draft of the Criminal Procedure Code has effectively rejected the practice of sending cases back for further investigation, however the practice of returning a case to the office of the prosecutor which was

¹²⁰ ECHR, Merith vs. Ukraine, Judgment 30 March, 2004.

¹²¹ Valid court decisions may not be cancelled. On-line edition on human rights RUPOR. Available from: <http://www.rupor.org/index.php?id=1106064919>.

introduced with the amendments from 21 June 2001 to the current Criminal Procedure Code (Article 249-1 of CPC), has been retained. At present the judge may, at the stage of preliminary consideration, return a case to the office of the prosecutor if the latter has infringed Articles 228-232 of the CPC, which are, in essence, its main activity as the representative of the prosecution.

For instance, the judge may return a case to the prosecutor, if he/she considers that the prosecutor did not check whether «a crime was committed» (Article 228 of the CPC). In practice, this means that the judge sees no evidence in the case of an actual crime, but does not wish to take the decision to terminate the case. He/she therefore sends it back to the prosecutor so that «it gets buried with other cases» or so that the prosecutor «uses some magic» to come up with some kind of crime». ¹²²

A judge may also send the case to the prosecutor if he/she considers that not all the people involved have been charged (Article 228 of the CPC), or that the charge should «be replaced by a more serious one» (Article 231 of the CPC).

Furthermore, the Draft of the new Criminal Procedure Code allows for cases to be returned to the prosecutor not only at the stage of preliminary investigation, but also when the main hearings have begun. This procedure may take place where the investigator has not informed the participants in the criminal process of the termination of the criminal case, has not shown them the case material, has incorrectly prepared the prosecutor's conclusions, has not added necessary material to the latter, or has not sent the case to the prosecutor. The same procedure is foreseen where the prosecutor has not confirmed the indictment or other decision about directing the case to court, or s/he did not submit to the defendant a copy of the indictment or a decree about amendments to it.

As an expert from the Kharkiv Human Rights Protection Group, Arkadiy Bushchenko, notes, this option is excessive for the purpose of removing formal discrepancies (which can happen in any field), while being clearly inadequate for rectifying significant failings. Many grounds for returning a case to the prosecutor during the main court proceedings can be eliminated during the very hearings. For instance, the court might give time for the accused to become familiar with case material and then satisfy his/her claims if deemed justified. ¹²³

Overall the development of legislation on criminal procedure, especially in the area of reasonable time, should be directed towards strengthening the adversarial principle which forms the basis for proceedings in all European countries, and complies with basic requirements for protecting human rights.

The practice of sending cases back for further investigation should be entirely discarded. It is vital to ensure the presumption of innocence of a person during investigation and when using preventive measures.

Evidence which has not been obtained through the adversarial process should not have legal force and anything which is not proven should be interpreted as being in favour of the accused.

4. INDEPENDENCE AND IMPARTIALITY OF THE COURT

The independence of the judiciary and its equal standing in relation to other branches of state power are the hallmarks of a State based on law, in which every citizen has the right to protection of his/her rights and freedoms by an authorized, independent, impartial and objective court.

Independence of the judiciary is a universally recognized right in international law. In adherence to fundamental principles of independence of judicial bodies, stated in UN General Assembly resolutions 40/32 and 40/146 dated November 29 and December 13, 1985 respectively, each member-state takes on the obligation to allocate sufficient funds to ensure that judicial bodies are able to properly fulfil their functions. The independence of the judiciary is guaranteed by the state and is stated in the Constitution or laws of the country. All state and other institutions are obliged to respect the independence of the judiciary and adhere to it (paragraphs 1 and 7).

Paragraph «b» of part 2 of principle 1 of the Recommendations of the Committee of the European Council on the independence of the judiciary dated October 13, 1994 proclaims that legislative and executive powers must ensure the independence of judges and oppose any efforts to jeopardize this independence. ¹²⁴

¹²² The Draft of the Criminal Procedure Code – a step back from democracy. Available from: <http://www.rupor.org/index.php?id=1094566365>.

¹²³ Same source.

¹²⁴ Available on the European Council website: http://www.coe.int/t/cm/home_en.asp.

Furthermore, the Vienna Declaration and the Action Plan adopted during the Second World Conference on Human Rights on June 25, 1993¹²⁵ stressed the importance of appropriate funding of all establishments of the judiciary (paragraph 27).

According to the provisions of Article 6 of the European Charter on the Status of Judges «*Judges are entitled to remuneration, the level of which is fixed so as to shield them from pressure aimed at influencing their decisions and more generally their behaviour within their jurisdiction...*

Remuneration may vary depending on the length of service, the nature of the duties which judges are assigned to discharge in a professional capacity, and the importance of the tasks which are imposed on them, assessed under transparent conditions.

*... judges who have reached the legal age of judicial retirement, having performed their judicial duties for a fixed period, are paid a retirement pension, the level of which must be as close as possible to the level of their final salary as a judge».*¹²⁶

The European Court when deciding whether a judicial body is independent considers the following factors:

- the procedure for appointment of its members;
- the duration of their service in this capacity;
- the existence of safeguards that shield them from pressure, and those which provide the given body with the external features of independence.¹²⁷

The European Court of Human Rights has ruled that a judicial body should act independently of both executive power and parties of the case.¹²⁸

The judicial system and proceedings should be organized in such a way as to prevent any opportunity for exercising pressure on judges nor any justified doubts among the parties to the case as to the impartiality of the judges in making their judgment.

The adoption of the Constitution of Ukraine raised the issue of whether to reject the system of military courts. The existence of such courts within a system of courts of general jurisdiction is not in keeping with the constitutional principles of specialization and territoriality, since military courts carry out civil and criminal court proceedings in military units. Furthermore, judges of military courts have a particularly privileged status as compared with other judges. This raises well-founded doubts as to the independence and impartiality of these judges. The law «On the Judicial system of Ukraine» of 2004, despite proclaiming a single status for all judges, retained the special status of military court judges. These judges are in military service and belong to the staff of the Armed Forces of Ukraine.

These judges' salaries and careers depend on their military rank, obtained through the active participation in the military command. A military judge also uses all kinds of military equipment and enjoys the social benefits of servicemen, thus in part being in the keeping of a State body (the Ministry of Defence) which is frequently an interested party in military cases. The special status of military judges discriminates against other judges and raises understandable doubts as to the independence of these courts.

Here we should mention the legal practice of the European Court of Human Rights¹²⁹, which considers that the independence and fairness of a military judge who is on military service and holds the rank of officer, regardless of any safeguards designed to shield him from pressure, must be in doubt, and that the existence of such a situation violates paragraph 1 of Article 6 of the European Convention¹³⁰. The European Court of Human Rights, in considering the case «*Dobertin vs. France*», noted that the elimination of the National Security Court and Paris Military Court were important changes which should improve the protection of the right to a fair trial, envisaged in Article 6 of the Convention¹³¹

The level of confidence in the military courts is not high amongst servicemen.¹³² Even if one considers the present backlogs in courts, there can be no justification in retaining military courts. The existence

¹²⁵ Available from: <http://www.legal.com.ua/document/kodeks/0CH56006CH50710-99.html>.

¹²⁶ Available from the Ministry of Justice of Ukraine website: <http://www.minjust.gov.ua/?do=dr&did=1955&sid=comments>.

¹²⁷ ECHR: two decisions in the case: *Campbell and Fell against the United Kingdom*, 28 June 1984.:

¹²⁸ ECHR, *Rinhaisen vs. Austria*: Judgment 16 July 1971

¹²⁹ ECHR rulings on the following cases: *Engel and others (1976)*, *Jong, Baljet and Brink (1984)*, *H.C.M.A. (1989) vs. Kingdom of Netherlands*; *Findlay (1997)*, *Morris (2002) vs. United Kingdom*; *Incal (1998)*, *Sahiner (2001) vs. Turkey*.

¹³⁰ ECHR, *Sinclair vs. Turkey*: Judgment 28 October, 1998.

¹³¹ ECHR *Dobertin vs. France*: Judgment 25 February, 1993.

¹³² Селюк М.Р. Кому служить військова Феміда? Практика судочинства військових судів України. – Київ., 2003. – с.340. / M. R. Seliuk. Who does the Military Femida Serve? Practice of Judiciary Proceedings in Military Courts of Ukraine. – Kyiv., 2003.- p.340.

of military courts within a system of courts of general jurisdiction is also placed in question by Article 125 of the Constitution of Ukraine which states that «the creation of extraordinary and special courts shall not be permitted».

In view of the above, the government draft introduced into Parliament in 2004, which envisages the abolition of military courts within Ukraine's court system, can only be welcomed.¹³³

Nonetheless, the Human Rights Ombudsperson, Nina Karpachova believes that the liquidation of the system of military courts may lead to disorganization of the work of the courts as regards cases involving military servicemen, and may negatively affect their position and the guarantees of protection of their constitutional rights. Therefore, the Ukrainian Human Rights Ombudsperson has addressed an appeal to the President of Ukraine, asking him to use all means to stop the liquidation of military courts, which she deems ill-considered.¹³⁴

In Ukraine a judge is initially appointed by the President for a period of five years, and is then elected by Parliament with indefinite tenure. The responsibility for choosing judges rests with a system of qualifying committees for judges and the Higher Council of Justice. The qualifying committees carry out the initial choice of candidates for the position of judge by checking whether each candidate meets the qualifying conditions and by carrying out attestation of the potential judges. The Higher Council of Justice then interviews those candidates recommended, and submits their shortlist to the President for appointment. In Parliament, the candidacy of judges is discussed first in the Committee on Legal Policy.

Such procedure, should independence of judges be properly respected, does not in general pose any threats to court independence, since a judge's life tenure does not depend on the will of the President who makes the initial appointment, and thus a judge upon his or her appointment or election ceases to depend upon the appointing or electing authority. In addition, the procedure involves independent collegiate bodies – the qualifying committees and the High Justice Council.

At the same time, one can point to many failings in the procedure for becoming a judge. The progression from candidate to judge depends to a fairly large extent on individual officials of the executive and judiciary, who are involved at certain stages in the process of choosing judges. The vague nature of provisions of the law «On the Judiciary of Ukraine» (2002) provides a lot of scope for abuse on the part of officials. Many provisions of the law can have more than one interpretation which in practice leads to a selection procedure which is not transparent. The State Judicial Administration, presidents of courts, and Administration of the President are also involved in the selection process, as well as the qualifying committees and the High Justice Council. We can expect these institutions to create various barriers at each of the stages of selection.

The authority to prepare materials for appointment and election of judges has been transferred from the Ministry of Justice to the State Judicial Administration, which acts as a mediator at every stage of the documentation processing. One should keep in mind that the State Judicial Administration is an executive body, whose directors are appointed by the President.

The role of court chairpersons in the selection and careers of judges remains significant. Since 2002 some of their functions have passed from chairpersons of courts of appeal to chairpersons of higher courts. Thus, the Chairperson of the Supreme Court makes submissions as to the appointment or election of judges and requests the appropriate qualifying committees to make conclusions as to the feasibility of appointing or electing judges, while the chairpersons of higher specialized courts submit requests as to appointment or election of judges of the respective specialized courts. One should also take into consideration the fact that the chairpersons of courts are appointed and dismissed by the President of Ukraine, which places upon them the need to be loyal towards the Presidential Administration.¹³⁵

The Law «On the Judiciary of Ukraine» has retained the provision that for qualification attestation, a candidate must provide a reference from his or her place of work, written by the chairperson of his or her court. This means that without such a reference, a judge seeking life tenure may be denied a qualifying attestation, which may also serve as a lever for unlawful influence on a judge by his or her court chairperson.

¹³³ В.Разік. Військове судочинство: Порівняльний аналіз судочинства у судах загальної та військової юрисдикції. Київ, 2004, /V. Razik: Military judicial practice. A comparative analysis of judicial proceedings in courts of general and military jurisdiction, Kyiv, 2004, available on the website of the Centre for political and legal reforms: <http://www.cppr.info>.

¹³⁴ Available on the human rights website RUPOR : <http://www.rupor.org/index.php?id=1097563805>.

¹³⁵ З.Сірик, О.Грабовська, В.Разік. Доступність суду в Україні після реформи. / Z. Siryk, O. Hrabovska, V. Razik. Accessibility of Court in Ukraine after the Reform. – Lviv, 2002. p.21.

Professionalism, independence, and impartiality of judges are vital for ensuring just decisions in court cases. The system of selecting judges, the prestige and authority of the position of judge need to ensure the formation of a highly-qualified corps of judges. The deepening specialization of the court and of judges should contribute to the quality of court decisions and to the resolution of cases in reasonable time.

A mechanism for judges' responsibility needs to guarantee effective and prompt reaction to cases involving judges' self-will or incompetence.

In a growing number of instances people without the sufficient moral and professional qualities required for the high status of a judge are nonetheless appointed to such a position. Judges are often former police officers or prosecutors who prove incapable of shedding their stereotypical thinking based on the point of view of the prosecution.

As mentioned, officials of the executive and judiciary can have a disproportionate influence on the appointment of judges. Unfortunately the requirement for competition when appointing judges has virtually no force. There are less people applying for the position of judge than there are actual judicial seats. The situation, however, is different in the capital or other large cities, where there are fees, albeit not broadcast, for services in facilitating somebody's appointment. No competitive procedure at all is envisaged in the process of election of judges for courts of higher jurisdiction, which, also contributes to corruption in this area.

The system of disciplinary liability of judges is far from perfect; in many cases it allows judges to avoid liability, and in some cases the system for disciplinary liability is used to crack down on a particular judge.

An example of this can be seen in the case of Judge Yuriy Vasylenko, who brought an action against President Kuchma, and as a result instead himself faced disciplinary proceedings.¹³⁶

Presently disciplinary authority is exerted by qualifying committees of courts (both judges of local and appeal courts) and the Higher Council of Justice (for judges of higher courts and of the Supreme Court). These also consider complaints about decisions to bring disciplinary proceedings against judges of local and appeal courts.

However, issues of judicial discipline are not directly tied to qualifications. For instance, the appearance of a judge drunk in the courtroom bears no connection with his professional knowledge but constitutes an administrative offence. That is why the authority to impose disciplinary liability on judges should not belong to the competence of qualifying committees. The difficulty of making a judge liable for disciplinary offences is further compounded by the fact that these bodies do not work on a regular basis, and the periods for imposing disciplinary liability are limited.

As a rule, interference with the course of justice occurs at the initiative of the chairpersons of courts, who have many levers of influence over judges, starting from distribution of cases among judges and ending with decisions as to bonuses.

Legislative guarantees for remuneration of judges in Ukraine do not contribute to the independence of judges. The system of remuneration, where, in the absence of an appropriate law, a judge's salary is at the discretion of the President of Ukraine and the Cabinet of Ministers of Ukraine, is evidence of the significant dependence of judges on the Head of the State and on the Government. Some legislative acts regarding remuneration of judges are not published to avoid making this dependence too obvious. To eliminate corruption in judicial bodies and to strengthen independence and impartiality of the judiciary, it is necessary to review the salaries of judges and prepare a draft «On Salaries of Judges and Court Staff».

Low salaries prevent the position of judge being considered prestigious in professional lawyer circles. On the other hand, the opportunities for gaining illegal profit from this post attract those whose aims directly contradict fair and impartial judicial proceedings and decisions.

One should note that judges' salaries decreased in 2004, this especially affecting local judges and auxiliary staff, and this created impossible conditions for their activity. For example, the monthly salary of a judge of the appeal court last year was on average around 2,100 UH, whereas this year, judges say that they received 1,700 UH per month. Salaries in commercial courts are much higher. Auxiliary staff in local courts receive 250-300 UH per month, and the salary of newly appointed judges of local courts is about 400-600 UH.¹³⁷

¹³⁶ Available from: <http://www.korespondent.net/main/32747>.

¹³⁷ Available on the human rights website RUPOR: <http://www.rupor.org/index.php?id=1098084859>.

To create additional safeguards for the independence of judges and to generate an increase in court confidence we should implement at procedural level the institute of trial by jury. The involvement of juries is important first of all because the law allows judges very wide discretionary powers, and the result of the decision on a case is dependent upon the moral assessment of the circumstances (juvenile delinquency cases, cases which determine a child's future, deal with questions of guardianship and care, etc.). Usually it is not judges' knowledge of legislation, but their life experience and general moral level which play a vital role in the correct and fair interpretation of laws.

There is a real need to develop mechanisms of legislative control over the functioning of juries. To begin with, trial by jury should be introduced only in specific categories of cases, for instance, those involving very serious kinds of crimes. The accused should have the right to choose between trial by jury and a panel of professional judges. While both jury and professional judges coexist in Ukraine, it is crucial to separate their functions. The jury in its verdict decides whether a crime was committed, whether it was committed by the accused, whether the accused should answer for the crime, while a professional judge passes sentence in the case based on the verdict of the jury and norms of criminal legislation.

The status of the Prosecutor's office also influences the independence of the judiciary. According to the Constitution of Ukraine (Article 121) this status is limited to two functions: prosecution in court on behalf of the State and supervision of the adherence to law of bodies that conduct investigative operations, detective enquiry and pre-trial investigation. Provisions of the Draft of the Criminal Procedure Code contradict the Constitution and endow the Prosecutor's office with the right to conduct pre-trial investigation (Article 232). It is a contradiction for both pre-trial investigation and supervision over the lawfulness of its activities to be carried out by one and the same body.

In order to prevent possible abuse in carrying out pre-trial investigation, particularly as regards protecting the rights of suspects and defendants, the Constitution removed the right of carrying out pre-trial investigation from the jurisdiction of the Prosecutor's office. We should note, however, that transitional provisions of the Constitution temporarily retain pre-trial investigation as a function of the Prosecutor's office until a system of pre-trial investigation can be created. Moreover, the wording used in the transitional provisions effectively permits the retention of these powers indefinitely. This does not, however, give grounds for accepting a new code with outdated norms which entirely ignore Article 121 of the Constitution, do not comply with the requirements of competitiveness in judicial proceedings, and which contradict the provisions of Article 6 of the European Convention.

5. «EQUALITY OF ARMS» AND ADVERSARIAL PROCEEDINGS

The present Ukrainian system of criminal justice still retains the principal features of the old Soviet model. It is based upon strict centralization, lacks clear values of morality and fairness, and manifests formalism and red tape, which develop into bribery and corruption. Ostensibly declaring the ideals of democracy, in practice this system opts rather for a repressive approach.

The system of criminal justice in Ukraine is at this stage an effective instrument for limiting democracy. It is used for political and economic purposes both at the highest political level, and on local scale. The years of independence have not achieved a satisfactory level of de-politicization of its law enforcement system nor judiciary. In all parts of the country, instances of the dependence of judges are not infrequent. The effectiveness of the activity of legal instruments aimed at ensuring independence of judges is extremely low. Unfortunately, it must be acknowledged that in recent years, there has been little evidence of appropriate activity from judges themselves in standing up for the principles of judicial independence.

The activities of criminal prosecution bodies is characterized by duplication of efforts, and where there is a conflict of interests, departmental considerations prevail over public interest. The delegation of functions in criminal justice does not conform to best democratic practice. At pre-trial stage, the role of the judiciary is artificially downgraded. A prosecutorial approach has become firmly entrenched.

Certain failings are highlighted by lawyer and expert in criminal law and process for the Kharkiv Human Rights Group, Arkady Bushchenko: «In several cases the Criminal Procedure code makes it possible to act in a way that violates standards of independence as regards review of cases by the Prosecutor. For example, according to paragraph 1 of Article 112 of CPC, possible brutal treatment meted out by «a serviceman of the Armed Forces of Ukraine» should, at the first stage, be investigated by the commander of the military subdivision. According to Paragraph 5 of the same Article, an appeal against brutality from

the staff of «a corrective labour institution, pre-trial detention centre, corrective labour and treatment centre, and educational and labour centre» will be investigated by the head of respective institution. Only in cases where this official is charged, shall further investigation be conducted by the office of the prosecutor».

The failings of the existing system of procedural consolidation and assessment of legal evidence are compounded by signs of susceptibility of court experts to administrative pressure. Expert establishments maintain close ties with investigating bodies.

The process of safeguarding the principle of competitiveness during trials remains on a very low level. Lawyers do not have sufficient influence on the court to achieve fairness of court rulings, while offices of the Prosecutor severely restrict professional independence of their employees when taking part in trials.

Provisions of the Draft of the Criminal Procedure Code also flagrantly violate the right to defence. Thus, the Draft stipulates that the defending lawyer may become involved in proceedings only after the first interrogation (part 2 of Article 52), or not earlier than the moment when the individual is declared a suspect or actually charged (paragraph one of part two of Article 55). We believe that this directly restricts the constitutional right of each person to defence from accusations and to legal assistance, since the adherence to this right should not depend on such circumstances as the conducting of a first interrogation or the laying of charges. With regard to this issue, the Draft worsens the position of a suspect or accused, in comparison with the current Code of Criminal Procedure of Ukraine which allows for a first meeting with defence lawyer prior to the first interrogation (articles 43 and 43-1).¹³⁸

The procedure for challenging a judge in Ukrainian legislation does not, in practice, meet the requirements of the equality of parties. According to the Civil Procedure Code of 2004, the challenge is considered by the very judge who has been challenged. In corporate and criminal court proceedings, the situation remains intact that the president of the court considers any challenges brought. The first variant raises doubts as to the objectivity of a decision concerning a challenge from the point of view of the fundamental principle: «Nobody can be judge in their own case». After all, a challenge by its very nature is a dispute between a party and the judge as to possible bias shown. The second variant is inadmissible since the president of the court may not have any special procedural rights as compared with other judges. A judge occupying an administrative post in court should not interfere in the decisions relating to cases made by other judges.

Ukraine is in a league of countries with an exceptionally high number of cases of remand in custody at pre-trial stage. The practice of falsifying administrative arrests in order to make the detention of a suspect appear lawful has become common. Those in detention are frequently subjected to unlawful methods of physical and psychological pressure. A confession of guilt from the accused remains the dominant form of evidence, while suspects are often bargained into making confessions by procedural benefits. Evidence is often rigged or destroyed.

The principle of the presumption of innocence, affirmed in the Constitution of Ukraine, is observed in an entirely unsatisfactory manner. Any doubts as to the defendant's guilt are more often interpreted not in his or her favour but rather the opposite. It is common practice for law enforcement bodies to inform the media of a person's proven guilt in committing a crime before sentence is passed in court, and even before the charge has been laid in court.

In the last ten years the procedural status of a suspect has become extremely restricted. Suspects are subjected to the same range of repressive measures, including preventive measures, as a person already charged.

One of the dominant ideas in Ukrainian criminal procedure remains that of limited judicial control. In accordance with this, the judge at the pre-trial stage appears only occasionally and is not entitled to confirm or assess court evidence. Having taken a decision about remand in custody of the individual, or about issuing a search warrant, the judge is then kept distant from the case.

An example of a violation of human rights in the context of equality of arms can be seen in the practice of sending cases back from the court for further investigation, and also the introduction in 2001 of the right of the court to authorize the criminal investigation unit to look for evidence as an alternative to further investigation.

The procedure for court review does not ensure adherence to the principle of adversarial proceedings. Evidence provided by the prosecution is more often given attention by the judge than evidence from the

¹³⁸ Implementation of basic principles of criminal justice in the Draft of the Code of Criminal Procedure of Ukraine. Available from the website of the Centre for Political and Legal Reform: <http://www.cprp.info/?w=r&i=61&d=153>.

defence. The abolition of the principle of continuity of court review in a criminal case has resulted in serious abuses in the court.

Administration of justice was significantly damaged by the rejection of collegial forms of court procedure. The vast majority of criminal cases are heard and decided upon by a single judge. The adjudication rules make it possible for a sole judge to pronounce sentences of up to ten years of imprisonment in all cases. If under the law a certain offence is punishable by a term in excess of ten years a panel of judges will sit only if requested by the accused. Compulsory review by a panel of judges is foreseen only for crimes which allow a sentence of life imprisonment. For eight years now there has been concerted effort to not allow the introduction of trial by jury.

The main direction for the development of criminal procedure legislation should be the principle of adversarial proceedings which dominates in procedure in European countries and meets the basic demands for defending human rights. It is crucial that the practice of sending cases back for further investigation be abandoned, and that the presumption of innocence of an individual is maintained when carrying out investigations or when using preventive measures.

Evidence obtained in non-adversarial proceedings should have no legal force, while everything that has not been proven should be interpreted in favour of the accused.

6. THE RIGHT TO LEGAL ASSISTANCE

The European Convention does not clearly state that there must be free legal assistance in civil cases. It has, however, ruled that legal assistance must be provided to meet the interests of justice. Article 59 of the Constitution of Ukraine affirms that «Everyone has the right to legal assistance».

It is up to the judge to determine whether the interests of justice require that free legal assistance be provided to a party in a civil case when s/he cannot afford a lawyer.

If a person accused is entitled to free legal assistance, then this assistance should be practical and effective, not theoretical and illusory.

Legislation regulates the necessary amount of state legal costs and establishes the categories of citizens and cases where benefits are due. However, given the low standard of living in Ukraine, it is financially impossible for the average citizen to pay for qualified legal assistance to prepare a case for court.

Justice cannot be considered accessible to all if the State lacks efficient mechanisms for providing legal assistance. The absence of effective mechanisms for providing legal assistance to the poorest layers of society is a violation of the right to a fair trial. In such a situation, judges in civil cases often provide legal consultation to the parties which creates serious doubts about their impartiality and violates the principle of adversarial parties.

The quality of legal assistance in criminal cases is low, since state fees to lawyers for providing free assistance are extremely low. Lawyers, appointed to defend a person in a criminal court case do not even bother to waste their time collecting the fee. However information from human rights groups suggest that even those funds allocated by the state budget for providing legal assistance are not being used by departments of justice.

The Kharkiv Group for Human Rights Protection approached regional departments of justice and courts of appeal requesting data on the use of budget funding allocated for paying lawyers providing free legal assistance in criminal cases. The statistic data received was uninspiring. In Ivano-Frankivsk region 12000 UH had been allocated, of which 210 had actually been spent, leaving 11 790 UH at the end of the year recorded as budget revenue. In the Kherson region, during the second half of 2004, 49 200 UH had been received, of which not one had been spent. The same was found in the Transcarpathian, Chernivetsky regions, and in the city of Sevastopol, where of the 7 500 UH received, none had been spent. In the Dnipropetrovsk region 18 191 of the 107 000 UH received had been used to pay for the services of 249 defence lawyers. Even in Kyiv of the 28 000 UH received, only 7 000 had been spent. One should note that the amounts which are given to different regional departments of justice vary considerably between 7 500 and 165 000 UH.

Modern civil procedural legislation in Ukraine allows the court to free a person from court charges, in particular for legal defence charges. However there remains no effective mechanism for involving lawyers in these cases, nor for paying for their services.

According to the European Court of Human Rights practice a state should guarantee legal assistance when «this is necessary for providing real access to justice or when legislation of member-states requires le-

gal representation in some categories of cases or in cases of complexity of judicial proceedings»¹³⁹. To comply with the standards established by the European Court of Human Rights according to the Convention, the vast majority of European Council member-states have developed a procedure for providing legal assistance free of charge or for an acceptable fee in civil and administrative cases.

The right to legal assistance in the interpretation of the European Court is an integral part of a wider notion of the right of access to the court, stipulated by Article 6 of the Convention.¹⁴⁰

According to Recommendation № R (93) of the First Committee of Ministers of the Council of Europe to its member-states with regard to effective access to law and justice for the poorest layers of society, dated January 8, 1993, states should facilitate effective access of the poorest to court by providing and covering the costs of legal assistance in all adversarial or non-adversarial proceedings. Member-states are also encouraged to create consulting centres in the areas where poor people live.¹⁴¹

Ukraine should, accordingly, create the conditions which would guarantee legal assistance to individuals whose income is too small to enable them to defend their interests in court. Legal assistance to people with low-income should be granted free of charge or for an acceptable fee not only in criminal but also in civil and administrative cases, where defence of the most fundamental human rights is involved. The state should facilitate the establishment of community bar associations in bodies of local self-government for rendering legal assistance free of charge to members of the community.

All of the above suggests that Ukrainian legislation needs to provide a better regulated system of access to the courts. In certain cases it should also determine liability of those directly or indirectly preventing citizens from turning to the courts to defend their infringed rights. There is also an urgent need for a law regulating the provision of free legal assistance to people with low incomes. 77.5% of judges surveyed agreed that there was a need for such a law.

Any practising lawyer will tell you how «happily» they defend «free» clients, and how «easy» it is later to receive the money owed them from the State budget. With regard to this, perhaps the idea, suggested by court employees, that the best solution for stimulating the provision of free legal aid would be to provide tax relief to those lawyers involved, should be taken seriously (53 % of those questioned agreed).¹⁴²

The Committee on Legal Policy of the Verkhovna Rada is currently reviewing a draft «On Legal Assistance» № 6320 dated November 9, 2004¹⁴³. The purpose of the Draft is to regulate legal relations with regard to mechanisms for satisfying and defending the right of individuals to legal aid. To achieve these aims, the Draft foresees the creation in Ukraine of a single system of legal assistance outlining the sole subjects providing legal assistance (legal advisors), the types of legal assistance, the principles of legal assistance and the bases and measures for liability in cases where the legal assistance was not of adequate quality.

7. ENFORCEMENT OF COURT DECISIONS

Failure to carry out court decisions is one of the most urgent problems of access to judicial proceedings in Ukraine. Complaints regarding violation of Article 6 of the Convention due to non-enforcement of the decisions of national courts make up the largest number of appeals made to the European Court of Human Rights against Ukraine. These appeals concern the non-enforcement of court decisions in civil cases, most of all, as regards payment of debts from salaries and social payments. The existing mechanisms for enforcement of court decisions have proven to be ineffective. Courts do not have levers of control to ensure that their decisions are implemented.

¹³⁹ ECHR, Airey vs. Ireland: Judgment 9 October, 1979.

¹⁴⁰ Правова допомога: Зарубіжний досвід та пропозиції для України // Автори-упорядники О.Банчук, М.Демкова. / Legal Assistance: International Experience and Proposals for Ukraine // О. Banchuk, M. Demkova. – Kyiv, 2004, p. 11.

¹⁴¹ Куйбіда Р.О. Реформування правосуддя в Україні: стан та перспективи / R. Kuibida. Justice Reform in Ukraine: Current State and Prospects. – Kyiv, 2004. p. 225.

¹⁴² О.Сорочкін, А.Бурій, В.Разік. Відповідність законодавства України статті 6 Конвенції про захист прав людини та основних свобод / О. Sorochkin, A. Buriy, V. Razik: Compliance of Ukrainian Legislation to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Lviv, 2003, p. 136.

¹⁴³ Draft «On Legal Assistance». Available from: http://www.rada.gov.ua:8080/pls/zweb/webproc4_1?id=&pf3511=19318.

Most of the cases that are directed from the European Court for communication with Ukrainian Government deal with Articles 6 and 13 of the European Convention on Human Rights and Article 1 of Protocol 1 to the Convention. The subject of this communication is the adherence by State bodies to the above-mentioned documents with regard to the time taken to carry out the decisions of national courts, when a judgment has been pronounced in favour of the applicant, existence of effective means for legal protection when a court decision is not implemented for a long time, and, in connection with this, when the State interferes in an applicant's right to peaceful possession of his/her property.

Practice shows that in the majority of cases, violations in judicial proceedings in cases involving the bankruptcy of enterprises which are in debt usually influence the duration of enforcement of decisions of national courts.

The situation is still further complicated by the moratorium on the bankruptcy of enterprises which are partially owned by the State. On the one hand, they do not have the money to carry out the court's decision, yet on the other, they are prevented by the imposed prohibition from selling the property. This ultimately means that decisions made by Ukrainian courts obliging indebted enterprises to pay their debts cannot be enforced which in turn leads to a violation of citizens' constitutional rights. The Verkhovna Rada this year considered a draft law to amend the provisions for the moratorium on bankruptcy of these enterprises, however rejected all such proposals.

The European Court paying special attention to the time taken to enforce court decisions in the light of a set of measures taken by a state to accelerate the resolution of internal systematic problems (final resolution on eligibility of decision in case «Sokur vs. Ukraine»; decisions in cases «Piven vs. Ukraine», «Zhovnir vs. Ukraine», «Voytenko vs. Ukraine», «Shmalko vs. Ukraine», «Romashov vs. Ukraine») ¹⁴⁴. The European Court through its decisions declares that state bodies, by not implementing the decisions of the court, have rendered the provisions of Paragraph 1 of Article 6 meaningless.

We should take into consideration that statements on violation of rights were issued after failure to enforce court decisions made by national courts within reasonable time. The time taken to implement court decisions in the above-mentioned cases had varied from 4 to 6 years. The European Court awarded 2,000 to 3,200 Euros for non-pecuniary damage in each of these cases. The amount to be paid as compensation was considerably higher than the actual sum of debt. Thus, legal practice of the European Court shows that the amount of compensation usually depends on the period of delay in implementing a court decision.

The European Court, in the case «Shmalko vs. Ukraine», emphasizes that «Paragraph 1 of Article 6 entitles everyone to address court or arbitration with a claim that deals with any of his/her civil rights and obligations. Thus, this Article proclaims the «right to a trial». The ability to put forward a claim of civil procedure to court is one of the aspects of this right and a manifestation of court accessibility. But this right would be insubstantial if the State legal system was to permit that a final court decision that has binding force could be not enforced if its enforcement might cause damages to one of the parties. Article 6 does not make any sense under the assumption that while describing in detail all the procedural safeguards of the conflicting parties, namely fair public and reasonably timed trial, it does not imply enforcement of court decisions. If Article 6 is interpreted only as a safeguard for access to judicial bodies and judicial proceedings, it might cause situations that contradict the rule of law principle, which is agreed to be respected by all the states that ratified the Convention. Thus for the purposes of Article 6, enforcement of court decision should be viewed as an integral part of «hearings». ¹⁴⁵

As a result of this, the European Court stated that it was impossible to use State financial difficulties as an excuse for non-fulfilment of a court decision of paramount importance for an applicant. The decision dealt with providing compensation to an applicant. State bodies during 1996-1998 had failed to provide him with free medication that he needed to take on day-to-day basis. This is why the European Court considered that the State bodies had been obliged to follow the court's decision immediately due to age, the health condition and nature of disability of the applicant and to pay all the necessary expenses. The European Court awarded the claimant 1000 Euros for non-pecuniary damage and 300 Euros as compensation for procedural costs.

Usually the European Court adopts a simplified procedure for cases that deal with non-fulfilment of court decisions since they do not contain complex legal issues. This means that, after the Court has agreed that the application is admissible and that its substance is clear, it makes the decision immediately.

¹⁴⁴ Available on the European Court of Human Rights website: <http://www.echr.coe.int/Hudoc.htm> (original text), on the human rights RUPOR website (Ukrainian text) <http://www.rupor.org/index.php?r=9&t=1>.

¹⁴⁵ *ibid.*

«*Voytenko vs. Ukraine*» is another example of a case when the court decision was not enforced in violation of paragraph 1 of Article 6, Article 13 and Protocol 1 to the Convention. The Government had partially agreed on the necessity to execute the decision made in favour of the claimant, but claimed that the reason for non-enforcement of the decision was lack of budgetary funds and legislative means. In this case, the Court had to consider a delay of four years in implementing the decision. The amount of compensation sum awarded to the claimant consisted of two parts, each of which belonged to different categories of budget classification. Thus the full settlement of one payment of compensation to the claimant in 2001 had not immediately meant any progress on the settlement of the second one. The State did not set aside expenses for the second payment from the Ukrainian State Budget which resulted in a four-year delay period in payment. The Court decided that this four-year delay in justice, aside from violating Article 6, also constituted interference in his right to peacefully enjoy his possessions in the context of paragraph 1 of Article 1 of the protocol to the Convention. The claimant was awarded 2,000 Euros as compensation for non-pecuniary damage and 33 Euros as compensation for court costs.

The lack of proper enforcement of a court decision regarding salary debt also formed the grounds for satisfying the appeal in the case «*Zhovner vs. Ukraine*»¹⁴⁶. Here the European Court awarded 3200 Euros as compensation for non-pecuniary damage and 50 Euros in material damages.

Due to the fact that issues involving the non-enforcement of court decisions in Ukraine are under the close scrutiny of the European Court, and that the number of cases directed to the European Court regarding this problem is constantly increasing, there is an urgent need to secure legislative safeguards for human rights protection especially in the area of ensuring that individuals receive compensations awarded to them through court decisions within reasonable time.

Statistics on complaints concerning decisions, actions or omissions of state executive bodies are extremely low, constituting a mere 0.7% of all the cases viewed by Ukrainian courts in 2004. This strange discrepancy is first of all caused by the lack of awareness on the part of the average person as to the procedure for appealing against such actions, since the procedure itself was only introduced on 19 October, 2000 with additions to the Civil Procedure Code, Chapter 31-Г: «Appeals against Decisions, Actions or Omissions of Officials in the State Executive service». Moreover, an appeal with a similar complaint about untimely enforcement of decisions is a prerequisite for subsequent appeals to the European Court, as has been repeatedly indicated in cases against Ukraine.

Accessibility of justice in Ukraine is challenged by non-enforcement of court decisions. Appeals concerning violation of right to a fair trial through non-enforcement of court decisions of national courts form a bulk of all the applications against Ukraine to the European Court of Human Rights. Existing mechanisms for carrying out court decisions have proven to be inefficient. Judges lack control over enforcement of their decisions.

8. CONCLUSIONS AND RECOMMENDATIONS

The system of justice in Ukraine, despite certain achievements in carrying out court reforms, cannot be considered transparent and accessible. The court system does not meet the needs of judicial proceedings and does not provide sufficient procedural safeguards. Court decisions are often not properly implemented. Judges are neither independent nor highly professional. The Prosecutor's office still has wide powers which often duplicate court functions.

In order to improve access to the justice system, effective mechanisms for providing state assistance in bearing legal costs should be introduced; the texts of court decisions should be widely publicized; legal and administrative means should be used to decrease the workload of courts; the State should be made liable for damages incurred by parties to legal proceedings as a result of unlawful actions or the inaction of the courts or court structures; the State should lose its monopoly in implementing court decisions.

In the field of criminal justice, measures are needed to ensure effective enforcement of the right of defence of people detained. The practice of sending criminal cases back from the court for further investigation or to the Prosecutor should be abolished, and trial by jury should be introduced.

The rules for civil proceedings should be amended to bring them into line with European standards.

¹⁴⁶ ibid

THE RIGHT TO A FAIR TRIAL

In order to ensure independence of judges it is necessary to take the following steps: to improve funding of judicial self-government; to introduce a transparent procedure for selection of judges; to reinforce safeguards of independent decision-making by judges, which automatically means preventing chairpersons of courts and executive bodies from interfering with judicial proceedings and to establish viable mechanisms for disciplinary liability of judges.

The prosecutor's office should be deprived of the right to supervise the observance of laws, and also to conduct pre-trial investigation.

Thus in order to ***improve access to justice*** the State should:

1) compensate damages incurred by parties to proceedings as a result of unlawful activity or lack of action of judges;

2) stimulate the development of non-judicial means of settling legal issues (notary services, mediation, independent arbitration);

3) promote the establishment of information centres with local courts, giving consultations on the judicial process and disseminating other information on the organizational basics and operation of courts;

4) create conditions for the judiciary to function transparently; to provide public access to texts of court decisions though placing them on websites and making them available in public libraries excluding parts that deal with private and commercial information;

5) introduce mechanisms for providing state assistance in bearing court costs and for providing free or reasonably priced legal assistance to people on low incomes, and also adopt a law «On Legal Assistance» that would regulate which types of legal assistance can be provided, and the grounds and mechanisms for exempting people from payment of fees for legal assistance;

6) improve the system of enforcement of court decisions, de-monopolize state enforcement-related activities, and adopt legislation that would determine mechanisms for implementing the decisions of the European Court of Human Rights;

7) implement judicial control over enforcement of court decisions;

8) bring the powers of the office of the prosecutor into compliance with the Constitution of Ukraine; deprive the prosecutor's office of functions of general supervision and pre-trial investigation.

For the creation of ***a stable system of courts of general jurisdiction*** it is necessary:

1) in cases stipulated by law to recognize general courts as being specialized in the field of civil, criminal, or other trials;

2) to eliminate the system of military courts;

3) to create a system of administrative courts.

In order to create ***reliable safeguards for courts*** it is necessary to:

1) limit the administrative authority of court chairpersons, transferring the authority for appointments from court chairpersons to bodies of judicial self-government;

2) fully separate the administration of justice from support and logistic functions.

In the sphere of ***criminal justice*** and with regard to organization of activities of courts, investigation bodies and the office of the Prosecutor, bringing the Ukrainian legal system into line with European standards implies reform both of the relevant structures and of procedures. Specifically, these tasks imply immediate:

1) strengthening of guarantees of judicial independence, which includes a significant reduction in the influence on judges imposed by political factors, the judicial administration and a move to non-deficit funding of courts;

2) securing real independence of court experts by managing forensic and expertise institutions through the Ministries of Justice and Healthcare and by developing within law enforcement agencies a many-layered system of units, laboratories and institutes specializing in narrow spheres of criminal research;

3) strengthening the professional independence of employees of the prosecutor's office by partially decentralizing their service and strengthening the procedural status of prosecutors; it is also time to develop discretionary components in the system of procedural prosecutor powers;

4) broadening the guarantees for lawyers' activity, ensuring real independence of defence lawyers in the judicial process from unlawful influences of judges or prosecutors.

In developing the civil procedural law of Ukraine, it is expedient to bring civil justice into line with European standards, especially as regards review of cases involving aliens, the recognition or enforcement of the decisions of foreign courts.

Administrative justice should envisage:

1) a procedure for settlement of all public law disputes with bodies of power, not only of disputes between individuals and the authorities;

2) public access to the decisions of administrative courts;

3) efficient mechanisms for implementing judicial rulings and relevant control over this enforcement

To *improve the status of judges* measures should be taken immediately to:

1) make the procedure for selection and career growth of judges as transparent as possible, introduce short training sessions for newly-appointed judges, as well as regular professional development training sessions with an emphasis on human rights;

2) standardize the status of judges of courts of different specialized jurisdictions and develop legislation that would establish a single mechanism of remuneration for judges;

3) establish additional safeguards against ungrounded liability, increase the efficiency of mechanisms for disciplinary proceedings, and introduce relevant institutional changes.

VI. THE RIGHT TO PRIVACY¹⁴⁷

1. DEFINING PRIVACY. PRIVACY IN INTERNATIONAL LAW¹⁴⁸

The right to privacy has been recognized as one of the fundamental human rights in the UN Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and in many other international and regional treaties. Privacy is a concept which underpins human dignity and other key values such as freedom of association and freedom of speech. It has become one of the most important human rights issues of the modern age.

Of all the human rights in the international catalogue, privacy is perhaps the most difficult to define. Privacy has its roots deep in history. The Bible has numerous references to privacy. There was also substantive protection of privacy in the early Jewish culture, Ancient Greece and China. This protection mostly focused on the right to solitude. Definitions of privacy vary widely according to context and environment. In many countries, the concept has been merged with Data Protection, which interprets privacy in terms of management of personal data. Outside this context, protection of privacy is frequently seen as a way of drawing the line at how far society can intrude into a person's private affairs. In the 1890s, the future U. S. Supreme Court Justice Louis Brandeis articulated the concept of privacy as an individual's «right to be left alone». The Preamble to the Australian Privacy Charter states that, «a free and democratic society requires respect for the autonomy of individuals, and limits on the power of both state and private organizations to intrude on that autonomy...» Alan Westin, author of the work «Privacy and Freedom» (1967), defined privacy as the desire of people to choose freely under what circumstances and to what extent they will expose themselves, their attitudes and their actions. According to Ruth Gavison, there are three elements in privacy: secrecy, anonymity, and solitude. It is a state which can be lost, whether through the choice of the person themselves or through the actions of another person. The Calcutt Committee in the UK said that, «nowhere have we found a wholly satisfactory statutory definition of privacy». But the committee was satisfied that it would be possible to draw a legal definition and adopted this definition in its first report on privacy issues: «The right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information».

From a modern point of view, privacy can be divided into the following facets:

- **Information Privacy**, which involves the establishment of rules governing the collection and handling of personal data such as credit information and medical records;
- **Bodily Privacy**, which concerns the protection of people's physical bodies against invasive procedures such as drug testing and cavity examination;
- **Communications Privacy**, which covers the security and privacy of mail, telephone conversations, e-mail and other forms of communication;
- **Territorial Privacy**, which concerns the setting of limits on intrusion into domestic and other environments such as the workplace or public space.

The modern privacy benchmark can be found in the 1948 Universal Declaration of Human Rights, which specifically protects territorial and communications privacy. Article 12 of the Declaration states: «No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor

¹⁴⁷ Prepared by Yevhen Zakharov, Co-Chairperson of the Kharkiv Human Rights Group and Head of the Ukrainian Helsinki Human Rights Union., and Volodymyr Yavorsky, Executive Director of the Ukrainian Helsinki Human Rights Union.

¹⁴⁸ For more detailed information, see: «Privacy and Human Rights». Privacy International Report – In «Freedom of Information and the Right to Privacy in Ukraine», Vol. 2. – Kharkiv: Folio, 2004, pp. 5-29; Dovydas Vitkauskas. The right to respect for privacy under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. /Freedom of Expression and Privacy, Issue № 1, 2004. – pp.15-29.

to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks». Numerous international human rights treaties guarantee the protection of the right to privacy. The International Covenant on Civil and Political Rights, the UN Convention on Migrant Workers, the UN Convention on the Rights of the Child all share the same principles. At the regional level, the right to privacy finds even more protection. Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides the following protection for the right to privacy:

«1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others».

The European Court of Human Rights has not yet come up with any precise definition of «private» life. The Court quite deliberately steers away from any such attempts and prefers (as a rule) to focus on a specific issue. The number of cases related to the right to privacy, as it is often called, is relatively small. Besides, this concept merges with other concepts, which are also covered by Article 8 of the Convention, namely family life, home and correspondence. In a number of cases, this merging of concepts was demonstrated by the general approach the Court applied to violations of the provisions of Articles 8, without specifying the exact aspect of the violation. For example, in the case of *Klass*, the accusation regarding surveillance of communications (mail and telephone calls) was recognized by the Court as potential interference in the applicant's family and private life, correspondence and home¹⁴⁹.

From the study of court precedents, it can be seen that the concept of privacy lies solely in the sphere of immediate personal autonomy. It covers aspects of physical and moral integrity. The concept extends beyond the narrow limits of guarantees of personal life free from unwanted publicity. It creates a field within which everyone can pursue his or her own personal development. It includes the right to self-identification, as well as the right and/or the possibility to develop interpersonal relations with other persons, including emotional and sexual relations.

Based on this concept, the Court ruled that the right to respect for privacy refers both to the physical and psychological integrity of the individual. The primary aim of the guarantees of Article 8 of the Convention is to ensure personal development of the individual without any interference from outside. The sex life of any individual undoubtedly belongs to the domain of privacy. Provisions of Article 8 also embrace the right to a first and last name, because the first and the last names serve as means of identification within a family and society.

Safeguard of personal data related to one's private life is covered by Article 8. The same goes for the protection of medical records.

This approach of the Court suggests to the reader that privacy is not a clearly circumscribed and protected circle, but rather a vast area with fuzzy boundaries. These boundaries become even more nebulous as a person's private life converges with their social activities. Strasbourg legal institutions from their very first rulings have emphasized that there must be certain limits with respect to private life. The State by many of its actions, directly or indirectly, affects the individual's opportunities for self-fulfilment, but not all of them can be viewed as interference with a person's private life within the meaning of Article 8. For example, the court decision of 1972 reflected the opinion that claims for respect to private life are automatically reduced as the person becomes more and more involved in public activities or infringes on third parties' interests. Among the cases considered, there was a decision, which held that taking photographs of people participating in a public event did not interfere with those people's right to privacy and which also referred to statements made during public hearings. It is possible to assert that privacy ends where social activities begin. In the case of *Friedl*, such approach was considered to be quite appropriate. It concerned the applicability of Article 8. Police had taken pictures of the applicant during a public event and kept them in police files. It was ruled that the photographing did not constitute invasion into the applicant's private life as it had taken place during a public event. However, the decision stated that the questioning of the applicant that followed the incident and recording of the questioning had been an intrusion into the applicant's private life, because these events referred more to the applicant's personal affairs.¹⁵⁰

Even though photo surveillance on people's actions in public places without recording does not in itself constitute intrusion into their private lives, regular or continuous data recording can imply such intru-

¹⁴⁹ ECHR, *Klass and others v. Germany*: Judgment 4 July 1978

¹⁵⁰ *Friedl*, (Peck, Perry)

sion. The Court confirmed this position in the recent case of Peck. The opinion was developed in the Court's decision on another case, *Perry v. the UK*. The Court held that usual video surveillance in public places, in streets or in buildings, such as supermarkets or police stations where they serve lawful and foreseeable purposes, is not in itself a violation of Article 8. However, in the case of *Perry*, the police had changed the angle of the video camera in such a way as to get a clear image of the applicant. Later they edited the videotape and showed it to witnesses so that they could recognize the man in the course of criminal court proceedings. The decision was held that Article 8 was applicable to this case.

Therefore, the right to privacy should be viewed together with the rights of other individuals and of society. The Court interpreted Article 8 in such a way as to impose both a ban on unwarranted interference and a positive obligation to provide protection from interference of other individuals.

2. OVERVIEW OF PROTECTION OF PRIVACY IN UKRAINE

At the state level, almost all the countries of the world recognize the right to privacy, which is directly enshrined in their constitutions. Ukraine is no exception. Article 30 of the Constitution of Ukraine protects territorial privacy («everyone is guaranteed the inviolability of his or her dwelling place»), Article 31 covers privacy of communications («everyone is guaranteed privacy of mail, telephone conversations, telegraph and other correspondence»), Article 32 refers to information privacy («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 collection, retention, use and dissemination of confidential information about a person without his or her consent shall not be permitted»), and Article 28 guarantees protection of certain aspects of bodily privacy («no person shall be subjected to medical, scientific or other experiments without his or her free consent»). But the other paragraphs of Articles 30, 31, 32 of the Constitution, which provide an exhaustive list of grounds for impinging on the right to privacy and conditions for such impingement, have no sufficient affirmation in laws and by-laws. A rather obscure formulation or absence of any regulation whatsoever as to what interference can be permitted into an individual's privacy, or as to the limits and methods of such interference are perhaps the least addressed problems in the legislative regulation of privacy protection, which lead to numerous infringements of the right to privacy in practice.

In our opinion, the worst infringements occur in the field of communications privacy. Current legislation does not stipulate either any clear grounds for interception of information from communication channels (phone tapping, mobile tapping, Internet tapping or e-mail tracking), or the specific period when such information is intercepted, or the circumstances in which the information should be destroyed and how it can be used. There are clearly not enough guarantees of the lawfulness of interception of information from communication channels. Consequently, no one can control 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 privacy¹⁵¹.

Wiretapping is carried out by court order, but in practice, the court considers such applications from law enforcement authorities automatically, granting permission in almost every case, without establishing the final date for the permitted wiretapping. As a rule, official statistics on wiretapping (for example, the number of permits issued by courts) cannot be obtained from State bodies, which rank such statistical information as classified. Nevertheless, information sometimes becomes publicly available. Thus, in 2002, the appeal courts granted more than 40 thousand permits for interception of information from communication channels, and in 2003 in one tiny region of Ukraine alone – Chernivtsi Region – 823 such permits were issued. The Law «On Investigative Operations» allows the use of investigative operations infringing the right to privacy only in cases of serious and particularly serious crimes. However at the stage of carrying out investigative operations, it is rather difficult to qualify a crime, and, comparing the above figures related to the number of permits with the number of serious and particularly serious crimes actually committed, it can be concluded that such investigative operations are used much more often. In the annex to this section, a list of the most famous reports of unauthorized tapping for the last year which became publicly known is given.

Seizure of correspondence and interception of information from communication channels as laid down in Criminal Procedure legislation also fail to meet international standards. Paragraph 3 of Arti-

¹⁵¹ For more detailed information on privacy of communications, see article: Yevhen Zakharov. Criminal Investigation Activities and Communications Privacy. – In: Freedom of Information and the Right to Privacy in Ukraine, Vol.2. – Kharkiv: Folio, 2004. – pp. 45-60.

cle 187 of the Criminal Procedure Code of Ukraine allows such investigative measures to be taken before a criminal investigation is formally initiated with the aim of preventing a crime. At the same time, there are no limitations on the categories of crime, even though, according to the Law on Investigative Operations, such measures can only be taken in connection with serious or particularly serious crimes.

Nor does the procedure for carrying out a search comply with European standards. For example, a search of all premises, except for search of a dwelling place or other possessions of a person, is carried out on the basis of an order issued by the investigator with the sanction of the prosecutor, which means that such actions are outside the court's control. Admittedly, even the court supervision of search procedures is more a formality, than actual, since courts virtually never refuse to authorize a search. The time limits and relevant search procedures are also often neglected.

Another problem is the absence of a legislative ban on monitoring the correspondence of prisoners or detainees, which is addressed to the European Court of Human Rights. The Ministry of Justice of Ukraine has prepared a relevant draft law on introducing amendments to the legislation. The draft law prepared by the Ministry of Justice proposes to introduce changes to the Criminal Procedure Code and the Law of Ukraine «On Pre-trial Detention», which will secure a legislative ban on checking correspondence sent from detention institutions to the European Court of Human Rights. However, Parliament has yet to pass this law.

The European Court of Human Rights has accepted 6 Ukrainian cases related to violation of the right to privacy with respect to correspondence of prisoners, their right to receive postal parcels and packages, restrictions on the number of meetings with relatives, and the conditions created for such meetings. In the cases «*Poltoratskyi vs. Ukraine*», «*Kuznetsov vs. Ukraine*», «*Aliyev vs. Ukraine*», «*Nazarenko vs. Ukraine*», «*Dankevich vs. Ukraine*», «*Khokhlych vs. Ukraine*», the Court recognized that there had been a violation of Article 8 of the Convention on the above grounds.

Privacy of information is also breached. This privacy is under threat of being undermined by all draft laws on registration and identification of individuals, which do not take into consideration the need to protect information about the individual (there is no basic law on personal data protection; parliament approved a relevant draft law at the first reading, but it still needs some serious improvement). All draft laws are based on the use of a single multi-purpose identification number for each individual, the introduction of which will violate all recognized principles of personal data protection, since it will create the possibility of uniting different registers, that is, data bases, which contain various kinds of personal data, without the consent of the person concerned.

With respect to adoption procedures, Ukrainian legislation does not take into account the interests of the adopted child. Adoption secrecy is guaranteed by means of providing the adoptive parents with the option of registering themselves as the child's natural parents (Article 229 of the Matrimonial Code), changing the recorded birthplace within 6 months and changing the date of birth (Article 230 of the Matrimonial Code), and disclosure of adoption information is subject to criminal prosecution (Article 168 of the Criminal Code of Ukraine). However the right of the adopted child to know his or her natural 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) seem to have been completely forgotten. The law contains provisions on keeping the adoption information secret even from the adopted child (Paragraph 2 of Article 226 of the Family Code).¹⁵²

Another problematical issue remains that of forced medical examinations, as well as the intrusion by law enforcement agencies into the family life of individuals with non-traditional sexual orientation. For example, law enforcement officers are still obliged to provide the State Committee of Statistics with information on homosexuals they have identified and to keep their records as people belonging to an AIDS high risk group¹⁵³. The general legislative approach to this issue remains outdated and ranks homosexuality together with prostitution, drug addiction and alcoholism.

Some of these issues are considered in more detail below.

¹⁵² Право на повагу до особистого та сімейного життя: цивільно-правові аспекти в законодавстві і судовій практиці України. Н.Петрова. Європейська Конвенція з прав людини: основні положення, практика застосування, український контекст / The right to respect for private and family life: civil and legal aspects in the laws and legal practice of Ukraine. N.Petrova. The European Convention on Human Rights: key provisions, application practice, the Ukrainian context / Edited by: O.L.Zhukovska. – Published by VIPOL CJSC, Kyiv, 2004. – p. 403.

¹⁵³ Report on results of the work of law enforcement authorities' on fight against prostitution business, detection of AIDS risk groups and results of their AIDS testing, approved by Order No. 436 of the State Committee of Statistics of Ukraine dated December 10, 2002.

3. PROTECTION OF PERSONAL DATA

3.1. PRINCIPLES OF PERSONAL DATA PROTECTION

In Ukraine there is no proper legislative framework regulating personal data protection, which could define the grounds and procedure for gathering such information, its processing, protection and use. Accordingly, there is no relevant state authority maintaining independent control over collection, retention and use of personal data by state authorities.

Based on our analysis of international and Ukrainian experience, we can suggest certain criteria for defining whether personal data protection is carried out by proper means and whether it ensures observance of human rights, and then assess whether the present situation in Ukraine is in keeping with such criteria:

1) Personal data should be obtained in a lawful way: there should be clearly defined procedure for obtaining such information and liability for obtaining it by illegal methods. The laws of Ukraine do not define clearly legal ways of gathering information about an individual and do not envisage criminal liability for using illegal methods of personal data collection.

2) The knowledge and consent of the individual are required for the collection of personal data: administrative practice and the law authorize state authorities to collect personal data in the interests of national, economic and public safety or with the purpose of protecting the rights of an individual without his or her knowledge.

3) Personal data should be used solely for the purposes initially intended when collecting such information. The same applies to the ban on bringing all collected personal data for various purposes under one particular code (the identification code), which would pose a direct threat to human rights and fundamental freedoms. The above notwithstanding, this very concept is now being implemented by State authorities, who take advantage of the sad lack of a legislative framework that would guarantee protection of personal data. The State authorities' concept is aimed at uniting all information about a person (medical records, permanent address, personal data, criminal and administrative records, tax history, credit history, retirement account, bank accounts, biometrics data and a lot of other information) into a uniform automated system under a particular code for every individual. A significant amount of personal data is intended to be incorporated into the electronic passport of every person. Such a concept is explained, inter alia, by supposedly new EU requirements for passports of aliens crossing its borders. It should be stressed that the accumulation of all collected personal data under one code runs counter to the practice of most democratic countries.

4) Only the minimum amount of personal data necessary to achieve the intended purpose should be collected. The laws of Ukraine do not prescribe the exact amount of collectable personal data. This is one of the reasons why the practice has become so widespread of gathering personal data which in no way serves the stated aim for collecting the information. Such practice is particularly used by State executive authorities, local authorities, and business corporations.

5) Personal data should be recorded accurately and made available to the person concerned (the bearer of such personal data). General administrative practice shows that individuals do not have access to the personal data on them which is held by a State authority. In most cases, the person is not even aware that his or her personal data is held by a particular State authority, because the latter is under no obligation to inform him or her of this.

6) Personal data should be destroyed after the intended purpose of its collection is achieved and such information is no longer needed. The law prescribes neither specific grounds and procedures for destruction of personal data, nor the procedure for its use after the intended purpose of its collection is achieved (for example, material from an investigative operation file relating to the person concerned).

Therefore, the laws of Ukraine provide no clear statutory framework that would fulfil any of the above mentioned criteria.

3.2. ANALYSIS OF THE DRAFT LAW «ON PERSONAL DATA PROTECTION»¹⁵⁴

The Draft Law «On Personal Data Protection»¹⁵⁵ has thus far only been passed by parliament¹⁵⁶ in the first reading. Although this draft law still requires some additional thorough elaboration, we believe that it is necessary to facilitate the enactment of this important legal statutory act.

¹⁵⁴ This subsection was prepared by Ruslan Topolevsky, Kharkiv human rights group.

The foundation of this draft law lies in the concept of the individual's right of ownership to his personal data. It is hardly possible to cover relations related to personal data through the concept of the right of ownership only. The right to personal data should be catalogued among individual non-property rights (regulation of individual non-property rights is prescribed by Book 2 of the Civil Code of Ukraine in the version of January 16, 2003). It is implicit, in particular, from the right to private life (privacy) guaranteed by Article 32 of the Constitution of Ukraine and Article 301 of the new Civil Code of Ukraine. The Council of Europe Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data (1981) provides, first of all, for protection of the right to personal privacy. Personal data is not ranked as property and, usually, the legal transfer of personal data into use is carried out on a free-of-charge basis. The right to personal data is also not viewed as part of intellectual property rights. Furthermore, the emergence of the issue of the right to personal data is not based on any of the grounds, which give rise to the right of ownership to information under Paragraph 3 of Article 38 of the Law on Information. At the same time, personal data, as a kind of information, is certainly covered by provisions of the Law on Protection of information stored in automated systems. In its turn, the creation of personal information databases leads to the emergence of the issue of intellectual property rights in respect of such information (Item 3 of Paragraph 1 of Article 433 of the Civil Code of Ukraine). Therefore, this draft law should reflect the specific nature of the right to personal data.

However, enactment of the draft law, which interprets the right to personal data as the right of ownership to personal data, is likely to bring the Law on Personal Data Protection into collision with the Constitution of Ukraine, the Civil Code, and other statutory acts in terms of the definition of the status of personal data.

When defining the circle of people, it should be clearly specified to whom this law applies, without effectively creating an indefinite circle of people by adding the word 'etc'. (Article 1).

The provisions of Article 4 of the Draft Law stipulating that personal data about an individual, who is seeking or who holds an elective office (in representative bodies) or a high-ranking state office, shall not be treated as restricted information, are to be welcomed. However, in our opinion, it can hardly be expedient to restrict the list of such persons to candidates to elective offices and high-ranking state officials only. As we can see from the practice of the European Court of Human Rights, confidentiality of personal data can be restricted if an individual enters the public arena and becomes a public figure. This concept is embodied in Paragraph 9 of Article 30 of the Law of Ukraine «On Information», which allows dissemination of information of public significance without the consent of the person concerned.

There is a discrepancy between the provisions of the Draft Law (Article 5), which envisage the possibility of processing personal data without the individual's consent, except as otherwise prescribed by this Law, and only in the interests of national, economic or public safety or for the purposes of protecting human rights, and the provisions of the Constitution, Paragraph 2 of Article 32 of which provides that «the collection, retention, use and dissemination of confidential information about a person without his or her consent shall not be permitted, except in cases determined by law, and only in the interests of national security, economic welfare and human rights».

Article 23 of the draft law prescribes that individuals should report any changes, amendments or destruction of their personal data, as well as any restrictions on access to such information, to State and local authorities, organizations, institutions and companies of all forms of ownership, to which such information should be submitted when it is required for protection of the interests of the person concerned. However, the objects (the bearers) of personal data receive no notice about changes, amendments or destruction of their personal data, which obviously infringes their right to personal data protection.

The draft law provides for the establishment of the institution of Commissioner on Personal data Protection and the creation of a Specially Designated Central Executive Authority on Personal data Protection. However, it seems redundant to have both the institution of Commissioner on Personal data Protection (Article 25) and Specially Designated Central Executive Authority on Personal Data Protection (Article 26) especially when their powers partially overlap.

It would seem expedient to create the institution of Commissioner on Personal Data Protection and Information Issues, who would exercise supervision over issues concerning not only personal data protection, but also the right to information. In our opinion, such a Commissioner should be appointed by the Verkhovna Rada. This institution could also be established as a separate subdivision of the office of the

¹⁵⁵ The Draft Law No. 2618 of January 10, 2003 was proposed by State Deputies: M. Rodionov, S. Nikolayenko, I. Yukhnovsky, P. Tolochko, and K. Sytnyk. It passed through its first reading on May 15, 2003.

¹⁵⁶ Parliament or, using the Ukrainian term, Verkhovna Rada – these terms are used in the text interchangeably. State Deputies (to the Verkhovna Rada) are therefore Members of Parliament (*translator's note*)

Human Rights Ombudsperson of the Verkhovna Rada of Ukraine. It is important to set out specific criteria for qualifying candidates to this office, such as educational qualifications, no criminal record, considerable professional experience or significant scientific achievements, public recognition, etc. The Commissioner on Personal Data Protection and Information Issues could also be given the authority to appoint regional representatives and determine the conditions for the functioning of these representative offices.

Although the draft law envisages the possibility of providing State authorities with statistical, sociological and scientific research reports, subject to the right of ownership to personal data and on condition that such records shall bear no direct reference to specific individuals (Article 29), it does not provide for the possibility of submitting such de-personalized personal data to scientific research institutions.

It is also important to allow for the transfer of personal data to archive institutions on condition that they ensure a proper level of protection of such personal data.

It seems that the draft law was initially intended to protect automated processing of personal data. There is no systematic attempt to regulate a filing system. For example, Article 12 «Collection of Personal Data» does not provide for the collection of data in organized file, etc. In our opinion, at the first stage, protection should be secured only for that personal data, which is subject to automatic processing (that is, the provisions of the law should not apply to manual files). Also, at this stage there is no need to apply this law to separate individuals, engaged in private practice. In future, it will be possible to extend the application of this law both to manual files and to such individuals.

Separate laws will need to be developed to regulate such categories of personal data as medical records, archive data, and personal data related to the sphere of telecommunications.

We would like to emphasize that the draft law does not consider such important problems as:

- a ban on merging personal data databases processed for different purposes;
- a ban on introducing a universal personalized multi-purpose identification code;
- regulation of procedures for destroying personal data;
- division of personal data into:

1) general personal details: name, surname, patronymic¹⁵⁷, date and place of birth, address;

2) special (sensitive) personal details: ethnic (racial) origin, political views and / or party membership, religious or other convictions, medical condition, sexual life, criminal record.

Such a division would make it possible to establish different procedure for using and disseminating personal details – more open for the first category, and with more restrictions for the second.

It should be noted that the enactment of this law will necessitate amendments to part 2 of Article 23 of the Law «On Information», in order to reconcile provisions of these two laws. The said article provides that, «General personal data includes information on a person's nationality, education, marital status, religion, medical condition, as well as address, data and place of birth». It is obvious that sensitive information, such as religion and medical condition, should be excluded from the category of general personal data.

3.3. INFORMATION PRIVACY AND INDIVIDUAL REGISTRATION

Of great concern are the efforts of the State authorities to introduce a Single unified register of all individuals, which would merge information from all existing registers.

A Draft Law on the registration of individuals in Ukraine (Draft Law No. 4002 dated May 12, 2004, submitted by State Deputies L. Kyrychenko, M. Onyshchuk and V. Sirenko) was rejected by the Verkhovna Rada on 16 November 2004. The Draft Law, like many others, had once again tried to legalize the creation of such a single register of individuals. Moreover, this Draft had been supported by the Parliamentary Committee on Legal Policy, which showed their total ignorance of the issues involving personal data protection. Another Parliamentary Committee, that on issues of European integration, had already in April recommended that Parliament reject the Draft Law on the registration of individuals in Ukraine as not being in compliance with European Union Provisions or Ukraine's obligations before the Council of Europe (CE) and as being in contravention of the Constitution of Ukraine.

However, the State authorities are not frightened by the lack of a legislative basis. In a Decree from 30 April 2004, No. 500 «On the Creation of a Single State Register of Individuals», the President of Ukraine daringly took it upon himself to assume the functions of legislative power, thus simultaneously violating several articles of the Constitution of Ukraine. According to the Decree, the creation and maintenance of this single register shall be entrusted to the Ministry of Internal Affairs on the basis of a Single

¹⁵⁷ A patronymic is one's father's name, used after one's personal name: The use of name and patronymic is common in Russia and parts of Ukraine, in situations where Mr / Ms might be used in English. (*translator's note*)

State Automated Passport System (hereafter – SSAPS), although it was left undecided which State body would answer for the single register. At that time, Parliament was considering several Draft Laws on the registration of individuals, which suggested various state authorities for running the Single Register (the Ministry of Internal Affairs, the Ministry of Justice, a separate specially empowered authority). Parliament, in its turn, on 8 September supported a query with regard to this Decree from State Deputy, O. Zarubinsky and later rejected Draft Law No. 4002.

In analyzing the Decree of the President, we are forced to the conclusion that this Register is being actively created without any legal basis. The question arises: using which rules and standards?

The President was not stopped by this setback, and on 9 December, he adopted an Addendum to his April document, where together with the enforcement of the system, it is necessary to introduce identification documents – carriers of personal data (driving license, military service record card, pension certificate, gun license and other identification documents.)

It is worth mentioning that the Concept for the creation of SSAPS was approved by the Prime Minister Pavlo Lazarenko in January 1997 (Resolution No.40 of the Cabinet of Ministers of Ukraine dated January 20, 1997.) According to this Concept, the tax identification number was to be used as a person's single multipurpose code in all documents, from Birth Certificate and Passport to Driving License. SSAPS was commissioned by the Ministry of Interior Affairs and the Coordination Commission, upon its creation, was to include representatives of all Enforcement and Military Departments. Thus, the issue was of having the possibility to merge all registers into one single data bank, from which it would be possible to obtain all personal data by using the single multipurpose code. This constitutes a gross violation of the right to privacy. It is worth noting that in the majority of countries of the world, governments have tried to impose a single multipurpose identification code, but almost everywhere these attempts have encountered protests from society that prevented those attempts from being put into practice¹⁵⁸. We provide an extract from the verdict of the Constitutional Court of Hungary in this regard¹⁵⁹

«A universal, single personal identification code, the usage of which is unlimited (that is to say personal identification codes are assigned to all citizens and residents of the country according to a single principle) is considered to be non-constitutional.

The rationale behind a single personal identification code is to provide simple and reliable identification of information about individuals and also its collection with the help of a short and technically easy to operate code that is not subject to change and exchange with other persons. Thus, a personal code is irrevocably accompanied by a consolidated information saving system. Its introduction in Hungary and in other countries constituted part of a plan to create comprehensive data bases, with a centralized monitoring system. Moreover, a uniform personal code is the most appropriate for compiling, in the case of necessity, personal data from different registers. With its introduction, information becomes easy to access and can be compared if discrepancies arise.

Such technical advantages increase the effectiveness of information processing systems that use personal codes, and also improve the effectiveness of the corresponding administrative and technical operations. Similarly, this system saves time and expense for people who need to provide information, since it eliminates the need for constant updating of submitted information.

However these advantages are linked with a serious threat to the rights of the individual, especially to the right to information self-determination. Of particular danger to the rights of the individual is the personal identification code. If information is received from various data bases, without 'bothering' the interested party, bypassing him or her entirely, than that person is effectively excluded from the information flow and either limited or entirely deprived of the possibility of following where and how information directly about him or her is used. This method contravenes the fundamental principle of protection of information, according to which information should be received from the interested party and with the latter's knowledge. The widespread use of a personal identification code leads to a narrowing of the sphere of private life, since information from even the most distant information retention systems, created for different purposes, can be used to create «a personal portrait», which is an artificial image which is applied to any randomly-chosen activities of the individual and invades his or her most private matters; such a portrait, given that it is compiled from data, taken out of context, provides, as a rule, a distorted image. Despite this, the individual who is processing the information will take decisions on the basis of this image, will use the given image to create and pass on information relating to the particular person. A large amount of

¹⁴³ For more information see the section. «The Right to Privacy and Personal Identification» in the book «Freedom of Information and the Right to Privacy in Ukraine», v. 2. – Kharkiv: Folio, 2004. – p. 65-136.

¹⁴⁴ Data protection: experience of Hungary. /Freedom of Speech and Privacy, No.3, 2003. – p. 28-33.

such inter-dependent information, about which the interested party in the majority of cases has no idea, leaves the individual totally defenceless and creates unequal conditions in any forms of communication. If one side does not know what kind of information the other side has about him or her, this can create a humiliating situation and impede free decision-taking. The use of a personal identification code leads to an excessive increase in the power of State bodies. If a personal identification code can be used in other fields, as well as those linked with State administration, this not only gives the person processing the information power over the interested party, but also leads to an increase in power of the entire State, since, thanks to the use of this information, it moves beyond the reach of any possible control. All of this, when considered together, seriously jeopardizes freedom of self-identification and human dignity. Unlimited and uncontrolled application of a personal identification code can turn into tools of totalitarian control.

The logic behind introducing a personal identification code runs counter to basic elements of the right to protection of information, to principles of distribution of information systems, strict conformity to the objective as defined by legislation and, finally, the basic principle, according to which information must be received from interested parties with their knowledge and consent. If one is consistent in adhering to these principles of information protection, then a personal identification code loses any sense, given that its intrinsic 'benefits' can find no application.

A personal identification code is the most technically convenient tool for reliably merging information about an individual, as it makes it possible to use modern possibilities for processing information. It is clear that information about an individual can be linked to a surname or, where needed, to additional identifying elements, such as mother's maiden name or home address. Considering the capacity of modern computers, the level of accuracy of information about an individual does not present serious problems. However «basic» information can change (for example, one's surname can change on getting married, or can be changed by deed poll), and it is entirely possible that the following information will generate demands for additional identification; furthermore, in the case of information which tends to change (one's home address, for example), constant updating and monitoring are needed. The associated technical difficulties and expenses can be a significant consideration when making a comparative analysis of profits and losses from information processing, which creates a kind of natural obstacle to the unjustified accumulation of information which might, otherwise, be encouraged by easily accessible personal identification codes. The limitations which arise from the right to information self-identification are applied, obviously, to all systems for collecting and processing information. Thanks to the technical sophistication of such systems, additional guarantees will be needed with personal identification codes to counter the mounting lack of security. If information about a person is renewed by a centralised system of information retention which is accessible using a personal identification code, then the information processing body responsible for the functioning of a similar system, for example, a register of inhabitants, holds a key position which requires, accordingly, especially accurate regulation of his or her activity on the basis of legal guarantees.

Thus, by its very nature, a personal identification code presents a particularly serious threat to the rights of each individual. Given the primary duty of the State to defend fundamental rights (Article 8 of the Constitution), it follows that this threat must be kept to a minimum, meaning that the use of a personal identification code must be limited by appropriate rules of security. This can be done in two ways: either the use of a personal identification code must be limited by clearly defined activities in information processing, or the access to the information which is linked with the personal identification code, and to the merged system for information retention which use the personal identification code, must be subject to strict restrictions and to control procedures»

Therefore, if this issue is not reconsidered, then fairly soon, wherever you may be, whatever you have done, the «centre» will know, as they will know about each of us by simply clicking a key on a computer keyboard.

4. MONITORING OF TELECOMMUNICATIONS

In Ukraine a system for monitoring messages and activities of individuals on the Internet, including messages sent by electronic mail, is being actively introduced, taking advantage of the lack of any legal norms regulating the establishment of such a system, its application, protection and use of information obtained, as well as of independent control bodies.

The existence of such a system was first officially acknowledged in a somewhat indirect fashion. Back in 2001, on the website of the Security Service of Ukraine (SSU), a text appeared, entitled: «On

monitoring the Internet network»¹⁶⁰, where SSU acknowledged that they were carrying out monitoring of information which is transmitted or received using systems and methods of communication. Monitoring was defined as a procedure «which is carried out by authorized State bodies for the purpose of uncovering on lawful grounds information in the telecommunications space of our country, the contents of which could pose a direct or indirect threat to the political, economic, military or other security of the State». It is not, of course, clear what exactly is considered the telecommunications space of our country, since the Internet has no borders. Although the information sheet claims that monitoring is carried out «in strict compliance with the law», another excerpt from the same text refutes this: «Fundamentally new possibilities for forming an integrated telecommunications network on a global scale make it objectively impossible to apply national laws which are based on geographic borders and traditional conceptions of State sovereignty».

Order No. 122 of the State Communications Committee of Ukraine «On approving procedure for compiling and maintaining a list of enterprises (operators) providing access services to global networks of information transfer to State executive bodies, other State authorities, enterprises, institutions and organizations that obtain, process, disseminate and store information which is the property of the State and is protected in accordance with legislation» dated June 17, 2002 stipulated that only those Internet Providers that have installed a state monitoring system and have been issued an appropriate Certificate would have the exclusive right to provide their services to the State authorities (paragraph 5 of point 3.1 and paragraph 5 of point 4.1.). At that time, nobody understood what kind of system it was and why all of a sudden the providers were obliged to install it at their own expense (the approximate cost being 30-40 thousand US dollars). There were no legal grounds for taking such a decision.

In June 2004, the Internet Association of Ukraine (InAU) and Ukrainian Internet Community (UIC) filed a claim to the Economic Court of the city of Kyiv demanding that the points of the Order mentioned above be declared void. For three months InAU provided the necessary explanations and evidence justifying their demand. The court several times postponed hearings on the case due to the involvement of a third party to the case (at first the SSU, then the Department of Special Telecommunication Systems and Information Protection of the SSU), through the reorganization of the State Communications Committee carried out by its president. On August 30, the case proceedings were suspended by court decree supposedly on the grounds that InAU could not represent the interests of all members although it is in fact an association of enterprise-providers. InAU submitted an appeal to the Court of Appeal, however the latter left the court decree unchanged. In the Court's opinion, InAU is not entitled to represent the interests of its association members without additional authority, that is, without their power of attorney. The court did not agree that the Order of the State Communications Committee infringed the interests of all members of InAU since the association included providers that had installed the given system of monitoring.

Understanding, nonetheless, that monitoring would need to be legalized, SSU prepared a Draft Law «On monitoring telecommunications», which effectively confirms the functioning of the existing system and technical requirements to it. This Draft Law was submitted to the Parliament under No. 4042. This Draft Law can be briefly described in the following way

- it introduces a system for monitoring telecommunications (the Internet and electronic mail) at the expense of the Internet providers, which ends up being passed on to the users, that is, the system of surveillance over Internet users is introduced at the expense of these very users;
- it provides no procedure as to the procedure for using the information received, its retention and destruction, nor any clear grounds for carrying out surveillance over a person;
- it does not allow for any independent control over the usage of such a system, making it possible to create a global uncontrollable system of surveillance of people without their knowledge.

One should note that, as far as guarantees against abuse are concerned, № 4042 is even worse than the Law on Investigative operations. There is no independent supervision over adherence to the law at all. Article 10 orders that information intercepted by mistake be destroyed. There is no other information about the retention of intercepted information, only a directive, that procedure for retaining and using a protocol for monitoring is determined by the Cabinet of Ministers of Ukraine. Article 12 states that any information concerning the personal life, honour and dignity of an individual which has become known through monitoring should not be divulged. That is all that is said.

Disagreeing at a conceptual level with such obvious risk of violations of the right to privacy and to the property rights of providers, human rights groups, in particular, the Kharkiv Human Rights Protection Group, together with Internet providers, decided to draw up an alternative draft law which would take into

¹⁶⁰ www.sbu.gov.ua

account international standards on receiving, retaining and using personal data. A working group was created which prepared the Draft Law «On the interception of telecommunications»¹⁶¹. In contrast to Draft Law № 4042, the draft law of the civic organisations included clearly outlined procedure for gaining a court order for the interception of messages, and for periodic court monitoring over enforcement of interceptions and the rules for retaining, using and destroying collected material. The procedure for extracting information from channels of communication is more transparent thanks to the introduction of a regulation making it obligatory to inform the person whose messages were intercepted, after the cessation of interception and to allow the person to see the information that was intercepted provided that this does not contain information which is secret as part of a criminal investigation. In order to keep the public informed about the scale of secret interceptions of information, a regulation was included requiring the publication of an annual report which would contain information about the number of interception warrants issued with an indication of the types of crimes, in connection with which the decision to carry out interception had been taken, the number of refusals to issue a court warrant and other information. An institution was introduced which would provide independent supervision as to the lawfulness of monitoring, and the question about the financing for producing and implementing a system of monitoring was resolved.

The first version of the alternative Draft Law was tabled on 26 March 2004. Further refinements were made to the draft with the participation of the public, and in particular, the Public Council under the Committee of the Verkhovna Rada on Freedom of Speech and Information. Comments from the Security Service of Ukraine and the Chief Scientific and Specialist Administration of the Verkhovna Rada of Ukraine were also taken into consideration. The Draft was sent for comments to State executive bodies, civic organizations and representatives of the business sector. As a result, the refined Draft was introduced to replace the previous proposal. The Draft Law has passed through hearings in four committees of the Verkhovna Rada of Ukraine, and all of them have recommended that it be passed.

5. RECOMMENDATIONS

1. To pass legislation on protection of personal data in accordance with Standards of the European Council and European Union (in particular, Directive № 95/46 of the European Parliament and the Council «On the protection of the individual with regard to automated personal data processing and the unimpeded movement of this information», Directive № 97/66 of the European Union on the processing of personal data and protection of privacy in the sphere of telecommunications, the Convention of Europol, Recommendation № R (99)5 with regard to protection of private life in the Internet, Recommendation № R (81)1 on automated medical data bases, Recommendation № R (83)10 on scientific research and statistics; Recommendation № R (85)20 on direct marketing; Recommendation № R (86)1 related to social security issues, Recommendation № R (87)15 regarding the police; Recommendation № R (89)2 on seeking employment, Recommendation № R (90)19 related to salary payments and associated operations provided by the Cabinet of Ministers of the European Council, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and others);

2. To sign and ratify international documents concerning the protection of personal data, in particular, the European Convention of 1981 on the protection of individuals in connection with automated processing of personal data, and the Supplementary Protocol to the Convention on the protection of individuals in connection with automated processing of personal data involving surveillance bodies and flows of information across borders;

3. To run training sessions for judges with regard to protection of privacy when considering cases on the protection of personal data, the issuing of search warrants, or warrants for wiretapping or other interception of information from channels of communication;

4. To introduce the practice of issuing a public annual report on the use of investigative operations which infringe upon the right to privacy (secret search, the interception of information from channels of communication), in which the number of court warrants issued for these measures, divided between the subdivisions who carry out investigative operations (the police, the tax police, SSU, etc), the effectiveness of the measures taken (the number of criminal investigations launched or submitted to court, etc) and other information.

5. To create a special State executive body to carry out independent supervision over adherence to law in the sphere of protection of personal data and access to information.

¹⁶¹ Draft Law № 4042-1 «On the interception and monitoring of telecommunications», introduced into parliament by State Deputy V, Lebedivsky

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Date of Interception	Objects of Interception	Source of information in the Internet	Consequences
March 2004	State Deputy David Zhvanyia (bloc «Nasha Ukraina» (Our Ukraine), Russian politician Ivan Rybkin and Boris Berezovsky)	<p>http://www.rupor.org/index.php?id=1092743112 Internet edition on human rights RUPOR</p> <p>The Security Service of Ukraine (SSU) was passed information saying that «Zhvanyia is a criminal, because acting on a prior agreement with Boris Berezovsky he took part in the kidnapping (of Rybkin), and in the latter's illegal detention...»</p> <p>http://ua.prona.com/print.php?p=news/2004/05/26/134026.html A bug was installed in the private office of Serhiy Nechyurenko, the Prosecutor of Shevchenkovsky District of Kyiv</p>	A criminal case was launched with regard to the interception. The Prosecutor's office is investigating
May 14, 2004	Prosecutor of Shevchenkovsky District of Kyiv	<p>http://www.klpg.org/index.php?id=1097697480 Bulletin of Kharkiv human rights group «Human Rights», № 26, 2004 AR of Crimea: Telephones of V. Yushchenko's supporters are tapped</p>	An act was directed to the Regional Prosecutor's office and the regional department of the Security Service of Ukraine. At a press conference held at the Chernivtsy Regional Department of the Ministry of Internal Affairs of Mykola Kharabara, a Deputy Chief of this Department, stated that the detected device was «home-made, not professionally manufactured». He did not make public any detailed information about the bugging saying that it was not available
September 2004	Valeriy Probyy-Golova, authorized representative of Viktor Yushchenko for territorial electoral district № 1, Head of his Crimea electoral headquarters	<p>http://www.klpg.org/index.php?id=1097697480 Bulletin of Kharkiv human rights group «Human Rights», № 26, 2004 AR of Crimea: Telephones of V. Yushchenko's supporters are tapped</p>	A. Shkil, People's Deputy of Ukraine, filed a request to G. Vasylyev, the General Prosecutor of Ukraine
October 10, 2004	State Deputies, Parliament's technical personnel, members of electoral headquarters and journalists	<p>Internet publication «Telekrytyka» (Telecritics) and «Trybuna» (Tribune) – news report dated October 10.</p>	An act was directed to the Regional Prosecutor's office and the regional department of the Security Service of Ukraine. At a press conference held at the Chernivtsy Regional Department of the Ministry of Internal Affairs of Mykola Kharabara, a Deputy Chief of this Department, stated that the detected device was «home-made, not professionally manufactured». He did not make public any detailed information about the bugging saying that it was not available
November 6, 2004	Father Vitaliy Kosovsky (Ukrainian Orthodox Church of the Moscow Patriarchate) and Yury Levenets (member of V. Yankovych's electoral headquarters)	<p>http://stv.com.ua/pr.archiv/136/0/255/ Program «Zakryta Zona» [Closed Zone] on Channel 5 Conversation about payment for priests' campaigning activities</p>	An act was directed to the Regional Prosecutor's office and the regional department of the Security Service of Ukraine. At a press conference held at the Chernivtsy Regional Department of the Ministry of Internal Affairs of Mykola Kharabara, a Deputy Chief of this Department, stated that the detected device was «home-made, not professionally manufactured». He did not make public any detailed information about the bugging saying that it was not available
November 9, 2004	Head of Department of Internal Control over Administrative Premises of the City Trade Complex «Kalynovsky Rynok» (Kalynovsky Market)	<p>http://www.gazeta.lviv.ua/articles/2004/11/12/36/ «Lvivska gazeta» (Lviv newspaper), November 12, 2004, № 208 (332) A bugging device was detected in the private office of the Head of Department of Internal Control over Administrative Premises of the City Trade Complex «Kalynovsky Rynok»</p>	An act was directed to the Regional Prosecutor's office and the regional department of the Security Service of Ukraine. At a press conference held at the Chernivtsy Regional Department of the Ministry of Internal Affairs of Mykola Kharabara, a Deputy Chief of this Department, stated that the detected device was «home-made, not professionally manufactured». He did not make public any detailed information about the bugging saying that it was not available
November 20 – November 21, 2004	Viktor Medvedchuk, Serhiy Kluyev, Oleh Tsaryov and others from Viktor Yankovych's team	<p>http://www.zerkalo-nedeli.com/m/show/526/48743/ «Dzerkalo Tyzhnya» № 15 (526) Phone conversations of Viktor Medvedchuk, Serhiy Kluyev, Oleh Tsaryov and other members of Viktor Yankovych's team during the second Presidential electoral campaign in Ukraine</p>	An act was directed to the Regional Prosecutor's office and the regional department of the Security Service of Ukraine. At a press conference held at the Chernivtsy Regional Department of the Ministry of Internal Affairs of Mykola Kharabara, a Deputy Chief of this Department, stated that the detected device was «home-made, not professionally manufactured». He did not make public any detailed information about the bugging saying that it was not available
November 26, 2004	Heads of electoral headquarters of V. Yankovych, Ukrainian Presidential Candidate	<p>Interception records proving the falsification of elections were made public at the official press conference of the State Deputy O. Rybachuk</p>	An act was directed to the Regional Prosecutor's office and the regional department of the Security Service of Ukraine. At a press conference held at the Chernivtsy Regional Department of the Ministry of Internal Affairs of Mykola Kharabara, a Deputy Chief of this Department, stated that the detected device was «home-made, not professionally manufactured». He did not make public any detailed information about the bugging saying that it was not available
December 23, 2004	Serhiy Kluyev and an unidentified woman	<p>http://stv.com.ua/pr.archiv/136/0/265/ «Channel 5»</p>	An act was directed to the Regional Prosecutor's office and the regional department of the Security Service of Ukraine. At a press conference held at the Chernivtsy Regional Department of the Ministry of Internal Affairs of Mykola Kharabara, a Deputy Chief of this Department, stated that the detected device was «home-made, not professionally manufactured». He did not make public any detailed information about the bugging saying that it was not available
January 2005	Administrative office of the company «Foxtro» in Kyiv	<p>Serhiy Kluyev has a conversation with an unidentified woman regarding the location of the opponent's electoral headquarters and private office of Viktor Yushchenko</p> <p>http://www.pravda.com.ua/archive/20023-28-77 «Ukrayinska Pravda»</p>	The Security Service of Ukraine (SSU) initiated a criminal investigation
February 10, 2005	Citizens of Sumy	<p>A bugging device was detected in the administrative office of the company «Foxtro» in Kyiv</p> <p>http://www.rupor.org/index.php?id=1108047997 Internet edition on human rights RUPOR</p> <p>As reported by Yury Udartsov, the Regional Prosecutor, at the collegial panel convened on February 8, the staff of special police divisions are, without any grounds, carrying out investigative operation of «Protection» category based on the consent of Heads of interregional divisions of the Department for Fighting Organized Crime. This lets them carry out interception and surveillance operations</p>	The Security Service of Ukraine (SSU) initiated a criminal investigation
February 17, 2005	Viktor Yushchenko and Yuliya Tymoshenko	<p>http://www.ctipo.com.ua/?sect_id=10&aid=3479 «Ukrayina Kryminalna» (Criminal Ukraine)</p> <p>Security Service of Ukraine (SSU) have initiated a criminal investigation over wiretapping of Yushchenko and Tymoshenko last year</p>	The Security Service of Ukraine (SSU) has initiated a criminal investigation over wiretapping in 2004

VII. FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION¹⁶²

1. OVERVIEW OF LEGISLATION

In comparison with many European countries, Ukraine's legislation is fairly liberal however the administrative practice of State executive bodies and bodies of local self-government places a lot of unwarranted obstacles before individuals trying to enjoy their right to freedom of conscience and religion. Moreover, certain provisions of the law do not comply with the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

In Soviet times, the State effectively did not recognize the human right to freedom of religion, and actively persecuted citizens for expressing their religious convictions. Therefore, at the beginning of the 1990s, the State authorities found themselves confronted with a new problem of regulating the fulfilment of this right. In 1991 the Law of Ukraine «On freedom of conscience and religious organizations» was passed. It is on the basis of this legislative act that State policy in this sphere has been carried out over the last thirteen years.

It is important to note that the State focused on legal regulation primarily in the sphere of collective religious expression carried out by religious organizations. However, the sphere of the private religious life of individuals (freedom of conscience) and protection from unwanted interference in this are virtually not regulated and remain without proper legal guarantees. For example, the issue of an individual's worship in a public place is not regulated in legislation at all, which can raise a number of practical questions.

Since the law was passed, there have been many fundamental changes in the legal system: the new Constitution of Ukraine has been adopted and Ukraine has become a signatory to many international agreements connected with the implementation of this right, in particular, the European Convention for the Protection of Human Rights and Fundamental Freedoms. Yet legislation with regard to religious organizations has remained virtually unchanged since that time. We would note that some of its provisions do not comply with international standards, and it also does not meet the contemporary demands for the development of social relations connected with ensuring religious freedom.

As a consequence of inflexible and imperfect legislation, situations arise where the human right to freedom of conscience and religion is exercised on the basis of established customs of administrative practice, or at the arbitrary will of officials of State executive bodies or bodies of local self-government. For example, despite the lack of any significant alterations to legislation, the procedure for registering religious organizations is constantly becoming more complication.

The right to freedom of religion is guaranteed by Article 35 of the Constitution of Ukraine (1996), which virtually repeats Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Article states:

«Everyone has the right to freedom of personal philosophy and religion. This right includes the freedom to profess or not to profess any religion, to perform alone or collectively and without constraint religious rites and ceremonial rituals, and to conduct religious activity.

The exercise of this right may be restricted by law only in the interests of protecting public order, the health and morality of the population, or protecting the rights and freedoms of other persons.

The Church and religious organisations in Ukraine are separated from the State, and the school – from the Church. No religion shall be recognised by the State as mandatory.

No one shall be relieved of his or her duties before the State or refuse to perform the laws for reasons of religious beliefs. In the event that the performance of military duty is contrary to the religious beliefs of a citizen, the performance of this duty shall be replaced by alternative (non-military) service».

¹⁶² Prepared by the Executive Director of the Ukrainian Helsinki Human Rights Union, Volodymyr Yavorsky

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Some provisions of the law on freedom of conscience and religious organizations run counter to the Constitution, yet they continue to be applied. For example, in accordance with Article 39 of the Constitution everyone has the right to freedom of assembly, upon notifying in advance the relevant executive bodies. Yet in Article 21 of the above-mentioned law, an approval procedure is defined for the holding of any mass religious events by religious organizations, according to which such activities are carried out only with the consent of local authorities (a body of local government or local State executive body), which in its turn puts obstacles in the way of holding gatherings of religious communities of a religion not dominant in the given area.

There have been frequent attempts by State executive bodies to strengthen State control of this sphere and to introduce more restrictions on the enjoyment of this right. However draft laws tabled in parliament have met with opposition from the community and have not been supported by State Deputies.

Sociological research carried out by the Razumkov Centre for Economic and Social Research¹⁶³ is interesting:

Assessment of the degree of observance of the right to freedom of conscience*												
% of those surveyed												
	Total number of those asked			Believers			Those wavering between believing and not believing			Non-believers		
	Agree	Disagree	No opinion	Agree	Disagree	No opinion	Agree	Disagree	No opinion	Agree	Disagree	No opinion
In Ukraine there is full freedom of conscience and equality of religions before the law	62,6	21,7	15,7	67,5	18,6	13,9	62,2	24,2	13,6	45,1	32,9	22
Freedom of conscience and equality of religions are declared in Ukraine but are not honoured	33,9	40,8	25,3	31,5	44,9	23,6	39,3	34,1	26,6	35,2	35,2	29,6
Religious organizations and churches misuse the rights and freedoms granted to them	31,5	38,9	29,6	28,6	45,3	26,1	35,6	32	32,4	38,1	27,9	24

* «Agree» (the sum of those who answered either that they «agree» or «probably agree»); «Disagree» (the sum of those who answered that they «disagree» and «probably disagree»)

1.1. STATE POLICY

State policy has still to be defined. Many attempts to draw up a concept of State policy in this sphere have been unsuccessful. In February last year a «Concept for the relations between State and Religion in Ukraine», drawn up by a working group of representatives of different religions and the Razumkov Centre, was completed.¹⁶⁴ It was then discussed and approved on 19 March and 24 June by a specialist Committee of the Verkhovna Rada of Ukraine on cultural and spiritual issues. It is expected to receive parliamentary consideration in the near future.

Unfortunately, the main shortcoming of this Draft remains the fact that it is a protectionist document for the Church which is often aimed at limiting the rights of religious minorities. This is seen in the provision, that «the State has the right to establish administrative restrictions on fulfilling the right to freedom of conscience and activity of the Church, which are dictated by ... the preservation of the traditional religious culture of society». The identification of the clearly different concepts – Church and re-

¹⁶³ Громадська думка про релігію і Церкву в Україні // Національна безпека і оборона / Public opinion on religion and the Church in Ukraine / National Security and Defence, No. 3, 2004, p. 39

¹⁶⁴ A draft of the concept is published in the journal National Security and Defence, № 3, 2004.

ligious organizations – is also a negative feature. Questions must be raised also by the desire to limit the activities of new religious movements from the point of view of equality before the law regardless of religion. One could mention many other conceptual discrepancies which, to varying extents, limit human rights and fundamental freedoms.

Five drafts of a new edition of the Law on religious organizations, drawn up by the State Committee for Religious Affairs, have reduced the scope of existing rights and freedoms and have encountered waves of protest from religious organizations. In other words, they are absolutely not supported by society, yet State executive bodies have continued to try to impose unpopular policy. The expediency of such actions raises serious doubts.

The activity of the special body – the State Committee for Religious Affairs – is neither consistent nor substantial. It is sometimes difficult to understand at all what this State body does. For example, in response to a formal request from the Council of Ukrainian Human Rights Organizations and Centre for Legal and Political Research «SIM» for information about infringements of the human right to freedom of conscience and religion, and also the possibility of working together with human rights activists, the State Committee stated that it «does not carry out monitoring of the observance of Ukrainian legislation on freedom of conscience and religious organizations», and added that «the resolution of these issues, as well as the appropriate response to cases of violation of the right to freedom of religion are, according to current legislation, the responsibility of local State executive bodies and bodies of local self-government within the framework of their authority».

Yet in February the number of employees of the State Committee for Religious Affairs was increased, and in April 2004, the Ministry of Justice yet again confirmed the strategic tasks of the activity of State Committee for Religious Affairs of Ukraine, which are usually not carried out, or are declarative, or are such that make it impossible to measure the results.

In particular, the State Committee for Religious Affairs, which is subordinate to the Ministry of Justice of Ukraine, is responsible for coordinating State executive bodies to achieve a future plan for emergency measures aimed at restoring the violated rights of churches and religious organizations, approved by the Cabinet of Ministers of Ukraine in 2002.

Among preventive measures for which the State Committee for religious affairs is responsible – is «not allowing the influence of foreign religious factors to destabilize relations between religions», nor the incitement to separatist moods among national minorities. The State Committee for Religious Affairs should contribute to mutual understanding between religious organizations of different faiths, and also to the unification of Orthodox Christians in Ukraine and the creation of a single Local Orthodox Church».

The content of such preventive measures raises many questions since they can be viewed and interpreted in different ways, practically to the banning of non-traditional religions. Therefore the package of given measures is incomprehensible. The will of the State to interfere in the activity of Churches, exerting influence upon them with the aim of creating a single Orthodox Church also raises many questions. It may be precisely to this end that State Committee for religious affairs refuses to register Orthodox churches. Such activity has nothing in common with ensuring freedom of religion.

The Committee should assist in the resolution of difficult issues relating to the transfer to religious organizations of religious buildings and other church property, which belong to the State or municipal structures, and are not being used or are not being used as intended. It does not have any authority as far as questions of property are concerned, and its function here is of an advisory nature. Experience shows that its advice is also seldom heeded.

Furthermore, the State Committee for Religious Affairs is declared responsible for providing consultative method assistance in questions regarding the application of legislation on freedom of conscience and religious organizations both to religious organizations, and to local State executive bodies. The State Committee for Religious Affairs should also perfect the legislative base in Ukraine in the sphere of State and religious relations. As we can see from the failures of Draft laws, this task causes them great difficulty.

In order to make the work of the Committee as clear as possible, and also to answer all questions regarding the activity in Ukraine of religious organizations, it was decided to equip the State Committee for Religious Affairs with an electronic information system. However, unfortunately, it remains unclear what this would be for.

In summary, one can state the following.

Certainly, the existence of a special executive body for religious affairs in no way limits human rights and fundamental freedoms. However, the more effective the organizational structure of a system of execu-

tive bodies with direct impact on the fulfilment of citizens' rights to freedom of religion, the better this right is ensured, and the less violations there are.

At the present time we have a State Committee with departments in the regions. One can state categorically that the present organization of executive bodies complicates the problem and makes the processes unmanageable.

The State Committee for Religious Affairs carries out in the main consultative-advisory and registration functions. An exception is the registration of religious centres, departments, monasteries, religious fraternities, missions and seminaries, and also the right to coordinate the activity of foreign priests of these organizations.

Analyzing disputes over the ownership of religious buildings or the allocation of plots of land to build these, one can conclude that in the majority of cases the State Committee and its regional representatives do not play a decisive role, and often they openly take one side, thereby violating the principle of State neutrality, defined by the European Court of Human Rights as a guarantee for ensuring religious freedom.

The representative offices of the State Committee for Religious Affairs in the regions carry out exclusively advisory functions, and their existence is simply incomprehensible. Moreover, the situation arises when religious communities are registered by local executive bodies which do not have any relation to the Ministry of Justice and the State Committee for Religious Affairs which the local body also does not always listen to in these issues. As a result of this, registration of a local community depends entirely on a local official, which in turn logically depends on the local traditional church.

In this way, legislation has in advance created a conflicting system where regulation of questions in one sphere is carried out by different structural executive bodies and this when there is a system with branches of a special executive body on religious affairs. Such a structure does not promote the implementation of a single State policy in this sphere, and instead contributes to an increase in violations of human rights and fundamental freedoms.

Two ways for the development of this situation would appear logical, and these have been partially reflected in various draft laws: either an increase in the powers of the State Committee for Religious Affairs, or, on the contrary, its disbanding and the transfer of its powers to the Ministry of Justice of Ukraine.

In our opinion, neither variant has been fully worked out. Both have weak and strong points, however, if they are sufficiently refined and regulated in detail with established guarantees of religious freedom, then the two variants are in essence equally valid.

In the first variant, the State Committee for Religious Affairs will receive the right to carry out checks on religious organizations, however their aim and results remain unclear, and the procedure and method for carrying them out are not defined at all. The role of regional representatives and bodies of local self government also remain unclear.

The suggestion to disband the special body of power could encounter a situation where the process is out of control with regulation in this sphere really handed over to local authorities with all the possible local abuse and inability of the State to exercise influence on their development. It would seem that this position is not fully warranted given that it would not encourage the guaranteeing of religious freedom.

1.2. THE PROCEDURE FOR REGISTRATION

Courts often do not recognize obstacles placed by executive bodies before the registration of religious organizations as being a violation of the right to freedom of religion and worship.

In legally protecting the rights of individuals connected with their religious convictions, one should distinguish two aspects: the right to believe (freedom of conscience) and the right to practise a religion (freedom of religion and worship)

The first is absolute, and must be defended without any exceptions from interference which the individual considers unwelcome. The second must, of course, contain a range of limitations. Nonetheless, in the second case access of people to an organized form of the first level by means of which they can practise their religion is fundamental.

Therefore the issue of creating religious organizations of the first level is extremely important and should be viewed in the spirit of Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (freedom of assembly and association), which protects the existence of social organizations from unwarranted interference from the State (European Court of Human Rights: case law: *Khasan and Chaush vs. Bulgaria*) and, accordingly, Article 36 of the Constitution of Ukraine, which guarantees the right to freedom of association.

In Ukraine the importance of gaining certain legal status is increased since only in this way can religious formations receive buildings for worship, print and disseminate literature, invite representatives of foreign organizations, organize public actions and receive charitable status, as well as carry out charitable activity. All of this is practically impossible in Ukraine without the registration of a religious formation, with legal entity status.

Also, in accordance with the European Convention, restrictions by the State on people's right to practise a religion must meet the classic criteria: the restrictions must be **clearly** defined in legislation, they must have one of the legitimate aims (prevention of civic disorder, the protection of health or morals of the population, or the protection of the rights and freedoms of others), and they must also be necessary in a democratic society.

Positive points are the voluntary nature of registration of religious organizations and the possibility for communities to exist without registering themselves. However the status of such unregistered communities and their rights are not defined by the law. Following the positivist logic which prevails in the State Committee on Religious Affairs and in other executive bodies, such organizations do not have any rights at all, since they are not set out in law. This applies, for example, to the right of worship in public places, invitations to foreign priests, the right to alternative military service of those who belong to such communities, and many others.

According to the law, religious organizations register their charter (regulations), however they submit far more documents and all of these are checked in accordance with Articles 12 and 15 of the Law on religious organizations. That is, in effect, registration is carried out not of the charter, but of the organization itself.

In practice, documents are not checked for their compliance with legislation, but rather the actual religion is assessed. In the case of *the Metropolitan Church of Bessarabia and others vs. Moldova*, 2001, the European court clearly defined: «... in principle the right to freedom of religion in the goals of the Convention excludes any evaluation by the State of the legitimacy of the religious beliefs». Criticizing the degree of freedom permitted the executive bodies, the European Court asserts that the right to freedom of religion guaranteed by the Convention excludes any arbitrary will from the State in questions involving assessment as to whether religious convictions or the ways in which these beliefs are expressed are legitimate. In compliance with this, the Court concluded that the requirement to receive a permit to open a house of prayer may comply with Article 9 only to the extent that it enables the minister to ensure that all formal conditions are met (the case of *Manussakis and others vs. Greece*, paragraph 47). This applies even more to the procedure for registration.

To draw an analogy with laws which define the gaining of legal entity status, then it can only be admissible to evaluate the formal aspects of the charters or other documents of an organizational character, but only if, in so doing, there is no evaluation of the religion in terms of its content. The Court further determined that the receipt of a permit on condition of having a positive reference from priests who belong to another church was manifestly inadmissible.

Still more objections arise in evaluating the carrying out of a specialist examination of the religion. It is indirectly clear that the specialist examination can decide that an organization is not religious which would be grounds for refusing to register them. However, it is unclear why for such a reply local State executive bodies and bodies of local self government are involved. Are these really specialists in religious studies? What is their function? Such commissions, usually, begin checking where the religion is 'good' or 'bad', rather than whether it is actually a religion. In this, there is direct interference with the right of individuals by asking them to make amendments to their charter documents and by delaying registration. From experience it is clear that such Commissions are made up of individuals who dealt with this question during Soviet times or, still worse, they can be made up of individuals belonging to a particular religion who may be sceptically inclined, or negative towards non-traditional religions. In this the need for the State to be protected from religious crooks in order to protect the rights of others is obvious. However, in Ukrainian legislation this balance of interests is clearly violated.

In view of this, one must clearly establish that such Commissions should be made up of specialists in religious studies for the purpose of carrying out a study of the religion in order to answer one question alone: whether the given organization is religious. In the law, there is no regularization whatsoever for the carrying out of this expert study, this being inadmissible.

The procedure for registering a primary religious organization consists of submitting registration documents together with an application signed by not less than 10 Ukrainian citizens. This application should be considered within a month, or in exceptional cases, three months. In practice the application is

considered, on average, within three months, and where a special opinion is needed, and as a precautionary measure, this is deemed necessary in the majority of cases, registration can drag on for six months. This violation of the law is established administrative practice which has no reasonable justification. This is stressed by the State Department of the USA in its report.

No clear grounds are set out in legislation for turning down an application to register a religious organization, and such grounds are substituted by the general phrase: «the charter of the organization contravenes legislation», which does not comply with the European Convention because of its vagueness in defining the grounds for limiting human rights.

Legislation does not permit the registration of religious organizations with canonical subordination to a spiritual leader (charismatic organizations), since canonical or economic subordination are permitted only to a religious centre (an organization which unites several religious communities), which is already registered. In this way, it is impossible to create religious organizations which belong to new religions and which do not have religious centres. It is similarly impossible to create new churches, since these are understood to be already hierarchical structural unions.

During registration, the State bodies return the documents submitted with their comments and their suggestions as far as the charter is concerned, although this is nowhere allowed for by legislation. The State bodies' comments frequently relate to aspects of religious practice and limit the rights of the individual.

There is a general suggestion to move the focus of regulation from the process of registration to monitoring of the activities of religious organizations. It is hardly likely that people will actually declare illegal activities in their charter documents. The majority of violations are observed in organizations which have charter documents which are in compliance with legislation. Therefore monitoring would have much more significance than preliminary control which is based on the discretion of an official. This thesis is similarly justified in view of the presumption of innocence of an individual: in turning down an application for registration, the individual is effectively being made accountable for his or her own intentions, and not actions.

1.3. THE RIGHT TO ALTERNATIVE (NON-MILITARY) SERVICE

According to Article 35 of the Constitution of Ukraine, citizens have the right to alternative (non-military) service on the grounds of their religious beliefs. This article should logically be supplemented by Article 24 of the Constitution of Ukraine: «Citizens have equal constitutional rights and freedoms and are equal before the law. There shall be no privileges or restrictions based on race, colour of skin, political, religious and other beliefs, sex, ethnic and social origin, property status, place of residence, linguistic or other characteristics». That is, this right should apply in connection with other convictions as well in order to avoid discrimination.

The State recognizes the right of an individual to refuse to do military service in connection with his religious beliefs (alternative service), however this right only applies to citizens who belong to registered religious organizations which are included in a special list of the Cabinet of Ministers of Ukraine. These requirements do not comply with the above-mentioned provisions of the Constitution, since in the Constitution no restrictions due to one's affiliation to a religious organization are set out. The existence of such a closed list of religious organizations, as well as linking human rights with the structural organization of religions in the country is an indisputable and inadmissible violation of the constitutional rights of citizens, especially considering the fact that there is no membership in religious organizations.

According to these two Articles of the Constitution of Ukraine, the right to refuse to do military service and to be able to do alternative service should apply not only on religious grounds, but in the case of other convictions, for example, pacifist views. However Ukrainian legislation, in particular the law on alternative service foresees the right to this only on the grounds of religious belief which narrows the constitutional scope of civil rights. Therefore, in practice, citizens do not have the right to alternative service on the basis of their political convictions, for example, pacifism.

In May, the Verkhovna Rada of Ukraine approved amendments to the Law of Ukraine «On alternative (non-military) service» (signed by the President on 7 June).

According to the amendments to this law, it is stated that grounds for refusing to allow a citizen to do alternative service or to release him from conscription is *the absence of confirmation as to the sincerity of his religious convictions*. This provision cannot but be startling for a number of reasons: what can give officials and the State the right to assess the sincerity of somebody's religious beliefs, what criteria can be

applied in order to assess this sincerity, and will this not lead to the customary discrimination on the grounds of religious convictions? All of these questions demonstrate the potential for future violations of civil rights. In order to have this right recognized, it is also necessary to provide proof of one's religion (of belonging to a certain religious organization), although religious organizations cannot have members and accordingly cannot provide documentary confirmation of someone's belonging to their organization.

Considerable difficulty is also caused by the inaccuracy of terminology in the law on alternative service, with the use of the term 'confession', the belonging to which gives the right to alternative service. However, other legislation does not define the term 'confession', and the term is not used at all, creating scope for different interpretations and misuse of restrictions of the right by officials of State executive bodies. A Draft law regarding a definition of the term 'confession' was recently rejected by parliament.

In accordance with the above-mentioned amendments to the law, the places are specified where a person who is refusing to do military service, can carry out alternative service. In particular, these are now State enterprises, «the activity of which, in the first instance, is connected with the social security of the population, protection of health, protection of environment, construction, housing and communal and agricultural services». It should be noted that in some countries these may also be non-profit-making non-governmental organizations involved in social or other socially useful activity (human rights, ecology organizations, etc.).

The period of alternative service is also changed.

«The period of alternative service shall be one and a half times that of the period for military service, established for soldiers and conscripts, carrying out obligatory military service in the Armed Forces of Ukraine and other formations in accordance with the laws of Ukraine for military formations. For those with higher education at the level of specialist preparation or a master's degree, the period of alternative service shall be one and a half times that of the period for military service, established for individuals who have the relevant educational or qualification level».

It should also be mentioned that the level of awareness among conscripts about the possibility of doing alternative service is not high. At the same time, the late submission of an application to do alternative service can be grounds for refusal to grant this, which also complicates the situation.

1.4. THE RIGHTS OF FOREIGN NATIONALS AND STATELESS INDIVIDUALS

Substantial unwarranted limitations on the rights of foreign nationals and stateless individuals to practice a particular religion should be noted, these running counter to both the Constitution of Ukraine and to Ukraine's international obligations, and being clearly a relic from the Soviet era.

For example, they cannot be the founders of religious organizations. Only citizens of Ukraine have the right to found a religious organization. Such a regulation is even more contradictory as regards foreign nationals and stateless individuals living permanently in Ukraine, since it effectively denies them the right to practice their religion collectively.

Foreign priests have the right to preach their message only in those religious communities which invited them and with the official consent of the state body which registered the charter (regulations) of the relevant religious organization. In this way, if a foreign national practices a religion, whose organization is not registered in Ukraine, then he or she is effectively denied the right to worship collectively.

Furthermore, there have been cases where consent for the invitation of foreign national to carry out religious activity has been denied, or where a person's right to continue to live in Ukraine has been turned down, either by State executive bodies or embassies (consulates) in issuing visas at the invitation of a religious organization.

These limitations on the rights of foreign nationals and stateless individuals do not fall under any of the reasons for limiting rights, defined in Article 35 of the Constitution of Ukraine, as they are in no way connected with the interests of protecting public order, the health and morality of the population, or protecting the rights and freedoms of other persons.

Among other things, such a provision limits the constitutional right to freedom of movement.

In its very basis it constitutes a flagrant intrusion into the internal affairs of a religious organization. As is stipulated in Principle 16 (4) of the Vienna Concluding Act (OSCE), religious freedom of associations includes the right to create places of worship, create associations in accordance with one's own hierarchical structure, elect, appoint or replace personnel in accordance with one's own requirements and to ask for financing. Issues involving territorial structure and organization are also considered 'internal affairs' of religious organizations. Therefore, such a system of permits makes them dependent on a local official, which

is intrusion into the internal affairs of the organization and a violation of the fundamental principles of OSCE.

This provision also directly violates Article 9 of the Convention. In the case *Metropolitan Church of Bessarabia and others v. Moldova, 2001*, the European Court stated: «Analogously, when the fulfilment of the right to freedom of worship or of one of its aspects, in accordance with domestic law, falls under a system of prior agreement, participation in such procedure for issuing permits to church bodies which are already recognized cannot but run counter to the requirements of Part 2 of Article 9»¹⁶⁵. Thus, when a State has registered the charter of a religious organization, thereby recognizing its legitimacy, it has accordingly permitted the holding of activities connected with the practicing of this religion, in the given case, inviting representatives of foreign religious organizations.

1.5. THE INTRODUCTION OF IDENTIFICATION NUMBERS

In general, the introduction of identification numbers can scarcely be considered an issue which seriously interferes with freedom of conscience and religion. This issue is rather one which touches on the sphere of privacy and the need to retain personal data about an individual.

Therefore the mere existence of an identification number is not a violation of human rights. It may, however, be a violation to have a single multipurpose (multifunctional) number, as may also be the practice of using or retaining information which is collected under this number.

However, from another point of view, if the State goes along with citizens in creating possibilities for avoiding identification under a number on the basis of religious convictions, then it must ensure the appropriate carrying out of this procedure and render discrimination on religious grounds impossible.

In the main, it is the Ukrainian Orthodox Church under the Moscow Patriarchate (UOC MP), and organizations supporting it, which are against the introduction of identification numbers. It is interesting that in Russia this church is not taking any action against identification numbers. Moreover, such actions run counter to the decision of the Sacred Synod of the UOC MP, which named these protests «pure blasphemy», superstition, since no mechanical actions or numbers can separate the soul of a person from Christ if the person does not wish this. However Protestants claim that the codification of a last name runs counter to Christian faith, still more, given that this code contains a lot of information about the actual person.

It all began with the Law of Ukraine «On a State register of individuals paying taxes and other compulsory payments», adopted at the end of 1994 and in force from the beginning of 1996, which allowed for the allocation to each person of an identification number.

In 1999, the Verkhovna Rada introduced amendments to this law which allowed people to refuse to accept these identification numbers. However, one can interpret the given provision in different ways, in particular with regard to the question whether a citizen can refuse to accept an identification number allocated before the amendments took effect. The procedure for carrying out this provision of the law also remains unresolved to this day. This lack of clarity and contradictory nature have naturally led to conflict which resulted in a large number of rallies, petition campaigns, letters written to various institutions and all kinds of other protest actions. The Human Rights Ombudsperson alone has received about 11 thousand complaints in this matter.

The courts in turn have frequently adopted rather contradictory decisions with regard to this issue.¹⁶⁶ In this area, also, there has thus been uncertainty, although the courts have predominantly supported the claims of citizens against the identification number. However their decisions have simply not been carried out, since there was no procedure for using last names rather than a code: only the Ministry of Internal Affairs has the right to insert the relevant marks into passports, whereas the identification numbers were issued by the Tax Service, and the two were unable to agree between themselves.

It was only on 19 October 2004 that these two departments drew up and adopted a joint order № 602/1226 «On the Approval of procedure for inserting an identifying mark into the internal passport of a Ukrainian citizen with regard to an identification number for each individual paying taxes and other compulsory payments». This Order put an end to the contradictory situation – an individual can reject the number already received, and be registered under his or her passport series and number. In accordance with the provision, the citizen submits an application to the Tax Inspectorate, then later to the Minister of Internal Affairs which inserts the appropriate note into the passport.

¹⁶⁵ ECHR.; *Metropolitan Church of Bessarabia and others v. Moldova, 2001*

¹⁶⁶ The decision of the Verkhovna Rada in this matter can be found on the web-page of the Internet publication on human rights RUPOR: <http://www.rupor.org/index.php?id=1071047921>.

Prior to this, parliament had spent a year attempting to resolve the problem.

In the Verkhovna Rada of Ukraine four draft laws on introducing amendments to the Law of Ukraine: «On introducing amendments to the Law of Ukraine «On a State register of individuals paying taxes and other compulsory payments» had been tabled, in which mutually exclusive positions on the issue of citizens' refusal to accept tax identification numbers on religious grounds were presented.

The first – Draft № 3711 was registered back in July 2003, the authors being State Deputies B. Bezpaly and V. Bondarenko. The Draft foresaw the right of a citizen to refuse to be allocated an identification number on the grounds of religious or other convictions. It also allowed for the rejection of identification numbers already allocated and partially removed the procedural obstacles for implementing this, in particular, through the insertion of an appropriate mark in a citizen's passport.

In this way, the authors of the Draft believed, the need existed to remove an obviously inconsistent and contradictory element in the Law «On the State register of individuals paying taxes and other compulsory payments» and to cater for those people who, on the grounds of religious or other convictions, did not consent to have such a number, and yet, as law-abiding citizens, were forced to receive one. It is worth also noting that people's views and convictions do have the habit of changing, and those people who at one stage did not object to receiving a personal identification number, with time might change their mind.

The second – Draft № 3711-1 was introduced to parliament in October 2003. The authors of the draft were State Deputies V. Maistryshyn, M. Komar and O. Korsakov. The draft withdrew the very possibility of refusing to accept an identification number, let alone rejecting a number already received.

The reasoning of the authors of this draft is of interest. They consider that the amendments adopted in the Law of Ukraine from 16 July 1999 № 1003-XIV contradict the definition of the State register of individuals paying taxes and other compulsory payments as the only automated data base of all taxpayers, Articles 24 and 35 of the Constitution of Ukraine which state that citizens may not have any privileges because of their religious beliefs, and Article 4 of the Law of Ukraine «On freedom of conscience and religious organizations», in accordance with which a person's attitude to religion is not indicated on any official documents.

In addition, the authors state that the regulations mentioned above also run counter to the Law of Ukraine «On income tax» from 22 May 2003, which came into force on 1 January 2004. In accordance with this Law, tax credit can only be given to a citizen who has an identification number.

The third alternative Draft № 3711-2 from 3 February 2004 was tabled in parliament by State Deputy V. Atroshenko. This draft does not at all remove the certain contradictory element existing in legislation to this day, but does deal with a procedural barrier – there is indication as to the content of the necessary information in the passport, and how it is to be added. At present court decisions are virtually not carried out as State bodies do not have instructions regarding what exactly should be put in the passport and on what basis.

State Deputies of Ukraine P. Simonenko, K. Samoilyk and V. Kalinchyk on 6 April 2004 registered a fourth draft on this issue, which sets out in general a detailed amendment to the law, while retaining the possibility of refusing to accept the identification number.

The drafts were scheduled for consideration in April, then postponed until May. However, they were never actually considered which is not surprising given the wide spectrum of opinions of State Deputies on this issue.

1.6. OVERVIEW OF DRAFT LAWS ON FREEDOM OF CONSCIENCE AND RELIGIOUS ORGANIZATIONS WHICH HAVE BEEN REGISTERED IN PARLIAMENT

In 2003 parliament rejected two draft versions of a law on freedom of conscience and religious organizations. One – the fifth already, and virtually unchanged – from the State Department on Religious Affairs, and the second from State Deputies, designed largely to get in the way of the first.

In 2004 a range of draft laws which set out many innovations were registered by State Deputies.

On 28 January 2004, State Deputy I. Stoiko (from faction «Our Ukraine», member of the Committee on freedom of speech and information) registered the Draft law «On freedom of religious belief and the activities of religious organizations» (Draft № 5041) – this being how he suggested renaming the Law of Ukraine «On freedom of conscience and religious organizations».

One can, in general, describe this draft as interesting and legally well-considered. It does, however, contain a range of points which are unclear or inaccurate.

The draft foresees the disbanding of the State body – the State Committee of Ukraine on Religious Affairs. The latter's functions are fully transferred to the Ministry of Justice.

The draft also envisages the creation of a permanent consultative council under the President of Ukraine which would consist of representatives of religious organizations, civil associations, specialists, lawyers, etc. Its activity would be directed at collecting information with regard to the legalization of religious organizations in Ukraine, the provision of consultative help in issues concerning the application of the given Law, the carrying out of legal and religious specialist investigation, the provision of official conclusions in response to requests from State bodies and religious organizations.

The full and absolute return of all church property which is now State property is foreseen, with the exception of objects of historical heritage. If in the present law this involves only buildings of religious worship, here the scope of property claims of the Church to the State is considerably wider.

And Article 6 sets out that:

«The teaching of religious knowledge, religious studies, religious-philosophic disciplines with an informative nature, and where the study of these is not accompanied by the carrying out of religious ritual, can be included into the curriculum of State educational institutions.

Teachers of particular religions, and religious preachers should develop in their audience a spirit of tolerance and respect to people of other faiths, and to those who do not practice any religion, and also *develop State awareness*».

It is interesting that the author touched on the issue of equality, stating that all are equal regardless of their attitude to religion, *«however the President and Prime Minister must be Christians, who will take the oath to serve Ukraine and its people on the Bible»*.

New concepts for Ukraine are introduced in the Draft such as non-traditional religious organizations, these being organizations which have disassociated themselves from the world religions, national and regional faiths, with teachings, religious rituals and ceremonies, and organizational structure which do not coincide with any of the traditional religions. Thus, from this definition, it is not at all clear, 'who' exactly will be a representative of a non-traditional organization.

In general, one can say that, despite the declared aim of ensuring freedom of religion, the draft contains the already traditional list of provisions which can lead to the violation of this right within the context of Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The main ways of limiting human rights are limiting definitions, unfounded limitations with registration, the limitations of the rights of foreign citizens and persons without citizenship, the imposition of other limitations with regard to the activities of religious organizations.

Unfortunately, in all draft laws, what are seen as controversial for them are not the provisions about how to ensure the implementation of freedom of religion (the mistakes in all of them are identical), but exclusively institutional interests. In particular, the biggest 'stumbling stones' prove to be the future fate of the State Committee on Religious Affairs, the issue of returning confiscated Church property (no longer only religious buildings), as well as the declaration of a Christian orientation of the State with the possibility of teaching this in State educational institutions. There is also a certain tendency towards limiting the possibilities for registration of religious organizations.

The main scientific and specialist department, in their conclusion dated 14 September, made a number of comments about the draft and recommended that parliament reject it.

On 21 October, parliament also rejected the Draft Law «On introducing amendments to Article 92 of the Land Code of Ukraine (regarding the right to use plots of land)», (Draft № 5354 and № 5354-1), despite many appeals from Christian Churches. The amendments foreseen had been the right of religious organizations to indefinite and free use of plots of land owned by the State or municipal authorities. Church representatives stated that often they were unable to pay rent, which could lead to these organizations going bankrupt.

1.7. OTHER VIOLATIONS OF FREEDOM OF CONSCIENCE, RELIGION AND WORSHIP

The allocation of land for building places of worship is often accompanied by a discriminatory policy from the authorities which clearly favour the local traditional church and use all means to put obstacles in the way of other religious organizations. The situation is complicated by the fact that the provision of land is a positive right, that is, a given community does not have the right to demand the land. However, given the obvious discrimination with this process on religious grounds, its rights are violated. This discrimination is also a violation of the principle of neutrality of the State, which stipulates the neutrality of the State

in inter-church relations, and that no church should receive preferential treatment with regard to the right to worship.

Ukrainian legislation makes access to penal institutions virtually impossible for priests of all religions. Usually, such access is given to representatives of one or two religions, this being decided at the discretion of the management of the specific institution. In this, no consideration whatsoever is taken of the actual religion of the prisoners. This violates the Standard Minimum Rules for the Treatment of Prisoners, European penal regulations and other international documents.

There is also no legislation which would allow the activity of priests of all religions in other restricted institutions, for example, chaplains in ports.

The lack of legal regulations for the activity of chaplains in the Armed Forces of Ukraine remains a problem, leading to abuses and discrimination on religious grounds.

One should note that law enforcement bodies frequently avoid resolving inter-confessional conflict in accordance with legislation, or even help one of the sides «convince» the other with the use of force.

2. AN OVERVIEW OF CASES INVOLVING THE VIOLATION OF THE RIGHT TO FREEDOM OF RELIGION AND WORSHIP¹⁶⁷

2.1. REGISTRATION OF RELIGIOUS ORGANIZATIONS

From surveys taken of specialists and of the population with respect to cases that they knew of unsubstantiated refusals to register a charter, the following results were obtained¹⁶⁸:

- 95 % in the East had not even heard of this;
- 89 % in the Crimea had also not heard of this;
- 42 % of those surveyed in the West said that they had heard of such cases.

In the Odessa region in the village Chabanka-Gvardiyske, there is still conflict between the Ukrainian Orthodox Church under the Kyiv Patriarchate (UOC KP) and the Ukrainian Orthodox Church under the Moscow Patriarchate (UOC MP), with the authorities having delayed the registration of the community of the UOC KP contributing to the continued conflict. This was reported in June last year.

The Parish and priests of the Ukrainian exarchate of the «True Orthodox Church» headed by Metropolitan Benedikt, the Exarch of Ukraine, informed in their letter, that the department for religious affairs of the Donetsk Regional State administration is delaying registration of their community.¹⁶⁹

Representatives of Progressive Judaism in Kharkiv inform that their application for registration was considered for a year before a positive decision was taken.

On 16 May 2004, the senior priest of the Svyato-Pokrovsk Parish (the city of Malin, in the Zhytomyr region), Father Vasily (V. Demchenko) addressed an appeal to the Head of the Committee of the Verkhovna Rada of Ukraine on human rights, national minorities and inter-ethnic relations, Gennady Udovenko, to inform the mass media that, with the acquiescence of the local State administration, attempts were being made to forcibly place the community of this parish under the jurisdiction of another diocese. The Svyato-Pokrovsk Parish has been under the jurisdiction of the Zhytomyr Diocese of the Ukrainian Orthodox Church since 1992. In March 2002, at a joint meeting of the community a decision was taken to transfer to the jurisdiction of the Crimean Diocese of the Russian True-Orthodox Church (RTOC). The relevant amendments to the charter of the community were registered by resolution of the Zhytomyr regional State administration.

Two years later, the new head of the Zhytomyr regional State administration, Sergiy Ryzhuk issued a resolution declaring the amendments to the charter invalid, as they «were registered with violations of current legislation. There was no court decision establishing such violations, and at present the community is defending its rights in court.

At the same time, the Malin district State administration has begun to play an active role, with its officials, in contravention of legislation, checking whether the members of the Parish meetings exist. According to Father Vasily, there are attempts to force his community to accept the authority of the Ovruts Parish

¹⁶⁷ This overview is not intended to provide a comprehensive list of all violations of the right to freedom of conscience and religion. All cases are presented in order to provide an example of violations, their character and scale, as well as effective mechanisms for defending the violated right.

¹⁶⁸ The state of religious freedom and level of tolerance in the regions of Ukraine// Religious Panorama, № 8-9, 2004, p. 83.

¹⁶⁹ Religious Panorama. № 4, 2004, p. 17

of the UOC MP. The members of the community, who have been subjected to the 'check', have reported pressure from the officials carrying out the check, in particular, from L.G. Shklyarskaya, who, despite being obliged to remain neutral, has been trying to convince believers that the RTOC is a schismatic church. Father Vasily is certain that the checking of numbers of members of the Parish meetings is being carried out in order to prove that the decision of the community does not have legal force.

Refusals to register Ukrainian Autocephalous Orthodox Church (UAOC) Canonical (the UAOC is sometimes also called Synodic)¹⁷⁰, in particular its religious communities have continued into a second year. In this, the State is clearly playing a part in hindering the development of this Church. Without becoming involved in this inter-religious discourse, it must be said, that the given Church does indeed have many religious communities, and some communities of other Orthodox Churches have openly decided to transfer to the UAOC Canonical. However the State authorities on various, often fabricated, grounds refuse to register them.

For example, in Kyiv a State representative claimed in court that one of the grounds for turning down the application for registration were grammatical mistakes in the charter which contravene the law on language.

However the authorities also apply better thought-out arguments which are based on the already mentioned shortcomings in our so-called liberal legislation. A religious community submits for registration a charter of a religious community of the UAOC Synodic, and the registering body claims that there is no such Church in Ukraine, or, more accurately, there is no registered religious centre or religious administrative body and by law, the State recognizes subordination only to registered religious centres or religious administrative bodies (Part 2 of Article 8 of the Law on religious organizations).¹⁷¹ In this way, the State executive body, by its arbitrary interpretation of legislation, creates a logical vicious circle, where the community is not registered because there is no Church, and the Church does not exist because it has no registered communities. The argument as regards the voluntary nature of registration of communities also does not have validity as legislation does not entitle unregistered communities to create religious centres or religious administrative bodies, this being direct discrimination against these communities.

On the other hand, registration of yet another Orthodox Church is a departure from the strategic goals of the State Committee on Religious Affairs in creating a Single Local Church. According to unofficial information, the retention of the post of the present head of the State Committee on Religious Affairs has been made directly dependent on whether or not another Orthodox Church is created. There are therefore well-founded grounds for asserting that in this case the executive body is clearly an interested party and wants at any price to make the registration of new Orthodox Churches impossible.

2.2. THE RIGHTS OF ALIENS TO WORSHIP IN UKRAINE

In February of last year, a Buddhist monk from Japan, a participant in many non-violent movements for peace, Dziunsei Terasavi, was refused entry to Ukraine with no explanation given. He was informed of this at the airport «Borispol» (Kyiv). According to unconfirmed information, the reason for this may have been the 'lists' of the Russian special services to which his name had been added after public actions against the war in Chechnya. At the end of the year, he was however able to visit Kyiv.¹⁷²

In March thirty State Deputies of Ukraine approached the State Committee on Religious Affairs with an appeal not to allow the persecution of a pastor of the religious organization «Embassy of God», Sunday Adelaja. In their opinion, the Ministry of Internal Affairs of Ukraine was illegally refusing to give him a residence permit, and his permit had expired on 14 March.¹⁷³

A Dean of the Roman Catholic Church, Father Volodymyr Sovinsky (a citizen of Poland) was summoned to the Department of Visas and Registration and informed of some problems in processing his documents giving him the right to engage in pastoral activity in Ukraine. In particular, the State Committee on Religious Affairs had taken more than two months to give their permission to his activity in Ukraine, by which time his permit to be in the country had expired. Numerous appeals to State bodies were fruitless, and he was forced to leave for Poland at the demand of the State authorities.

¹⁷⁰ For more details, see the official website of the Church: <http://www.soborna.org>.

¹⁷¹ The situation is even more complicated where the subordination of a religious community is to an individual, who is not a centre. This is possible with charismatic religious organizations however the State refuses to officially recognize such relations.

¹⁷² A Buddhist monk is to come to Kyiv on 21 December 2004 // Information on the Internet: <http://maidan.org.ua/static/news/1103501803.html>.

¹⁷³ The Internet website of the Religious Information Service of Ukraine: <http://www.risu.org.ua>.

In Dnipropetrovsk, Kharkiv and other cities foreign nationals are often asked to provide a second permit for their religious activity, despite existing agreements received by the religious centre from the State Committee on Religious Affairs.

In the Crimea, the permission procedure for foreign nationals invited to come by Muslim communities has become more complicated. In contravention of Article 24 of the law on religious organizations, each time they need to have such permits processed in Kyiv, and not in the State body which registered the charter of the organization.

The Department of Internal Policy in Sevastopol banned lectures by a teacher from Canada giving as their grounds that not everyone would understand or would be willing to communicate with a foreigner.

2.3. THE ALLOCATION OF LAND FOR THE CONSTRUCTION OF RELIGIOUS BUILDINGS AND CONFLICT OVER THE USE OF RELIGIOUS BUILDINGS

A representative of the State Committee has stated that around 4 thousand religious buildings have already been returned to Churches, and that another 300 buildings cannot be returned immediately because adequate premises need to be found for those institutions presently using the buildings. There are also a lot of buildings of cultural significance, and therefore their status is regulated by separate legislation on the protection of cultural heritage.

The Kyiv City Council refused to allocate land to Ukrainian Lutherans, giving no reason.¹⁷⁴

After a demonstration of «Embassy of God» which gathered seven thousand people, on 2 April, the head of the Department of land resources of the Kyiv City Administration stated that the authorities would allocate them 2,3 hectares of land in order to build a church in the Oskorky district in Kyiv.¹⁷⁵

The Luhansk City Council refused to allocate the Ukrainian Orthodox Church of the Kyiv Patriarchate (UOC KP) land for building a church. Deputies of the City Council called the construction of churches of the UOC KP «pure provocation», «an attempt by divisive elements to drive a wedge into society».¹⁷⁶

In the town of Rozhenky (Luhansk region) land already allocated to the Church «The Word of Life» to build a church, was without prior warning and at the decision of Deputies of the State Council used to build a sports ground. Fencing which had marked off this land allocated back in 1993 was removed. The Police in all of this took no action.¹⁷⁷ Certainly, the necessary construction work of the church had not taken place for over ten years however this does not deprive the religious community of the right to the land.

On 24 December actions of the City Council in Donetsk led to protest actions from the Christian Church «The Word of Life». For over 14 years they have not been able to get land in order to build a church. They were therefore forced to gather in rented premises, but then the City Council raised the rent, and also transferred premises which the Church had already rented and renovated on 100 Tkachenko Street to other individuals. It was only on 21 January that a compromise decision was reached on fulfilling the following four demands of the Church:

1) to submit copies of documents, signed by the Mayor, about the review of the issue of transferring the property rights of the building to a session of the City Council in February;

2) to withdraw the application from the court for stopping a rally of the Church;

3) to include representatives of the Church in a commission for reviewing this issue and to give prior warning of the dates of sittings of the commission and of sessions of the City Council at least two weeks in advance;

4) to take a decision on 26 January at a meeting of the executive committee about changing the method of calculating rent, taking into account the demands of religious organizations.

An argument about a church in the Kherson region was settled through the courts. The Kherson Appeal Court on 10 February 2004 declared the claims of the Eparchy of the Moscow Patriarch to the right of ownership of the church in the village Kalininskye unfounded.¹⁷⁸ This decision put an end to a conflict lasting several years between churches which had been accompanied by fights, demonstrations and publications in the press.

On 29 October 2004, the Kharkiv Regional State Administration passed Resolution № 436 on the transfer of a part of the premises of the Uspensky Cathedral in Kharkiv to the Ukrainian Orthodox Church

¹⁷⁴ Religious panorama, № 5, 2004, p. 14.

¹⁷⁵ Religious panorama, № 4, 2004, p. 23.

¹⁷⁶ Religious panorama, № 3, 2004, p. 12.

¹⁷⁷ Religious panorama, № 8-9, 2004 p. 16.

¹⁷⁸ The Appeal Court has resolved the dispute over property between two religious organizations in the Kherson Region // RUPOR <http://www.rupor.org/index.php?id=1076758783>.

of the Moscow Patriarchate (OUC MP), with subsequent (by 1 January 2006) full transfer of the premises of the Cathedral to this Church. The situation is complicated by the fact that both the Ukrainian Autocephalous Orthodox Church and the Ukrainian Orthodox Church of the Kyiv Patriarchate were laying claim to these buildings. The Cathedral's premises include a Hall for organ and chamber music. For a long time the return of the Cathedral to religious communities was put off due to the cost of moving the organ. However the Regional State Administration has informed that a solution has been found for this problem. According to unofficial sources, such a sudden transfer of the Cathedral is connected with the support given by the Ukrainian Orthodox Church of the Moscow Patriarchate to V. Yanukovych.¹⁷⁹

In Sevastopol, for several years now there has been no success in resolving the issue around the return to the Roman Catholic community of St Clement of a church building on 1 Schmidt Street which presently houses a cinema «Druzhba». This has continued despite many appeals from Catholics and from religious leaders of other churches asking that the church be given to the Catholics. The Sevastopol Human Rights Group on 10 March published an open letter with a demand to the city authorities to stop violating the rights of Catholics in Sevastopol, and to take measures to return the church which is owned to them, and warning against discrimination on religious grounds.

In Sevastopol places of worship have been returned to followers of Orthodox Christianity and Islam. However Catholics are openly and consistently being denied the restoration of their rights and the return of their church. With the consent of the city authorities, in the altar area of the church, an open and constantly working public pay toilet has been installed. In the actual church, which was reequipped as a cinema, low-quality films (erotic and action films) are shown, and game machine are also available. In this way, a house of worship has been turned into an entertainment area.

Also in Sevastopol, there is a problem with the allocation of a place to build a mosque, although here the argument is raging less about the allocation itself, but around specific places. The authorities of Sevastopol approved a plan for locating Churches, which did not allow for Mosques. The city authorities now, therefore, are trying to allocate a place for the Mosque outside the city or in an inconvenient place, whereas the Muslim community is demanding a better place for their building.

Human rights organizations have received a copy of the General Plan for the city of Sevastopol, «Plan for the location of Orthodox Churches», agreed with the Head of the City Council and blessed by the Arch Bishop of Simferopol and the Crimea, and also the by the Beneficial of the Sevastopol district. This is a documentary example of the discriminatory policy of the authorities as regards the allocation of land for new places of worship. It also confirms that the city authorities, in allocating land to any community, consult with the representatives of the Ukrainian Orthodox Church of the Moscow Patriarchate.

In Sevastopol a place has also been allocated for building a church of the Greek Catholic community. It is true that the place is on a transfer road, virtually outside the city, and yet the community cannot build there either due to the obstacles place by neighbouring businesspeople.

The special sub-division «Berkut, according to the Head of the political and legal administration of the Medzhlis of the Crimean Tatars, Hadir Bekirov, have forced the Muslim community of the town Nikita (Crimea) to vacate premises which were in the past a Mosque. The building is 114 years old. It is formally under the administration of the State Committee for Natural Resources, and recently it was transferred to the State enterprise «Pivdenecogecentre»¹⁸⁰ However for the last years it has stood empty and abandoned. Bekirov asserts that the mosque building was used for keeping hens and breeding snakes, and at night, rather suspicious types, looking like criminals, used it as a gathering place. The court supported the enterprise and evicted the community, despite the position of the State Committee for Religious Affairs, which had suggested adding the Mosque to the list of objects of cultural heritage, which are subject to return to the community. This yet again demonstrates the impotence of departments of the State Committee for Religious Affairs in the regions when it comes to resolving disputes over property.¹⁸¹

In Lviv representatives of the Ukrainian Orthodox Church of the Moscow Patriarchate (UOP MP) complain that they are not being allocated land to build a cathedral and a building for eparchial administration. They accuse the authorities of deliberately dragging out the process. However the authorities claim that they are offering options which the UOP MP reject, since they do not suit them.

¹⁷⁹ See more about this on the Internet: http://www.mignews.com.ua/regions/sobor_0507.html; <http://www.sedmica.orthodoxy.ru/35-08-05-02.php>; <http://www.kh.ua/about/uspen.htm>; <http://sedmica.orthodoxy.ru/106-21-08-03.php>; <http://www.atvc.tv/print.asp?id=55389&rand=2008935809>; <http://news.media-objektiv.com/city/2002/954.shtml>; <http://news.media-objektiv.com/city/2004/18222.shtml>.

¹⁸⁰ Southern ecological and geological center

¹⁸¹ «Crimean authorities wage an anti-Muslim Dzhihad» // Обком, <http://www.obkom.net.ua>.

More than 500 believers from the UOP MP picketed the Rivne Regional State Administration on 2 June demanding that they be allocated the Rivne Svyato-Voskresensk Cathedral together with the premises of the former eparchial administration. Representatives of the Church stated that, in accordance with court decisions taken from 1995 – 1997, premises of the eparchial administrations should belong to them. However the decision of the court has not been implemented since the building is presently occupied by the eparchial office and seminary of the Ukrainian Orthodox Church of the Kyiv Patriarchate (OUC KP). Representatives of the authorities have called for negotiations with the OUC KP, and have offered to act as mediators.

The premises of the Synagogue of Orthodox Judaism in Uzhhorod, which now houses the local philharmonic orchestra, have not been returned. This despite the community having nothing against neighbouring with the philharmonic orchestra, and, it would seem, are ready to seek a compromise solution.¹⁸²

Parishioners of the Vinnytsa Roman-Catholic Parish of the Mother of God, Antohelska, have appealed to the Prime Minister with a request to return the buildings of the Caputsinsky Monastery to the community. They had previously approached the City Mayor, O. Dombrovsky, but had had no response.¹⁸³

In Poltava, the Zhovtnevy district court satisfied the claim of the OUC KP, acknowledging their ownership of the Svyato-Mikolayivsk Church, this following a two-year conflict between the community of the OUC MP and the former head of the community of the OUC KP who, against the wishes of the community, had transferred to the jurisdiction of the OUC MP and had used property of the community for his own business purposes. The decision declares illegal the continued retention by the former Senior Priest of the Church, Sergiy Znamensky, of the official stamp, the treasury and the accounting documents of the religious community of the OUC KP. The court has decreed that he must return this property, as well as the keys to the Church, and has prohibited the former head of the community, Znamensky, from calling himself the head of the Parish of the community of this Church. The Svyato-Mikolayivsk Church was, from May 2002 until the decision of the court about its ownership illegally sealed. In May 2002 representatives of the OUC MP provoked a fight with parishioners of the OUC KP in Poltava, and in May 2002, Parishioners of the OUC KP accused the OUC MP of having seized the Svyato-Mikolayivsk Church in Poltava. In all of this, the law enforcement agencies, Prosecutor's office and Department for religious matters of the Poltava Regional State Administration took no appropriate action to stop the conflict. The law enforcement agencies, in particular, did not even launch a criminal case concerning the clear abuse of his official position in the past by the then head of this religious community, this contributing to the development of the conflict and the violation of people's right to practice their religion. The best that the State representatives could think of was to seal up a religious building, thus depriving people of the right to collectively practice their religion, and making it impossible to use the Church for more than two years. This despite the fact that the conflict had in general arisen not between different communities over the Church, but between the members of the community and their head, a single individual. We consider that in this case the State bodies yet again neglected their obligation to solve such conflicts using the rule of law.

The Spiritual Council of Christian Confessions supported the appeal of the believers of the Evangelical Christian Baptists of Odessa sent on 8 November to the President of Ukraine, Leonid Kuchma, in which the authors of the document ask him to help them restore justice and the legal rights of the Odessa Church of the Evangelical Christian Baptists «Resurrection» to a place of worship.

The Church «Resurrection» and the joint stock company «Odessa Tourist» signed a lease contract on 30 June 2002, with subsequent right of purchase of the half-ruined 676 metre squared building at the address: Odessa, Gagarinske plateau, 5 with surrounding territory of 0,5 hectares. A month after this contract was signed, the said building was, in accordance with an order of the General Director of «Odessa Tourist» № 14 of 30 September 2000, transferred to the closed stock company «Antarctic Tourist». The «Resurrection» Church had renovated this building and paying all rent on time, as well as other payments and contributions in accordance with the contract. When the «Resurrection» Church declared their intention to buy this building, the joint stock company «Odessa Tourist» – the former owner of the building turned to the Commercial Court of the Odessa Region demanding that the lease agreement be dissolved and the «Resurrection» Church evicted. The Commercial Court of the Odessa Region ruled in favour of the joint stock company «Odessa Tourist». The Appeal Commercial Court of the Odessa Region on 5 May 2003 annulled this decision as having had no legal basis. In a second appeal by the joint stock company «Odessa Tourist» to the Commercial Court of the Odessa Region, a decision was once again made in favour of the «Resurrection» Church.

¹⁸² Religious Panorama, № 10, 2004, p. 28.

¹⁸³ Religious Panorama, № 8-9, 2004, p. 14.

2.4. INCITEMENT TO RELIGIOUS HOSTILITY

In Simferopol local skinheads have been accused of persecuting Crimean Tatars. This was reported by the Mejlis of the Crimean Tatars, who demanded that the organization of skinheads be disbanded. In his words, it is specifically they who destroyed the Monument to the Victims of the Deportation in Simferopol. Law enforcement officers not only deny the existence of skinheads in the Crimea, but take no steps to look for them.¹⁸⁴

Representatives of the OUC MP attempted to interrupt a religious service in the Church of the Holy Martyr Joseph Petrogradsky in Dzherzhynsk (Donetsk region), which belongs to the True Orthodox Church (TUC). The Moscow Fathers stated that only the OUC MP has the right to serve parishioners in this region. Previously, on 18 April during a Service for the Dead at one of the cemeteries of the city, priests from the TUC were attacked by clergy from the UOC MP. The next day their telephones and electricity were cut off. On the application of the eparchiate, the city authorities have demanded that the dome and cross be taken from the Church, and representatives of the Executive Committee have demanded that they cease their religious activity in the city.¹⁸⁵

The activity of so-called anti-sectarian organizations have led to waves of inter-confessional tension. In legislation there are no legislative norms regarding the definition of «sects» or «non-traditional religion». Furthermore, all organizations are equal before the law and none should be given precedence. In such conditions the activity against so-called sectarian organizations, which are in fact recognized and active religious organizations in Ukraine, should be qualified as incitement to religious hostility and punished in accordance with the law. Unfortunately, the law enforcement agencies not only do not react to illegal activities aimed at inciting religious hostility, but sometimes even support such behaviour and take part in their activities.

In this area, the public activity of the Moscow «Fighter of Sects», O. Dvorkin, and the Help Centre for Victims of Destructive Cults «Dialogue», particularly stand out. The founders of such organizations are often representatives of OUC MP, which use such mechanisms to consolidate their own position. The overt support of OUC MP for anti-sectarian organizations is also demonstrated on the official Internet website of OUC MP in the section «Sects». In it we find information about non-Christian religions, and occasionally the OUC KP is also named a sect or schismatic movement.¹⁸⁶ Such organizations particularly focus on charismatic Christian Churches. They hold conferences and seminars, distribute printed or electronic material which overtly turn people against this or that religious organization which is officially recognized in Ukraine. After this, there are cases of conflict or scuffles on religious grounds, religious services are illegally stopped, and moral and physical pressure is exerted on representatives of religious organizations which, in the view of the «Dialogue» Centre, are sects.

In particular, as a result of such «educational work» by the «Dialogue» Centre, inter-religious conflicts occurred on 13 and 14 May in Donetsk and Horlivka.¹⁸⁷

We consider that the authorities should react properly to overt demonstrations of incitement to inter-religious hostility and incitement to conflict.

2.5. OTHER VIOLATIONS

In Dnipropetrovsk the Regulation on holding mass actions in the city of Dnipropetrovsk which was approved by a decision of the executive Committee of the Dnipropetrovsk City Council on 21 August 2004 № 2207 remains in force. The illegality of this legislative act is accounted for by several factors, more about which can be read in the section on freedom of peaceful assembly. However it is interesting that

¹⁸⁴ Religious Panorama. № 3, 2004 p. 24; № 4, 2004, pp. 24-25.

¹⁸⁵ Religious Panorama. № 4, 2004, p. 17.

¹⁸⁶ Here is an example of such information in the section «Sects and heresies»: «02.04.2004. LUHANSK. Yet another provocation from schismatics foiled. At a recent session, the city council of the regional centre finally refused to allocate land in the city centre to the schismatic community of the «Kyiv Patriarchate» for the construction of a cathedral. An application addressed to the mayor of Luhansk, Yevgeny Burlachenko, with the help of whom the small (there are hardly 20-30 parishioners) community of the Ukrainian Orthodox Church of the Kyiv Patriarchate representatives were actively trying to have land allocated, has infuriated the Orthodox community. Given that in the Luhansk region there are only two small schismatic communities which don't have any influence on the development of religious life in the region, their claim to prestigious land seems even more unjustified. Believers of the Luhansk region in a few days gathered several thousands signatures against this intention, and they were taken into account by the city authorities». Source: <http://www.orthodox.org.ua>

¹⁸⁷ For more details, see Religious Panorama, № 5, 2004 pp. 55-56.

this Regulation stipulates specific rules for the holding of peaceful assemblies by religious organizations which contravene the law on freedom of conscience and religious organizations, and also establishes discrimination on religious grounds. Paragraph 16 of the Regulation states that: «Religious actions outside the places and buildings foreseen by the Law of Ukraine «On freedom of conscience and religious organizations» are held each time on having gained the permission of the Executive Committee of the City Council after a review of the purpose and program of the action to be held by the Office of internal policy of the City Council».

Human rights activists have sent a complaint to the Prosecutor's office for the city of Dnipropetrovsk concerning the contravention by this Regulation of norms of the Constitution and laws of Ukraine, however they have received no response.

Representatives of the Ukrainian Autocephalous Orthodox Church have pointed to obstacles being placed in their way when seeking to satisfy the religious needs of military servicemen, and have also drawn attention to cases, when, in order to hold religious services in prisons, they were forced to seek permission from priests of the OUC MP.

Cases have been recorded of the violation of people's labour rights because of their religious convictions: people have been dismissed or forced to work on religious holidays, etc.

On petition from a priest of the Moscow Patriarchate in the village Muraf, Krasnokutsk region, in January 2004, the Kharkiv regional department of education demanded that the director of a school in Muraf dismiss a priest of the Ukrainian Autocephalous Orthodox Church, Mikhailo Mironov, who had begun teaching English in the village (Father Mikhailo Mironov studied at the faculty of foreign languages). The formal reason given was the teacher's incomplete higher education. Now students in the village will not learn English at all due to the unwillingness of bureaucrats to allow a priest of the Ukrainian Autocephalous Orthodox Church to engage in teaching work. Father Mikhailo Mironov appealed for assistance to the Head of the Commission of the Verkhovna Rada on Cultural Issues, Les Tanyuk, and the Human Rights Ombudsperson Nina Karpachova.¹⁸⁸

3. PARTICIPATION OF RELIGIOUS ORGANIZATIONS IN THE ELECTION CAMPAIGN FOR PRESIDENT OF UKRAINE¹⁸⁹

The election campaign of 2004 was marked by the mass use of religious organizations with the aim of influencing citizens' choice through their religious convictions. On the whole, this can be explained by the fact that, according to results of sociological research, religious organizations at the beginning of 2004 enjoyed the greatest degree of trust from the population. What took place was effectively a deliberate manipulation of people's freedom of conscience. Moreover, the State authorities took no measures to stop such activity.

In a democratic society it is inadmissible to use religious organizations for political campaigning, this being undoubtedly an intrusion into the private life of citizens and a violation of their freedom of opinion and religion.

The main participants in the election campaign were the OUC MP, the «Embassy of God», Jewish communities¹⁹⁰ and other organizations.

Human rights organizations¹⁹¹ published an open appeal on 19 November¹⁹², in which they stressed that such practice violates legislation and freedom of conscience and religion.

The Sevastopol Human Rights Group, in an open appeal on 15 September drew attention to the fact that the headquarters of V. Yanukovych in Sevastopol were coordinating their actions together with religious organizations, and had stated this directly at their opening.¹⁹³

¹⁸⁸ See the Internet website: <http://www.uaoc.org.ua/hpe/News/news2004/newsjanuary2004.htm#S12>

¹⁸⁹ We are not giving a comprehensive list of all incidents. More information about the role of religious organizations in the election process can be found in a selection of news items on the web-site of the Religious Information Service of Ukraine on the Internet: http://www.risu.org.ua/ukr/news/hot_theme/2004/vyborny2004.

¹⁹⁰ See, for example, the website: <http://maidan.org.ua/static/news/1100806687.html>.

¹⁹¹ The Ukrainian Helsinki Human Rights Union, the Kharkiv Human Rights Protection Group, the Sevastopol Human Rights Group, the Centre for Legal and Political Research «SIM» (Lviv) and the Kherson Regional Organization of the Committee of Voters of Ukraine.

¹⁹² The text of the appeal is available on the human rights website RUPOR: <http://www.rupor.org/index.php?id=1100857761>.

¹⁹³ See RUPOR: <http://www.rupor.org/index.php?id=1095256225>.

The Administration of the OUP MP came out with explanations as to pastoral practice in the framework of the presidential campaign, in which it found the twisting of legislation admissible. In particular, in these explanations the main focus was on the prohibition of campaigning exclusively on the premises of churches or during religious services, which narrowed the general prohibition, established by legislation. However, practice showed that even this demand was not adhered to.

Cases of campaigning by representatives of the churches were reported, from the OUC MP, in Sevastopol, Luhansk, Kirovohrad, Sarny, Odessa, Sumy, Zaporizhye, Poltava, Donetsk and many other cities and villages. The campaigning took place both in the Churches themselves after religious services, and in separate interviews, appearances and public statements.

In Eastern Ukraine, including in the church buildings themselves, illegal leaflets without information about their source were distributed in support of Presidential candidate, V. Yanukovych. These contained clear elements of incitement to religious hostility and intolerance, and were also direct campaigning by the OUC MP for its candidate.

The OUC MP held a number of religious processions in support of Presidential candidate, V. Yanukovych, this being a form of direct campaigning and, accordingly, illegal activity for religious organizations.

In the program «Closed Zone» on «Channel 5», cassette recordings were made public which proved the participation of the OUC MP in campaigning for Presidential candidate, V. Yanukovych. In particular, on the day after the first round of voting on 6 November, there was a conversation between Father Vitaly Kosovskiy and one of the leaders of the headquarter of V. Yanukovych, Yury Levenets. The cassette records a conversation in which they discuss payment to priests for their campaigning services. In their words, special meetings have been organized with priests, at which they are handed campaigning material and also given 'breakdowns' about the payment for their services. After this conversation, mass distribution of campaigning literature in support of Yanukovych, and against Yushchenko, began in all churches belonging to the OUC MP.

Later the Mass Media and Internet publications were inundated with reports of cases of direct campaigning by priests of the OUC MP for one of the Presidential candidates.¹⁹⁴

On 23 November, a cleric of the Church of St Feodosiy Chernihivsky, Archpriest Sergiy Ivanenko-Kolenda made a public statement in which he disclosed cases where in the churches of the Chernihiv eparchy of the OUC MP, a lot of priests, due to pressure from the authorities and church leadership, had undertaken election campaigning for the Presidential candidate, V. Yanukovych. In particular, current legislation had been flagrantly violated by the Archbishop, rural deans and very many priests, through open campaigning, with the use of churches, where direct calls were heard to vote for one candidate only, and where untruthful information was spread about the other candidate. Leaflets and newspapers with a campaigning direction were also distributed in churches. This information was circulated in the Troitsky and Spassky Cathedrals of Chernihiv, churches of Horodnye, Berezny, Korbyukivky, Kulikivky and many villages. The Bishop of Chernihivsky and Nizhynsky OUC MP, Ambrozy (Polikopa) personally made addresses in 17 district newspapers of the region in support of Yanukovych. As a result of the publication of these facts, Archpriest Sergiy was subjected to threats, demands that he «repent», withdraw his statement and lead the city. After the priest refused to do this, the Bishop of Chernihivsky, Ambrozy issued an order on 3 December forbidding him from conducting religious services.¹⁹⁵

In its turn, the Ukrainian Greek Catholic Church (UGCC) published a special instruction as to how priests should act during the pre-election period. Priests could not organize political meetings, but could take part in these as citizens, but their presence should be reasonable and justified. They were also not to indicate support for a specific candidate, drawing attention to critical thinking, caution in their utterances and encouraging people to fulfil their civic duties.

The Synod of Bishops of the Kyiv-Halytska Metropolis of the UGCC has forbidden priests from standing for election to state executive bodies at all levels. It allows them to stand for election to bodies of local self-government with the consent of the local eparchy, and in this, they must not represent any particular political party.¹⁹⁶

¹⁹⁴ See, for example, <http://maidan.org.ua/static/news/1097944179.html>; <http://obkom.net.ua/articles/2004-11/19.1101.shtml>; <http://www.rupor.org/index.php?id=1095757036>.

¹⁹⁵ See the human rights website RUPOR: <http://www.rupor.org/index.php?id=1103127052> and <http://www.rupor.org/index.php?id=1102669906>.

¹⁹⁶ Religious Panorama, № 7, 2004, p. 15.

During December, the religious organization «Embassy of God» created a special campaigning stage on Independence Square in Kyiv, from where they campaigned for the Presidential candidate V. Yushchenko. Songs like «Jesus is our Lord» were interspersed with chants of «Yes to Yushchenko!» They also distributed special campaigning material.

The behaviour of the special State executive body on religious matters was interesting. The State Committee simply distanced itself from the whole problem¹⁹⁷, stating that it had no levers of influence on the situation.¹⁹⁸ It concluded that the law must be changed. As though it had no authority to stop organizations which were carrying out such activities. Yet, the point here is that the State Committee did not even make a public statement on this subject, it sent no warnings to organizations and in general took no action at all, which still further strengthens the arguments in favour of disbanding it.

We consider it to be unacceptable to force people to vote for the President of Ukraine under the pressure of the clergy and under threat of being refused Communion. We believe the cases of moral coercion and intimidation of believers in the Church from some priests and bishops to be inadmissible, and to be a grave violation of the right to a free vote, which is the foundation of the election process. Under such psychological pressure, people lose their freedom of choice, and the very coercion has nothing in common with the fundamental idea of the holding of free elections.

Such practice violates not only the principle of the neutrality of the State, which is affirmed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, the principle of separation of Church and State, guaranteed by the Constitution of Ukraine, but also the Law of Ukraine «On the freedom of conscience and religious organizations» which not only stipulates that religious organizations must not take part in the activities of political parties and must not give them financial support, but also that they must not carry out political campaigning (Article 5 of this Law).

Responsibility for the violation of Article 5 of the Law on religious organizations is fairly clear. In Part 3 of Article 16 of this law, it is stipulated that in the case of political campaigning by these religious organizations (a violation of the demands of Article 5), such religious organizations should be dissolved by the court. The court is authorized to consider such cases on the application of the body which registered the religious organization (the State Committee for Religious Affairs, local administrations), or the Prosecutor's office.

However, not one executive body has shown any desire to stop such practice. This entirely applies to the local authorities, who could have used judicial procedure to forbid mass actions (processions, rallies and demonstrations) by religious organizations.

4. RECOMMENDATIONS FOR IMPROVING THE SITUATION

1. To bring Ukrainian legislation into compliance 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..

2. In drawing up a new version of the law on religious organizations to move the focus from checking out organizations at registration stage to monitoring their activity: to accordingly shorten and simplify the registration of religious organizations, making the procedure at least analogous with the registration of civic associations.

3. To eliminate discrimination when registering the charters of religious communities and to clearly define the grounds for refusing to register or for cancelling the registration of the charters of religious communities.

4. State bodies must not interfere in internal church matters, in particular, those concerning the creation of a single Local Orthodox Church.

5. To introduce effective mechanisms for avoiding discrimination on religious grounds, particularly in the penal system, the social sphere and in the area of labour relations.

¹⁹⁷ With the exception of a joint statement with the main violators of legislation, which ingenuously commented on the need to introduce amendments to legislation and establish liability for religious campaigning: <http://www.derzhkomrelig.gov.ua/current.html>

¹⁹⁸ The human rights website RUPOR: <http://www.rupor.org/index.php?id=1102609266>.

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6. Law enforcement agencies must react appropriately to cases of incitement to religious hostility, especially from dominant religious organizations, and parties fighting organizations which they consider to be sects.

7. In order to eliminate discriminatory administrative practice and conflict between churches, to pass clear legal norms with regard to 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 religious buildings.

8. To simplify the access for priests of all religions to penal institutions, the Armed Services of Ukraine, and to introduce access of chaplains to all parts of Ukraine, in accordance with international norms.

9. Local State executive bodies 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.

VIII. THE RIGHT OF ACCESS TO INFORMATION¹⁹⁹

Information is the lifeline of democracy. Only a well-informed society can exercise control over the authorities in order to make them serve public interests. While, on the other hand, bad power needs secrecy in order to bury its incompetence and corruption. This is why transparency of those in power, making public exactly what the State powers want to keep secret and why, is always an immediate political issue, the litmus paper that reveals the powers' intentions and plans.

Ukraine inherited a heavy burden from its totalitarian past, when practically all State activities were kept secret for decades, whereas any attempts to obtain and distribute information about State activities were interpreted as anti-State crimes. In this manner, the Soviet authorities hid their crimes, the collapse of the economy, as well as their own income, benefits and privileges. It is rather difficult to break free of this gloomy legacy, as reminders of the past became all too frequent during the years following independence. One such reminder is the well-entrenched practice of illegally classifying information which is being carried out by State bodies.

The right to access to information is one of the aspects of the right to information that Article 34 of the Ukrainian Constitutions guarantees: «Everyone has the right to freely collect, store, use and disseminate information by oral, written or other means of his or her choice.

The exercise of these rights may be restricted by law in the interests of national security, territorial indivisibility or public order, with the purpose of preventing disturbances or crimes, protecting the health of the population, the reputation or rights of other persons, preventing the publication of information received confidentially, or supporting the authority and impartiality of justice».

This list of grounds for restriction of access to information is exhaustive. Unfortunately, article 34 of the Constitution does not include the demand in Article 10 of the European Convention on Human Rights and Fundamental Freedoms, i. e. these restrictions «as ... are necessary in a democratic society».

Implementation of the right of access to information which is in the possession of State executive bodies and bodies of local self-government is also supported by the constitutional right for citizens' petitions, which is guaranteed by Article 40 of the Constitution. This Article obliges State executive bodies and bodies of local self-government and their officials to consider all written petitions, individual or collective, and give a well-founded response within the term prescribed by the law «On citizens' appeals» (one month).

Constitutional restrictions on the right to access to information about an individual are set down in Article 32 of the Constitution, which prohibits the collection, storage, use and dissemination of confidential information about an individual without his/her consent, except in cases envisaged by law and only in the interests of national security, economic welfare and human rights. The issue of personal data protection is discussed in the section devoted to the right to privacy. In this section we will only consider access to information which is in the possession of State executive bodies and bodies of local self-government.

A distinction is drawn between passive and active access to information, that is, the obtaining of information through communication channels created by State executive bodies and bodies of local self-government and by means of formal requests for information, or about the access to materials. One should also distinguish access to parliamentary, governmental and court information, as well as information owned by private and non-governmental legal entities. Access to documents and access to public hearings (parliamentary, government, etc.) are essential constituents of the right to access to information.

¹⁹⁹ Prepared by Co-chairperson of the Kharkiv Human Rights Protection Group and chairperson of the Board of the UHHRU, Evhen Zakharov, co-chairperson of the Kharkiv Human Rights Protection Group, Irina Rapp, and member of the Kharkiv Human Rights Protection Group Yuri Chumak.

1. ACCESS TO OPEN INFORMATION

1.1. LEGISLATIVE REGULATION

Access to information is, in addition to the above, regulated by the law «On information» adopted in October 1992 and the Law «On state secrets» adopted in January 1994. The adoption of these laws was an undoubted achievement of the young State. Even before the adoption of the Constitution, these laws defined a system of relations and obligations in this sphere, usual for a democratic state.

Article 10 of the law «On Information» defines the guarantees of the right to information; it imposes the obligation on State agencies at all levels to inform the public on their activities and decisions taken, while Article 21 defines the means of making official information public, including providing it directly to those interested (orally, in writing or in other ways).

The resolution of the President of Ukraine of 28 March 1996 «On measures to raise the awareness of the Ukrainian population about the main directions of State policy» is also noteworthy. According to this resolution, all the structures of executive power (Cabinet of Ministers, Presidential Administration, Ministries and other central, regional, city and district administrative bodies) were to organize a system to regularly inform the population about current issues of internal and external state policy. To this end, monthly «information days» were suggested, in which top leaders and executives would participate. Most ministries, agencies and local administrations did in fact begin to hold regular briefings with the help of the press services each set up.

One should note in this connection the President's Resolution of 23 November 1995 «On coordination of press services and informative-analytic bodies of executive power», as this resolution effectively creates a ladder of Press services at all levels of executive power. The duty of coordinating all press services is assigned to the Presidential press service, which has to hold monthly briefings for heads of the press services of the Cabinet of Ministers, ministries and other central bodies of executive power. Each of these press services must coordinate, with the Presidential press service, all the materials, which are passed to the mass media and which «contain evaluation of external and domestic state policy which could have substantial public impact». Furthermore, these services must inform the Presidential press service about all activities which are to be held by State executive bodies or by state officials together with the mass media.

In our opinion, these resolutions, while appearing designed to render official information more accessible, lead, however, to a limitation on freedom of information, and to rigid state regulation of the procedure for obtaining such information. The centres of public relations and press services created are frequently the founders of their publications, and these publications, in fact, serve rather as means of propaganda than as sources of unbiased and authentic information. Instead of serving the interests of society (given that the goal of their creation was to guarantee transparency of the activities of state bodies and agencies), they have served the interests of specific State bodies. Moreover, having the monopoly on a certain range of information of a public nature, they have often restricted its access for journalists and ordinary citizens.

Article 29 of the law prohibits the restriction of access to open information, although it grants advantages in obtaining information to persons who need this information to fulfil their professional duties, which, from the viewpoint of Article 45 on equal rights of all participants in information exchange, seems somewhat questionable.

The list of documents and information, which are not to be made accessible to the public, is given in Article 37. In particular these include:

- information which, in accordance with established procedure, has been deemed a State secret;
- confidential information;
- information about investigative operations or criminal investigations of offices of the Prosecutor, the Ministry of Internal Affairs (MIA), the Security Service of Ukraine (SSU), and the court, which, if made public, could damage investigative operations, detective enquiry or criminal investigation, could infringe upon the right to just and objective consideration of cases by the court, or could threaten the life or health of some person;
- information about the private life of individuals;
- internal departmental correspondence, connected with the process of decision making, where the decision has not yet been taken;
- information of financial bodies prepared for audits;

– information which should not be made public in accordance with other laws and normative legislation. The restrictions on the freedom of information will be considered in more detail in Section 2.

Article 32 of the Law «On information» describes the procedure for satisfying official requests for information; this Article obliges state agencies «to impart information about their activities orally, in writing, over the telephone or using public speeches of state officials». Such a formulation enables bureaucrats to refuse to give written answers to specific questions, since they can refer to the public speeches of officials of their agency, whereas the same Article defines a request as a written request to give information orally or in writing, that is, the form of the response is determined by the author of the request. Another form of official request for information is the request to be given access to any non-classified document which is held by State executive bodies or bodies of local self-government in order to find out what it contains.

To ensure the right of free access to information, the question, who is responsible for what, is most important. This question is treated in Articles 35 and 48, which describe the procedure for handling complaints about the unlawful actions of state agencies in questions involving information. The complaints about these actions are dealt with by State bodies at a higher level or in court.

In addition, Article 47 of the Law which deals with responsibility for the violation of legal norms on information sets out disciplinary, civic, administrative or criminal responsibility in accordance with Ukrainian legislation, including responsibility for an unjustified refusal to give information or for the unwarranted inclusion of this information in categories designated as classified.

The Law of Ukraine «On introducing amendments to some legislative acts of Ukraine concerning the question of provision and unimpeded fulfilment of the human right to freedom of speech», adopted by Parliament on 3 April 2003, introduced amendments into the Administrative Offences Code, supplementing it with Articles 212-3. This Article establishes responsibility for an unwarranted refusal to provide information, the untimely or incomplete provision of information, or for the provision of false information, in cases, where such information should be provided on the request of an individual or legal entity in accordance with the Law of Ukraine «On Information» and «On citizens' petitions». It is, moreover, stated that «State officials, who fall within the jurisdiction of the Law of Ukraine «On fighting corruption», shall be brought to answer for such actions in accordance with the Law of Ukraine «On fighting corruption».

We are, however, unaware of any serious reviews, particularly at the court level, in this field, although cases of unjustified refusals to provide information in response to official requests, cases of arbitrarily interpreted statements restricting the provision of information, or cases where there was simply no response to a request, occur quite frequently, especially on a local level.

The Law «On the procedure for the coverage by the Mass Media of activities of State executive bodies and bodies of local self-government in Ukraine» obliges State executive bodies and bodies of local self-government to provide the Mass Media with full information about the activities of these bodies via the appropriate information services of the State executive bodies and bodies of local self-government, to ensure that journalists have free access to this information, except in cases set out in the Law of Ukraine «On state secrets», to not exert any pressure on them and to not interfere in their creative process (Article 2 of the Law). However, there have been many cases of restriction of access to the sessions of local city councils and regional state administrations.

1.2. ACCESS TO OFFICIAL PUBLIC EVENTS

Despite their pronouncements of democratic principles, the State authorities, from the Cabinet of Ministers down to local State administrations, and bodies of local self-government have often created obstacles for journalists as regards access to official public events.

Accreditation problems have generally arisen following the publication of material criticizing representatives of the authorities. For example, during 2004, no journalists from any opposition-leaning media outlet (the TV-channels «Channel 5», «Tonis», «TRK Era», the newspapers «Dzerkalo Tyzhnya», the Internet-edition «Ukrayinska Pravda», and «Gromadske Radio (Civic Radio)») were included in the so-called «presidential pool» (a group of journalists, who accompany the President or other officials, at the State's expense, on trips abroad to cover their activities), so they were often forced to make such trips at the expense of international donor organizations. Moreover, when a new President came to power, the situation was reversed: those left behind were now taken, and the others not. Understandably, such discriminatory policy is, in principle, without any legal justification.

The most typical examples are as follows:

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1. On 23 January 2004, the Presidential press-service revoked the accreditation of journalist Hanna Tsukanova from the France-Press Agency for the joint press conference of the Presidents of Ukraine and Russia. On the same day, the Presidential press-service revoked the accreditation of Sergiy Leshchenko, a correspondent of newspaper «Ukrayinska Pravda», to cover the meeting between Leonid Kuchma and Vladimir Putin.

2. An ICTV filming crew was not allowed to attend an Internet-conference held by Sergiy Yermilov, Ukrainian Minister of Fuel and Energy on 4 February 2004.

3. Viktoria Marenich, a correspondent of Radio «Liberty» in Kharkiv was among the members of the Kharkiv regional media who found themselves without accreditation for the All-Ukrainian Conference on Engineering Industry held in Kharkiv, which was attended by President Leonid Kuchma on 2 March 2004.

4. Olga Olenich, Chief Editor of the newspaper «Kremin» was refused access to a press conference at the Office of the Ministry of Internal Affairs in Kremenchuk (Poltava Region). On Saturday, 24 April 2004, the editor declared a «dry» hunger strike in protest against encroachments of freedom of speech with regard to the Ukrainian independent media, and her newspaper, in particular.

5. Members of non-State Vinnytsa media – the Information Agency «Kontekst-Media», newspapers «Channel 33» and «RIA» – were denied access to public events and facilities, visited by Prime Minister Viktor Yanukovich on 9 June 2004, during his visit to the Vinnytsa Region.

6. Journalist Volodymyr Boyko of Radio «Liberty» was not permitted to attend a press conference given by the General Prosecutor, Gennadiy Vasilyev, which took place on 22 September 2004.

7. On 12 October 2004, in the Kharkiv Sports Arena «Lokomotiv», Presidential Candidate Viktor Yanukovich met with young Kharkiv residents. About 20 students, supporters of Viktor Yushchenko, tried to attend the event. A TV-crew of an ATN news program (Channel 7) happened to be nearby. Police officers detained the students and pushed the journalists away, hampering their work. Two men in civilian clothes grabbed a video camera from Andriy Voytsekhovskiy, press secretary of the local headquarters of Our Ukraine», and threw it in a fountain.

8. On 24 October 2004, 15 journalists from Kherson, mostly from non-State media outlets, were not permitted to attend to a special session of the Kherson Regional Council, where a resolution was expected to be adopted concerning the political situation in Ukraine and the attitude of the Kherson regional council members toward it.

9. On 9 November 2004, Natalya Gridina, a judge of the Suvorovsky Local Court in Kherson, did not allow journalists from independent media to be present at a court hearing concerning a complaint by Lyubov Yeremicheva against unlawful actions by the Regional Governor (then still Sergiy Dovgan).

10. On 24 November 2004, the Mayor of Chuguev (Kharkiv Region), Galina Minayeva, denied journalists Serhiy Rogozin and Roman Gnoyevoy (the latter, by the way, was then a correspondent of the newspaper «Chuguev News» – a publication of the town council!) access to a plenary session of the Chuguev town council. Yury Chumak, correspondent of the newspaper «Tochka Zory», was also forcibly ejected from the town hall, without even a vote of the Council.

1.3. ACCESS TO PUBLIC EVENTS DURING THE ELECTIONS

The problem of access to public events during the 2004 election campaign became particularly acute.

The high-profile situation of acute political confrontation in Mukachevo (Trans-Carpathians Region) at the beginning of 2004 attracted enormous media interest. The attitude toward the press, demonstrated by the authorities and some members of interested political forces during the Mukachevo elections, was highly indicative, above all, from the point of view of the likely coverage of the forthcoming Presidential elections. The methods of «work with the press», employed in Mukachevo, were striking not because of their particular originality, but because of the absolutely open, undisguised disregard for the law – both election and information legislation – demonstrated by the local authorities (with the full support of those in power in Kyiv). The system of isolating members of the media from information about the election campaign and voting in Mukachevo was very simple, with no technological tricks applied. The great number of media representatives, who arrived in Mukachevo a few days before the election, were quite simply not admitted into the premises of the Territorial Election Commission (TEC). The buildings were simply cordoned off by reinforced police units, who referred to the relevant order from the Head of the TEC. It was impossible to contact this same Head of the TEC, there were no official refusals, and effectively there was nobody to hand an official complaint to regarding the impediments placed on journalist activity. Nothing remained but to

prepare the appropriate reports about violations and turn to the courts with a complaint about the actions of the TEC.

Overall, according to the Kyiv Independent Media Trade Union, during the Mukachevo events, 15 cases of unlawful refusals to provide journalists with information were recorded.

The Law «On the Ukrainian Presidential Elections» states that «electoral commissions are special collegiate State bodies, authorized to prepare and hold elections for the President of Ukraine» (Part 1 of Article 22). In addition, Part 4 of Article 14 reads «electoral commissions, State executive bodies, bodies of local government, officials and functionaries of these bodies are obliged, within the scope of their authority and competence, to provide representatives of the media with necessary information concerning the preparation and holding of the elections». Media representatives are ensured unimpeded access to all public events connected with the elections. On the basis of Part 9 of Article 28, on the day of voting, they are entitled «to be present [there] without a permit or invitation from the relevant commission» (provided that there are no more than 2 representatives of one media outlet).

In order to conceal abuses during the election campaign, members of the press were hampered in various ways in their access to polling stations. Denial of access to information at polling stations – this violation being the «hit» in October and November precisely «thanks to» electoral machinations. Over October and November 64 such cases were recorded (and these are only the cases which were brought to light and which received Press coverage). It is symptomatic that the majority of these violations were recorded in those regions, where the largest number of cases of election fraud and violations were observed – in the Kharkiv, Sumy, Kirovograd, Donetsk, and Lugansk regions.

From the end of November / beginning of December, the situation with the use of State administrative resources during the election campaign changed significantly. The Orange Revolution with the ensuing and quite unprecedented social activeness of Ukrainians forced a significant part of the bureaucracy to believe that serious changes were inevitable. And, after all, it is the way of any bureaucracy to try to find a place for themselves in new circumstances. Perhaps for this reason the attempts at vote-rigging, as well as the attempts to hamper open information about the course of the rerun of voting, were, so to speak, of a «residual» nature. Thus, although denial of access to information remained the most common violation in December – with an obvious regional orientation towards eastern and south regions, nonetheless, it was now, fortunately, on a lesser scale than just a few weeks earlier. Of 19 cases reported by monitoring services, only five occurred in the centre and in the West (Trans-Carpathian Region), all the rest occurred in the East and South. This fact to a certain degree could serve as a kind of definition of the remains of the «administrative resources».

Some refusals [to allow access] during the voting, already traditional for voting days, were directed at representatives of the Committee of Voters of Ukraine, who, denied the right in law to officially observe the election process, were forced to obtain accreditation for their observers under the auspices of the newspaper «Tochka Zory».

The majority of grounds given for refusing access to polling stations were flimsy, but formally plausible reasons such as the incorrect form of journalists' ID (no photograph, no signature, the pass having expired). There were, however, cases recorded where journalists were denied access to polling stations with no reason being given.

One should note that an appeal to the court in cases where flimsy grounds for denying access of journalists to polling stations had been given always ended with the court deciding in the journalists' favor.

1.4. ACCESS TO NORMATIVE LEGAL ACTS

Article 57 of the Constitution declares: «Everyone is guaranteed the right to know his or her rights and duties. Laws and other normative legal acts that determine the rights and duties of citizens shall be brought to the notice of the population by the procedure established by law. 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».

The law on the procedure for publishing normative legal acts was passed by Parliament, however President Kuchma used his right of veto, which Parliament could not overcome. The lack of a law is a negative influence on the nature of access to normative legal acts.

Thus, if we take the President's Decree № 503 of 10 June 1997 «On the procedure for the official publication of normative legal acts and their coming into effect», it follows that decrees and orders which do

not concern the rights and freedoms of citizens are disseminated by bringing them directly to the notice of interested individuals, State executive bodies and bodies of local self-government. In practice this means that a large number of normative legal acts are not published. There are still a great number of closed-access departmental instructions, which have more weight for the employees of the relevant departments than the Constitution and laws of Ukraine.

Laws and Resolutions passed by the Verkhovna Rada are printed in official publications in both Ukrainian and Russian – in «Vidomosti Verkhovnoyi Rady Ukrainy» and the parliamentary newspaper «Golos Ukrainy». Since 1997 a printed organ of the Ministry of Justice has been published – «Ofitsiyny visnyk Ukrainy», which includes all normative acts registered in the Single Register of the Ministry of Justice the access to which is not classified. Non-State mass media may publish official documents of State executive bodies and bodies of local self-government only on the basis of an agreement between the body which passed the document and the editorial board of the media outlet (Article 22 of the Law «On the procedure for the coverage by the Mass Media of activities of State executive bodies and bodies of local self-government in Ukraine»). In general, the activity of the Verkhovna Rada and other State Executive Bodies is covered in the mass media on conditions defined in agreements between State executive bodies and the editorial board of the media outlet (Article 20 of the Law). That is, non-State media outlets may publish texts of laws and other decisions of parliament only having signed an agreement with the Administrative Department of the Verkhovna Rada. Moreover, Article 4 of the Law prohibits independent translation of official documents from one state language into another.

It was virtually impossible previously to gain access to Draft Laws, except perhaps through acquaintances among State Deputies. With the development of computerized legal systems and the Internet, the situation has improved. These days, texts of some Draft Laws can be found on the free website of the Verkhovna Rada: www.rada.gov.ua. One can follow the entire Draft process, beginning with registration of the submitted draft law in parliament, on the computerized legal system «Liga Zakon» which contains all normative legal acts registered by the Ministry of Justice, draft laws, all resolutions of the Constitutional Court of Ukraine, and some resolutions of the Supreme Court of Ukraine. Access to this system is, however, on a paying basis.

It should be noted that the Ministry of Justice does not register all normative-legal acts. For example, in accordance with the President's Decree № 493 of 21 May 1998, acts of the General Prosecutor's office of Ukraine are not liable to state registration in the Ministry of Justice. As a result of this many normative legal acts of the General Prosecutor's office are not published. The section «General Prosecutor's office» on the website www.rada.gov.ua contains only 6 documents concerning international cooperation of the General Prosecutor's office with offices of the prosecutor of other countries and 2 documents on the procedure for presentation by the State financial monitoring agency of generalized materials on financial operations. «Liga-Zakon» includes only 4 documents adopted in 2003 and 2 documents adopted in 2004. At the same time, such important documents as the Order of the General Prosecutor of Ukraine № 89 of 28 December 2002 «List of documents arising from the activity of offices of the Prosecutor which contain confidential information and which are classified as being of limited access 'For official use only'», as well as the «Instructions on the procedure for consideration of and decisions on appeals, and personal reception of citizens in offices of the Prosecutor of Ukraine», approved by order of the General Prosecutor of Ukraine № 7ГН of 9 April 2004, which clearly need to be published, are unknown, and as far as we have been able to ascertain, have never been published at all, which is a violation of Article 57 of the Constitution. This unacceptable situation must be rectified: all open normative legal acts of State executive bodies should be published and added to computerized legal systems.

The situation as regards access to normative legal acts of regional State executive bodies and bodies of local self-government is even worse than the situation with central State executive bodies. Local bodies do not send their acts to the central computer legal bases on a regular basis and do not always place them on their own sites, most of which only appeared in 2002. Moreover, not all local bodies have managed to create their own sites. That is why the situation quite often arises that local communities have no opportunity to access even such important acts as the local budget. Sometimes the budget is concealed deliberately, as, for example, in Severodonetsk, where the budget was made public only at the request of the town prosecutor following an appeal from the Luhansk branch of the Committee of Voters of Ukraine.

The problem of access to court decisions is only beginning to be resolved. As already mentioned, all decisions of the Constitutional Court are published, both in the Internet and in printed editions. The most important decisions of the Supreme Court are also published. As for decisions of appeal and local courts, as well as economic courts, these decisions are published rarely and at random, this being caused by their

great quantity. For example, in 2004 about 3 million decisions were taken on civil cases. The huge number of court decisions causes problems in creating the appropriate databases.

One should mention that there are a certain number of normative legal acts, adopted by the President, State executive bodies or bodies of local self-government, which should be open, but are illegally classified and are not published. This problem is considered below.

1.5. REQUESTS FOR INFORMATION

Human rights organizations constantly use requests for information in their practice in order to obtain official data on the situation as regards human rights in the country. The Kharkiv Human Rights Protection Group has twice – in 2001 and 2004 – carried out an experiment whereby requests for information were sent simultaneously to the majority of central State executive bodies and the Supreme Court, all regional bodies of the Ministry of Internal Affairs (MIA), the General Prosecutor, the Ministry of Justice, the State Committee on Television and Radio, Appeal Courts to gain information and to check how state bodies implement current legislation.

According to Articles 32-34 of the Law «On information» requests for information must be considered by State bodies within 10 days; within this term the State body must inform the author of the request in writing that the request will be answered or that the requested information may not be divulged. Any refusals, furthermore, must be substantiated. The requests must be answered within a month. If the answer cannot be prepared within a month, then the State body must inform the requesting side about the delay in providing the answer, explain the reasons why the request cannot be dealt with within the legally stipulated period and state when the answer will be provided.

Not one single State body of those who we approached answered within 10 days that the request would be satisfied or turned down. Only from the Supreme Court, the Ministry of Justice, the State Department on Penal Issues and the State Department on Nationality and Migration Issues did we receive a satisfactory answer within a month. Answers arrived with infringements in the time periods from the Ministry of Employment and Social Policy, the Ministry of Internal Affairs, the Security Service of Ukraine (SSU), the Ministry of Education (after a repeat request), the Commission on Pardoning under the President of Ukraine. No replies at all were received from the Ministry of Defence, the Ministry of Health and the General Prosecutor. The responses themselves were incomplete, and we were frequently advised to turn to other departments, primarily the State Committee of Statistics. All State bodies do, indeed, pass on their information to the State Committee of Statistics in the approved form. However, we approached the departments which gather and process information in their fields and asked in the main for information which is not contained in statistical yearbooks.

We received substantial answers from the Ministry of Justice, the Supreme Court, the State Department on Penitentiary Issues and the State department on Nationality and Migration Issues. For example, the Ministry of Justice sent averaged statistical data about the financing of regional, district (town) and military courts from the state budget, as well as the number of judges against whom disciplinary measures had been taken and those dismissed. The State Department of Ukraine on Penal Issues answered our questions regarding the financing of the penal system, and gave data as to the level of illness and mortality in penal institutions. Only the department of higher education answered our questions, other department of the Ministry of education did not answer at all.

As regards regional State executive bodies, the situation here is even worse: around 30% of the bodies answer, more often than not with an infringement of the time periods stipulated by legislation. Another 30 – 40% reply after receiving a repeated request, and 30 – 40 % do not reply at all (this does not concern regional departments of Justice, which respond to requests, largely complying with legislation). Refusals to provide information are received more often than substantial responses.

Regional offices of the Prosecutor are particularly bad at responding to these requests. We approached the General Prosecutor and 27 of its regional offices in 2001 and 2004 for information regarding supervision over adherence to the law in law enforcement bodies. In 2001, we received 8 replies with the information requests, although 6 of these were only partially answered. 11 regional offices of the Prosecutor recommended that we approach other departments (5 of these recommended approaching the General Prosecutor as the highest body in the system of prosecutors) and only two prosecutor's offices – that for the Autonomous Republic of the Crimea (ARC) and for Sevastopol – stated that the data requested was information classified as «for official use only». At that time, 4 regional offices of the Prosecutor did not respond at all. By 2004, the number of those who stated that the data requested was information classified as

«for official use only» had tripled, the number of prosecutor's offices who did not respond at all had doubled, the General Prosecutor himself did not answer, and finally, the number of regional prosecutor's offices which satisfied the request for information had become four times lower. (More details can be found in the bulletin «Svoboda vyslovlyuvan i pryvatnist» // «Freedom of Expression and Privacy» № 1, 2002 and Nos. 2 and 3, 2004²⁰⁰).

This situation compelled us in June 2004 to lodge a complaint with the court about the illegal activities (or, in the case of no response, inaction) of offices of the Prosecutor. Although these complaints must, according to law, be considered within 10 days, only in one court case has a decision been taken, with the other court proceedings still continuing. The Pechersky district court satisfied the claim and bound the General Prosecutor of Ukraine to respond to the request for information, however the latter did so only four months after the decision was passed, and then not voluntarily. Having waited in vain for a response for two months, we sent a letter to the Pechersky Court with a demand to issue a writ of execution in order to approach the executive service. Instead of this, the court sent the General Prosecutor a document unheard of in procedural legislation, entitled «A Reminder of the need to carry out a court decision». Following this, we received a response, but not an answer in substance, but a standard formal reply.

One should note that regional departments of the Ministry of Internal Affairs have become much better at answering requests for information, most of all owing to the principled position of the central apparatus of the MIA (for more details, see «Svoboda vyslovlyuvan i pryvatnist» № 3, 2004).

We approached the appeal courts with requests for information regarding the number of permits for the interception of information from channels of communication, and how these were distributed between operational subdivisions that have the right to carry out investigative operations. Although we requested only de-personalized statistical data, all the courts refused to provide the information under various pretexts, referring to its secret nature. Only the Chernivetsky Appeal Court gave a general number of permits issued in 2003. We also received a reply in substance from the Supreme Court of Ukraine.

Some actions of state bodies may be regarded as indirect responses to our requests. For instance, the SSU declassified «The list of items of information that constitute state secrets» after our request for information as to the legality of the grounds for classifying the List as secret and after an active exchange of letters and phone calls on this theme. The Commission on Pardoning under the President of Ukraine has, since Autumn 2001, regularly informed the press about the number of convicted prisoners who have been pardoned.

In our opinion, the attitude on the whole of State executive bodies to their obligation to provide all interested individuals with information about their activity, in accordance with the Constitution and the Law of Ukraine «On information» is openly contemptuous. This demonstrates in the main that State executive bodies continue to pay no heed to society which has empowered them to fulfil designated functions and is entitled to expect accountability.

2. CLASSIFICATION OF INFORMATION. STATE SECRETS

2.1. LEGISLATIVE REGULATION

Article 30 of the Law «On Information» gives a definition of classified information which in legal terms is divided into confidential and secret.

Since confidential information consists of information which is owned, used, or managed by specific individuals or legal entities, the rules for providing or disseminating such information are determined by the owners themselves. An exception would be information, the legal procedure for which is set by Parliament (issues involving statistics, environmental protection, banking operations, taxes, etc.), as well as information, the concealment of which could cause a risk to life and health.

The only law that completely regulates limitations on access to information is the Law «On State secrets», passed in January 1994. In August 1995, a «List of items of information that constitute state secrets» was registered with the Ministry of Justice. In September 1999, significant amendments were introduced into the Law «On state secrets».

Article 1 of the Law «On state secrets» defines a state secret as being a form of secret information in the area of defence, economics, science and technology, foreign relations, state security and the protection of law and order, the divulgence of which could endanger the national security of Ukraine, and which are

²⁰⁰The Internet website of the Kharkiv Human Rights Protection Group «Human rights in Ukraine»: <http://www.khpg.org>

therefore subject to State protection. The degree of secrecy of the information is determined by the potential damage which could be caused by its divulgence, and different restrictions are introduced according to the degree of secrecy.

The criteria for determining the degree of secrecy were the responsibility of the State Committee of Ukraine on State Secrets and the Technical Protection of Information. This same Committee was a special central executive body for ensuring the defence of state secrets. However, at the beginning of 1999 the Committee was dissolved, and its powers were transferred to the SSU.

Article 9 of the Law stipulates that the classification of information as being a State secret shall be carried out on the basis of a substantiated decision by a State expert on issues of secrecy. Such State experts are the Head of the Verkhovna Rada, other officials in other State executive bodies, authorized by the President of Ukraine to fulfil these functions in the relevant fields of State activity at the application of the head of the relevant body. Article 9 contains a wide list of authorities, rights and duties of State experts. In particular, a State Expert defines the grounds on which information should be classified as a State secret, presents conclusions as to the harm to the national security of Ukraine in the case of the divulgence of the specific secret information, the degree of secrecy of the information («of particular importance», «top secret», «secret»), the period of secrecy (30, 10 and 5 years, respectively – Article 13).

Article 8 lists the information in different spheres of State activity which may be classified as State secrets. The fact that such an article exists is, undoubtedly, a significant positive feature of the Law. However, serious doubts arise at the present in this list of such information in the area of defence as the size of the Armed Forces of Ukraine and of other military formations; in the economic sphere – of the financing of State orders for providing for defence and security requirements; in the sphere of State security and protection of law and order – of the financing of investigative operations.

One should also note that Article 8 of the Law prohibits the classifying as secret of any information if this would impinge upon the content and scope of constitutional human and civil rights and freedoms, or cause harm to the health and security of the population. Information about the state of the environment, about the quality of food products and goods may not be made secret, nor may information about accidents, catastrophes, dangerous national phenomena and other extraordinary events which have taken place or may take place and threaten the safety of citizens. Other things which may not be classified as secret are: the state of health of the population; the standard of living, including food, clothing, housing, medical services and social security, as well as socio-demographic indicators; the state of law and order, of education and culture of the population; violations of human and civil rights and freedoms; unlawful activities by State executive bodies, bodies of local self-government and their officials; other information which, in accordance with the laws of Ukraine and the international agreements to which it is signatory, cannot be made secret. However this does not mean that the relevant information is absolutely open, since this Law covers only State secrets and does not cover other types of limitations in the field of information.

Responsibility for classifying the information listed above as secret information, as well as certain other violations of the Law on State secrets is set out in Articles 212-2 of the Code of Ukraine on Administrative Offences, and allows for a fine from one to three minimum wages before tax, and for officials – from three to ten minimum wages before tax, and for the repeated commitment of this offence within a year – from three to eight minimum wages before tax and for officials from five to fifteen minimum wages before tax, respectively.

Amendments to the Law «On state secrets», which were approved by the Verkhovna Rada of Ukraine in September 1999, significantly increased the range of information which can be classified. As well as information in the fields of defence, economics, foreign affairs, state security and protection of law and order, which could be classified as state secrets, information in the field of science and technology was added, specifically information «about scientific, scientific research, research-construction and design plans, on the basis of which one may create progressive technology, new forms of production, products and technological processes which have important defence or economic significance or significantly influence the foreign economic activity and national security of Ukraine» (Article 8). In our opinion, this is a fundamental mistake of the authors of the new version of the Law since classifying as secret in the field of science and new technology serves only to guarantee backwardness in the future and to encourage the emigration of specialists. In the sphere of State security and law and order, new positions have appeared: information can be classified as a State secret «about the personnel of bodies which carry out investigative operations, «about the implementation of rules of secrecy in State executive bodies and bodies of local self-government, in enterprises, institutions and organizations, State programs, plans and other measures in the area of protecting State secrets», «about the organization, content, state and plans for development of

the technical protection of secret information», and «about the results of inspections carried out in accordance with the law by the Prosecutor within the framework of appropriate surveillance over adherence to the law, and about the content of documents of detective inquiry units, criminal investigation and court procedures concerning the spheres mentioned in this article».

The last point is entirely incomprehensible. It is, in our view, inadmissible to classify as secret information the Prosecutor's surveillance over adherence to the law, particularly given that the range of information which can be classified as State secret in the fields mentioned above is very wide.

New Articles have been introduced which describe in detail the permission procedure for carrying out activity connected with State secrets, as well as the activity of the SPB – secret procedure bodies (not subdivisions, but actual State bodies). SPB have a wide range of rights and levers of influence over the work of enterprises, institutions and organizations which carry out activity connected with State secrets. If the creation of SPB is foreseen by staffing distribution, the position of deputy head in charge of procedure is introduced, who has the duties and rights of a head of the SPB. The SPB are made up of specialists who have access to State secrets with the level of secrecy of «top secret» or, if necessary, «of particular importance». SPB have the right to take part in carrying out the checking procedure for employees whose work is connected with State secrets, to check the condition and organization of work from the viewpoint of protection of secret information and even to conduct searches at workplaces – as far as we can see, this is what is meant by the right «to carry out checks on adherence to the rules of secrecy in the working place of employees who have access to State secrets».

Most unfortunately, we have to state that the State policy on protection of State secrets has changed in the direction of creating still greater secrecy.

Article 39 sets out responsibility for infringing legislation on State secrets, in particular, for classifying information as secret which, in accordance with Article 8, may not be made secret, for applying the stamp for secret information to information which is not a State secret, and also for classifying something as secret without grounds. However, since all this activity is effectively secret and covers wide spheres of activity of the State, and considering that for many decades virtually all State activity was basically secret, it is difficult to expect swift progress in this sphere. It is precisely for this reason that free access to the «List of items of information that constitute state secrets» is of great importance.

Amendments to the Law «On state secrets» did not affect the procedure for compiling or publishing the List of items of information that constitute state secrets (hereafter LISS). According to Article 12 of the Law (Article 10 in the 1994 version), amendments and additions to LISS are to be published in official publications not more than three months from the day of receipt of the appropriate decision of the State expert on issues of secrecy. LISS was printed in the «Uryadovy kuryer» («Government messenger») in August 1995, and reprinted several times in various publications. However, the first amendments to LISS, introduced by Orders of the National Committee on State Secrets № 2 of 29 September 1995, № 3 of 12 December 1995, № 1 of 16 January 1996 and № 2 of 6 February 1996 were not published: the first two have the classification «secret», the last two – the classification «for official use only», and then LISS itself received the classification «secret», this being a direct violation of the Law. The latter was only declassified in March 2001.

LISS is rather wide-ranging, detailed and covers the spheres of activity of the State which are defined in Article 8 of the Law «On State Secrets». Since a detailed analysis of LISS is beyond the scope of this article, we will limit ourselves to certain comments.

While the first part of LISS, concerning the sphere of defence, does not raise any serious questions (particularly given that, in contrast to the Law, there is no prohibition on information about the size of the Armed Forces), part two – the economic sphere – arouses certain bemusement. For example, Paragraph 2.6 classifies the amount of medical supplies and food supplied to the Armed Forces in time of peace. How could this threaten the national security of Ukraine? Paragraph 2.36 classifies information about the financial expenditure on defence orders as a whole in Ukraine. It is not clear what defence secrets this could reveal, however it makes the budget less transparent and controllable, and this affects the interests of taxpayers.

Paragraph 2.25 also looks odd in that it classifies information about special purpose automobile roads (a description of roads leading to military and other closed access objects, as well as to big railway junctions, stations, bridges, sea and river ports). It would be difficult to imagine special roads leading, say, to large stations which could be kept secret.

As for the sphere of State security and protection of law and order, here any information connected with investigative operations is classified (Paragraphs 4.1 – 4.9). The Security Service, in turn, becomes

entirely closed to society given that even information about the size of its staff (Paragraphs 4.14) may not be published. Paragraph 4.17 classifies information about the status, results and prospects for cooperation between SSU and security services of other countries. It is baffling as to why information about the fact itself of cooperation, its directions, specific results and even prospects need to be concealed from society, especially given that such information appears in various media outlets and, manifestly, causes no harm to Ukraine's interests. In our opinion, this point is clearly out of date, and requires significant editing. Paragraph 4.49 prohibits society as a whole from knowing about the actual status of protection of State secrets. It is also unclear what is understood by the words «actual status», however one gains the impression that Paragraphs 4.14, 4.18 and 4.49 are designed more to protect the interests of some agencies than those of the state.

Paragraph 4.48, connected with archival information about the death penalty, also warrants special attention. Firstly, it is not clear why this information is given the highest degree of secrecy – that of a State secret, when the sentence itself was announced quite openly. If this was for humane reasons, then it is not clear why relatives were not allowed to bury those executed and are not told where their burial place is. If the death penalty itself was imposed as a lesson and deterrent to serious criminals, as the State representatives claimed, then it should have been carried out in public. Perhaps it was in fact explained by a subconscious recognition by the State that such an act was immoral? Incidentally, according to the sense of Paragraph 4.48, the number of executions should not be classified as secret. Although the formulation is given in such a way as to allow the authorities to treat statistical data on executions as State secrets, and such cases have indeed occurred at the local level.

One positive feature can be seen in the appendix to the section of the LISS «General Provisions» Paragraph 5, where the terms and concepts used in the LISS are defined (Order of the SSU, № 3 58 of 2 July 2004).

Responsibility for disclosure of state secrets is regulated by Article 328 of the Criminal Code of Ukraine (Article 67 of the CCU in the 1960 version) and is punishable by deprivation of liberty for a period from two to five years, or, if the disclosure had grave consequences, then for a period from five to eight years. This Article may be applied only to those persons who were entrusted with this information or learned about it in the course of their official activity.

There were not many criminal cases concerning disclosure of secret information in 2004. According to information from the Ukrainian Security Service²⁰¹, six citizens of Ukraine were stopped while trying to pass information which constitutes a State secret, as well as confidential information which is the property of the State, to representatives of foreign countries. The illegal plans of Ukrainian citizens, connected with passing on state secrets, were foiled.

2.2. ACCESS TO PROTECTED INFORMATION WHICH DOES NOT CONSTITUTE A STATE SECRET

In accordance with Statute 30 of the Law «On Information», secret information is that which constitutes « a State secret or other secrets allowed for by legislation, the disclosure of which could be harmful to an individual, society or state».

The definition of state secrets and the rules for access to information which is deemed a state secret are prescribed in the Law of Ukraine «On State secrets». As for «the other secret information allowed for by legislation», the situation is much less clear. The procedure for classifying information as secret in accordance with Statute 30 of the Law «On information», is determined by the appropriate bodies in compliance with the demands of the Law «On information». Since Statute 21 of this law stipulates that the sources and procedure for receiving, using, circulating and keeping official information from state bodies at all levels shall be defined by the laws relating to these bodies, it is entirely reasonable to expect this to be reflected in the relevant laws, for example, «On the Police» (1990) or «On the Security Service of Ukraine» (1992). Article 3 of the Law «On the Police» prohibits the disclosure of information which constitutes official secrets, while Article 7 of the Law «On the Security Service of Ukraine» – prohibits the disclosure of military, official and commercial secrets, however nowhere in the law is there a definition of these terms.

In this way, the classification of information as secret is, presumably, determined and regulated by internal departmental acts or instructions, and the basis for their creation can only be Article 37 of the Law «On information», which contains general provisions about information which does not have to be pro-

²⁰¹ Official WEB-page of the SSU in the Internet: <http://www.sbu.gov.ua/reports/ann17-01-2005.shtml>.

vided on request, in particular, «information that are not subject to disclosure in accordance with other legislative or normative acts». One should note here that, in accordance with Article 21 of the Law «On information», unpublished normative acts which concern human rights and freedoms do not have legal force.

Which information does the state protect and on what grounds? Some kind of answer to these questions is provided by the Concept of Technical Protection of Information (hereafter TPI), approved by the Cabinet of Ministers of Ukraine in October 1997. According to the Concept, the leak of information which constitutes a State secret or other secrets allowed for by legislation, confidential information which is the property of the State, is one of the main potential threats to Ukraine's national security in the sphere of information. The threat to the security of information in Ukraine is explained, according to the Concept, by various factors, among which in first place would be a «lack of a thought-out State policy in the sphere of information technology, which could lead to uncontrolled and illegal access to information and its use», and also «the activity of other states aimed at gaining an advantage in foreign policy, economic, military and other spheres».

Technical protection of information is defined in the Concept as «activity aimed at ensuring through technical and engineering means of the procedure for access, the integrity and accessibility of access (making it impossible to block access) of information, which constitutes a State secret or other secrets allowed for by legislation, confidential information, as well as the integrity and accessibility of open information which is important for individuals, society or the State». This definition is made more precise by one of the principles of the formation and implementation of State policy in the sphere of TPI: «the need to protect, through technical and engineering means, information which constitutes a State secret or other secrets allowed for by legislation, confidential information, which is the property of the State, open information which is important for the State, regardless of where this information is circulated, as well as open information which is important for individuals or society if this information is circulated in State executive bodies and bodies of local self-government, the National Academy of Sciences, the Armed Forces or other formations, law enforcement bodies, in State enterprises, in State institutions and organizations».

Of the concepts mentioned in this list, only the concept of State secret is clearly defined by the law. The concept of «confidential information, which is the property of the State» remains unclear. «Open information which is important for the State, regardless of where this information is circulated» is also an endlessly vague concept.

Such formulations lead to only one conclusion, this being that, ultimately, State officials would like to take any decisions about which information should be protected solely at their own discretion. Moreover, the Concept foresees the creation of TIP units in all places where there is a need to protect information. In our view, this gives serious grounds for believing that the implementation of the Concept will significantly and unwarrantedly restrict the access of the community and, simply, of individuals, to entire categories of information which they require.

As time was to tell, our fears were not unfounded. On 11 May 2004, the Verkhovna Rada of Ukraine passed the Law «On amendments to certain legislative acts of Ukraine (concerning the protections of State secrets)». This law had previously been passed on 9 July 2003, however the President had used his power of veto after severe criticism of this Law from both Ukrainian and foreign experts, and paragraph 6 of the President's comments had demanded that «a definition be given of confidential information which is the property of the State». Nevertheless, the Law was passed again in virtually the same form. It significantly narrows the boundaries of the constitutional right to information (this in itself being a violation of Statute 64 of the Constitution which prohibits any limitation on constitutional rights and liberties, aside from cases specifically allowed for by the Constitution). We would mention Part 1 of Article 34 of the Constitution: «Everyone has the right to freely collect, store, use and disseminate information by oral, written or other means of his or her choice». Part 1 of Article 2 of «Freedom of the Activity of the Printed Mass Media», the Law on the press now declares «the right of every citizen to freely and independently look for, receive, locate, retain, use and disseminate any information which is **open under the rules of access** with the help of printed means of mass media». The main right of journalists to information is similarly narrowed: a journalist now has «the right to freely receive, use, circulate (publish) and keep that information which is **open under the rules of access** (p.1 of Part 2 Article 26 of the Law on the Press). In this way, two fundamental principles of legislation on the freedom of information²⁰² are being violated, and it is now simply im-

²⁰² The first is the principle of maximum publicity: all information which is held by State executive bodies should be made public, with exceptions possible only in a very limited number of cases. The second principle defines the requirements for limitations: a) exceptions must be clear б) they must be defined very narrowly, в) they must be subject to strict control as to the presence of 'harm' and influence on 'public interests. The refusal of a state body to make information public is justified if, firstly, the information is related to a legitimate aim, foreseen by the law, secondly, its being

possible to use the three-component test of the European Court of Human Rights as to the presence of «damage» and influence on «public interests», which had been taken into consideration in the current Law «On information»²⁰³. In particular, it is impossible to use the concept of public individuals, the amount of confidential information about which must be much more open for the public, than that about private individuals.

Thus, it is now not permitted to receive, use, circulate and keep information with restricted access, that is, according to Article 30 of the Law «On Information», confidential or secret information. And a definition of confidential information which is the property of the State has still not been given.

Let us look carefully again at Part 2 of Article 30: confidential information – this is «information which is owned by, used by or at the disposal of specific individuals or legal entities and is circulated at their wish on the conditions they stipulate». We would note that, although not stated directly, owners of confidential information may be only individuals or non-governmental legal entities, since, in accordance with Article 19 of the Constitution, «State executive bodies and bodies of local self-government and their officials are obliged to act only on the grounds, within the limits of authority, and in the manner envisaged by the Constitution and the laws of Ukraine», that is, they cannot circulate information at their wish on the conditions they stipulate». Thus, one cannot consider that Part 2 of Article 30 gives a definition of «confidential information which is the property of the State».

This discrepancy is not resolved by the introduction into Law № 2663 of parts 3 and 4 of Article 30. Part 3 states that with regard to information which is «the property of the State and is in use by State executive bodies and bodies of local self-government, businesses or organisations with any form of property, limited access in accordance with the law and confidential status may be assigned in order to preserve the information. It is entirely illogical and extraordinary to offer limited access to information «in order to preserve the information». It remains unclear which law this statute is in accordance with. As regards part 4, where the information which cannot be assigned such status is listed (this almost word for word repeating the list of information which cannot be considered a state secret according to Article 8 of the Law «On State secrets», cf. above), one can confidently predict that in a given case, these restrictions will not work: it is precisely state officials, and not the law, who will decide whether to limit access to information for those reasons, or not. The 'negative' definition of confidential State given in the Law could work if the creation of a «list of items of information which is the property of the information which are confidential information which is the property of the State» had been allowed for, as was the case with items of information which are a state secret. It would then have been possible to avoid the said discrepancy where one and the same information is, according to the wishes of one department circulated, while another decides that it should be classified as secret. However the law passed does not allow for any such «List» to be created.

Thus, the information which is protected by the State is not defined by Law, with the exception of information which constitutes a State secret. Therefore the classified stamps which State bodies generously distribute over various normative acts (Decrees and directives of the President, resolutions, instructions, orders of State executive bodies, etc) – «Not to be published», «For official use only», «Not to be printed» – are arbitrary and illegal. Only classifications of secrecy, that is «of particular importance», «top secret» and «secret», which represent established levels of secrecy in accordance with the Law «On State secrets», can be considered legal.

However, even if documents are stamped «Not to be published», «Not to be printed», etc, there still have to be appropriate procedures for allocating or removing (revoking) such classifications, and for defining the grounds for taking such measures. There clearly also need to be some regulations for organizing access to such documents. However our search for such normative acts was unsuccessful. It transpired that normative acts on the work with documents classified as «Not to be published» and «Not to be printed», officially registered by the Ministry of Justice, do not exist at all.

As regards procedure for working with documents stamped «For official use only» (OU), this was approved by the Cabinet of Ministers of Ukraine in Resolution № 1813 of 27 November 1998 «On the approval of Instructions for the procedure of accounting, storage and use of documents, cases, publications and other physical forms of information, containing confidential information which is the property of the State». It is surely an irony of fate that this resolution was published in «Uriadovy kuryer» («The gov-

made public could indeed jeopardize a legitimate aim, and thirdly, the damage which might be caused the said goal must outweigh the public interest in obtaining the information.

²⁰³ On 3 April 2004, Article 47-1 was introduced into the Law «On information». According to this Article, a person cannot be held responsible for divulgence of confidential or other information with restricted access, if a court would establish that the right of public to obtain this information prevailed over the rights of other persons, including the state, concerning non-disclosure of this information.

ernment messenger») on 10 December, on the 50th anniversary of the adoption of the Universal Declaration of Human Rights.

According to Section 2 of the Resolution, central and local executive bodies and bodies of local self-government were obliged, within a six-month period, to design and put into effect a list of types of confidential information which are the property of the State. This information was to be given the stamp OU. Who specifically, and on the basis of which criteria, was supposed to decide which particular information was confidential was not defined by the Resolution. It is also not clear whether these lists will be available for general view, and virtually every such body could have its own list.

From the point of view of principles of information legislative, it would be logical to assume that a «List of items of information which constitute confidential information which is the property of the State» would be created and published. However, from 1999 to 2002 no such list emerged. One should also mention that, in accordance with Paragraph 3 of the Resolutions, it is not only State executive bodies and bodies of local self-government who must follow the Instructions, but also enterprises, institutions and organizations regardless of their form of ownership.

The lists may contain not only the information, which is created by the executive body in question, but also the information which it owns, uses or has at its disposal. This means that information which has reached a State body may become confidential at the wish of the head of the body, while the creator of the information (the first source) knows nothing about this.

According to Paragraph 5 of the Instruction, documents of legislative bodies and higher executive bodies, and higher court bodies, which were issued in 1991 and later without classifications limiting access, but which were not published in official publications, may be considered as material containing information of restricted use with the stamp OU.

The conditions for storage, copying and distribution of documents classified as OU are no less severe than those for documents which constitute State secrets: they must be registered, all drafts and variants must be destroyed, names and even positions of the authors must not be indicated, and so forth (Paragraphs 17-28 of the Instruction).

In order to have access to documents classified as OU, representatives of the mass media must in each specific case gain written permission from the head of the institution which established the stamp, and only on the basis of a written decision from an expert commission as to the advisability of giving the particular document to the journalist.

It would thus seem that the likelihood of a journalist obtaining information with the stamp OU is extremely small, especially given that it is the head of the body which handed out the information who bears the responsibility for disclosing confidential information, rather than the journalist. What an expert commission is, and what the rules of its work are remain unclear from reading the Instruction. It is clear only that it comprises «employees of the chancellery, the restricted secrets unit and other structural units».

Paragraph 32 of the Instruction classifies a case with documents which are not secret as OU if there is even one document with this stamp included. In such fashion one could restrict access to any information.

In our view, Paragraphs 51 and 52 of the Instruction are particularly telling and characteristic. According to these, cases with the stamp OU, which have no scientific, historical, or cultural significance and are of no practical use, are to be destroyed, having first «without fail been shredded to a state which would preclude any possibility that they could be read».

The Criminal Code, which came into force on 1 September 2001, contains Article 330 (in the CCU of 1960 there was no such article) which stipulates punishment in the form of deprivation of liberty for a period of up to three years, or deprivation of liberty for two to five years with no right to hold certain posts, or engage in certain activity for up to three years, or without this, for disclosing to or keeping in order to disclose to foreign enterprises, institutions, organizations or their representatives, economic, scientific and technical or other information which constitutes confidential information which is owned by the State. Given that the latter has not been defined by the law, and that lists of such information, should they exist, have not been published, it remains a total mystery what this is about. Article 330 may be applied only in relation to individuals to whom the information was entrusted or to whom it became known via fulfilment of their official duties. If this disclosure has led to serious consequences, then it is punishable by deprivation of liberty for a period of between four and eight years, with no right to hold certain posts, or engage in certain activity for up to three years.

In an attempt to ascertain how widely these illegal classifications restricting access are applied, we have analyzed all documents, passed by several central bodies in the years 2000, 2001, 2002, 2003 and 2004 in order to find out how many documents contained this classification. The computerized legal sys-

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tem «Liga:Zakon» was used for this purpose. Our analysis showed that the largest number of documents with the classifications mentioned were passed by the President of Ukraine and the Cabinet of Ministers, with the President having used the classification «Not to be published», the Cabinet of Ministers – «Not to be printed», while other bodies in the main used «For official use only (OU)»:

– 95 out of 1636 documents adopted by the President had the classification «Not to be published», in 2001 – 78 out of 1461, in 2002 – 74 out of 1479, in 2003 – 111 out of 1794.

The number of documents, adopted by the Cabinet of Ministers with the classification «Not to be printed» constituted: in 2000 – 85 out of 2387, in 2001 – 39 out of 2372, in 2002 – 100 out of 2672, in 2003 – 46 out of 2791 with a further 12 classified «For official use only».

Summarized data on using illegal classification in 2004 are given in the table (January – December)

State Body	Number of documents	For official use only	Not to be published	Not to be printed
Cabinet of the Ministers of Ukraine	2432	19	–	44
Ministry of Internal Affairs	72	4*	–	–
Security Service of Ukraine	31	27	–	–
Ministry of Defence	44	2	–	–
Ministry of Economy	763	–	–	–
Ministry of Industrial Policy	37	–	–	–
Ministry of Fuel and Energy	350	–	–	–
Ministry of Employment and Social Policy	144	–	–	–
Ministry of Transport	198	–	–	–
Ministry of Justice	111	–	–	–
Ministry of Education and Science	214	–	–	–
Ministry of Health	558	1*	–	–
Ministry of Finance	210	–	–	–
Ministry of Agriculture	504	1	–	–
State Penal Department	14	–	–	–
Treasury of Ukraine	76	–	–	–
State Border Administration	29	2 (1*)	–	–
State Customs Service	1222	–	–	–
State Tax Administration	485	–	–	–
National Commission on Regulation of Electric Energy	1397	1	113	1
National Bank of Ukraine	580	–	–	1
General Prosecutor's Office	2	–	2	–
President of Ukraine	1551	1	113	1
State Guard Directorate	12	2	–	–

* together with other bodies

We would note that the majority of documents with the classification OU previously had a title in the database, from which one could at least gauge the content of the document (from 2002 documents with the classification OU have not had titles, only number and date when they were passed). Documents with the classifications «Not to be printed» and «Not to be published» have only numbers and date when passed, thus making it impossible to understand what is contained in the documents. True, in some rare cases, when the document appears in topic-based sections, it is given with its title. For example, it was ascertained that the Directive of the Cabinet of Ministers № 4 11-p from 13 September 2001 had something to do with pensions. However what information about pensions needs to be classified as secret and kept from citizens of Ukraine? It is truly difficult to imagine any information about pension provisions which would not be of interest to the public. Moreover, the law «On State secrets» prohibits classification as secret of information which concerns the rights and freedoms of citizens. Given that the degree of secrecy of information with the classification «Not to be printed» is perhaps lower than that for State secrets, documents which contain information which concerns human rights and freedoms should not have this classification. And information about pensions, undoubtedly, relates to human rights. For the same reason, the Decree of the President № 7 09/94 from 30 November 1994 «On the provision of information and analysis for the President of Ukraine» should not have been classified.

The large number of untitled documents passed by the President and the Cabinet of Ministers prompted us to investigate the dynamics of their adoption over a longer period. It transpired that the classifications

«Not to be printed» and «Not to be published» had begun as early as in 1994, before the pre-term presidential and parliamentary elections. There are clear spurts in the production of such documents by both the President and the Cabinet of Ministers. Although there is no clear correlation between these spurts, in most cases they coincide with election campaigns and the holding of the all-Ukrainian referendum. It cannot be ignored that the President classifies far more documents as secret than the Cabinet of Ministers or any other body.

In a private conversation, an official working in the President's Administration said that documents with the classification «Not to be published» concern appointments to posts and awards, and added that this could not interest anyone, so why waste paper on publishing such documents. It is difficult to seriously believe such an ingenuous explanation, particularly given the examples cited earlier of the use of classifications of secrecy for documents which have a direct connection with human rights. One thing is clear: officials now, as previously, themselves decide what the public need to know, and what would not interest them, and deprive society of information at their own discretion.

Here even a superficial glance at the names of documents with the classification OU demonstrates that socially significant information, which cannot be included in the range of restrictions defined in Article 34 of the Constitution is being classified as secret. For example, «The national program for the development of energy policy up to 2010», which, incidentally, was passed in 1996 without any public discussion and which since then has been hiding under the classification «For official use only». This classification had also been given to the plan for joint Ukraine – NATO activities, and it took three months of public pressure to have it removed. The agreement of 29 October 2004 between the companies «Naftogaz Ukrainy» and «Gazprom» on the creation of a gas consortium has also been classified «for official use only». This agreement is not available even to the members of the supervisory board of «Naftogaz Ukrainy». In accordance with Decrees of the President with the classification «Not to be published», objects, the sale of which was prohibited, were sold into private property, in particular, sanatoria with valuable mineral springs. We could cite many more examples.

In our opinion, the illegal practice of classifying information as secret must be subjected to close public scrutiny. All normative legal acts with classifications «Not to be printed» and «Not to be published» should be made open, and documents classified as «for official use only» should be analyzed in order to establish whether their secret status is well-founded.

3. CONCLUSIONS AND RECOMMENDATIONS

Transparency in the activity of the State authorities, despite numerous decrees, directives and promises from those in power, remained an unresolved issue throughout 2004. The authorities of various levels were apparently busy distributing press-releases, carrying out more press conferences, briefings, were providing information about their activity on the Internet, yet all was done in half-measures: the information, as a rule, was that which the authorities considered of interest, and not that which citizens needed. Attempts by journalists to ask inconvenient questions and to touch on burning issues were met with opposition from State officials, obstacles were put in front of these journalists' activity; the latter found themselves refused accreditation. During the Presidential elections, these negative factors became considerably more acute.

State executive bodies and bodies of local self-government were reluctant to provide information about their activity and often used various pretexts to avoid doing so. Sometimes they simply do not respond to requests for information, or they send usually formalized answers, or they may try to only answer by telephone, or answer only some of the questions. On the other hand, the low degree to which society is informed is in large part a result of its own inertia and lack of real desire to receive information. The illegal use of secrecy classifications also requires intense public scrutiny.

In order to rectify this unacceptable situation, the following steps need to be taken:

1. To stop the practice of illegally making information, including normative legal acts, secret, using the classifications «Not to be printed», «Not to be published» and «For official use only»;
2. To declassify all normative legal acts with classifications «Not to be printed» and «Not to be published», and to scrutinize documents classified as «for official use only» in order to establish whether their secret status is well-founded.
3. To analyze «The List of items of information that constitute State secrets» from the point of view of whether this classification of information is well-founded, using the three-component test of the Euro-

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pean Court of Human Rights for checking the presence of «damage» and «influence on public interests», as well as Article 47-1 of the Law «On information»;

4. To adopt a new law on information which would guarantee the access to information in State executive bodies and bodies of local self-government on the basis of the Recommendations of the Committee of Ministers of the Council of Europe № R 19 (1981), REC 2 (2002), 13 (2000) of the Convention of the EEC UNO on the access to information, public participation in decision-making and access to justice in environmental matters (the Aarhus Convention – adopted on 25 June 1998 and ratified by Ukraine in 1999);

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

6. For representatives of the mass media, human rights and other civic organizations to monitor the efficiency of active and passive access to information at central and local levels, to use the courts more actively against the inaction of state officials with regard to the providing of information and refusals to give information.

The issue of ensuring the right of access to information can be positively resolved only by the mutual efforts of the new Ukrainian leaders, showing respect for their voters and not fearing journalists, the representatives of the mass media remaining committed to the cause of informing the public, and society as a whole, which must become active in demanding openness and transparency from their leaders.

The question of guaranteeing the right to the access to information may be settled positively only by the joint efforts of new Ukrainian power, which would respect its voters and would not be afraid of journalists, representatives of mass media, who, in their turn, would not lose their persistency in informing of public, and the society as a whole, which should be more active regarding openness and transparency of power.

IX. FREEDOM OF EXPRESSION²⁰⁴

The legislation of Ukraine on information largely inherited a Soviet style of regulation, according to which the protection of State interests took priority, and the right to freedom of expression remained secondary. The state-level advocacy of legal concepts unheard of in the democratic community such as «information security of the State» or, even worse, «national information sovereignty», has resulted in unwarranted restrictions on freedom of expression, which are inconsistent with international standards, and has also contributed to the backwardness of society and State in the development of the sphere of information and information exchange.

1. FREEDOM OF THE MASS MEDIA AND OBSERVANCE OF THE RIGHTS OF JOURNALISTS

Last year, freedom of the mass media and of journalists was restricted through systematic measures by the State authorities, resulting most overtly in the clear and undeniable imbalance of information at national and local levels, and in the absence of alternative or critical points of view. For this reason, the mass media failed largely to play their fundamental role in guaranteeing democracy. As a result of a certain let up in pressure from the Authorities, the situation partially improved in the national media during the Orange Revolution.²⁰⁵

In Ukraine there is no obligation to make known the owner of a media outlet. There are also no effective regulations for anti-monopoly restrictions on the information market. As a result, the most powerful national information resources (radio, television and newspapers) are concentrated in the hands of several individuals who, in their turn, are closely connected with and heavily dependent upon top-ranking officials in the country. For this reason, the media outlets which they control, do not criticize the Regime and are not capable of expressing any opinions which offer alternatives to the Regime's position.

On the other hand, those media outlets which attempt to provide balanced information, encounter difficulties from law enforcement authorities, tax and controlling bodies, suspension of broadcasting on cable networks and other forms of pressure.

As a result of this, journalists find themselves under constant pressure from the owners and managers of their media outlets. Such conditions make it impossible for journalists to freely express their opinions, and many resort to a form of self-censorship in order to retain their jobs.

Moreover, journalists are frequently persecuted for publishing critical material. Law enforcement bodies do not generally make any effort to properly and efficiently investigate crimes connected with attacks on journalists, threats to them and obstacles placed in the way of their activity.

For example, the Independent Media Trade Union last year recorded 54 cases where journalists were attacked, and link the majority of these with the fulfillment of journalists' duties. If one analyzes all cases where journalists have been attacked, one is forced to mention that criminal investigation units are highly reluctant to qualify these as crimes connected with their professional activity. It is by no means unlikely that such an attitude from the law enforcement bodies encourages those who with their own bad purposes are planning attacks on journalists to simulate robberies, accidents, malicious hooliganism, etc. In such instances it can be very difficult to ascertain the true motive for the crime.²⁰⁶

²⁰⁴ Prepared by Volodymyr Yavorsky, Executive Director of the Ukrainian Helsinki Human Rights Union.

²⁰⁵ When (perhaps whether) the Orange Revolution ended (on 8 December when the crowds agreed to leave Independence Square, after the Supreme Court had annulled the election result, or 26 December when V. Yushchenko won the re-vote) is a matter of opinion, but it began after the second round of elections on 21 November. (*translator's note*)

²⁰⁶ The 2004 report on the results of monitoring violations of the rights of journalists and mass media. The Kyiv Independent Media Trade Union. Internet site: <http://www.profspilka.org.ua>.

Sometimes such persecution of the mass media has been with the assistance of law enforcement or controlling (tax) bodies.

For example, Serhiy Boyko, the director of «Volya», Kyiv and Ukraine's largest cable operator, and his deputy Valery Samoilov were arrested on 29 March and charged with operating without a license (Part 2 of Article 202 of the Criminal Code of Ukraine (CCU)), and later, with broadcasting on closed cable networks allegedly pornographic material in retransmitting foreign satellite channels such as Private Gold, Spice Platinum and Private Blue (Article 301 of the Criminal Code of Ukraine). Shortly after these charges, «Volya» and its directors were presented with another charge – this time of legalizing (laundering) income obtained through criminal means (Article 209 of the CCU).

First the Commercial Court ruled that the activity of «Volya» was not subject to licensing. Then, some days later, the local court released those detained and declared the demands of the prosecutor's office unfounded. Later on, the other charges were dropped.

The director was arrested for a second time, together with the account of the company «Volya-Cable» on 18 August, and charged with tax evasion. This took place several hours after the Appeal Court in Kyiv confirmed the local court's ruling that the charges of the prosecutor's office had been unfounded. The arrested were released in the evening of 21 August.

Employees of «Volya» asserted that the real reason for the persecution was the refusal by the largest Ukrainian cable television operator to remove the broadcasting of the opposition television channel «Channel 5» from its social package, which is watched by most subscribers, especially in Kyiv, and to add other television channels to this package, including a television channel which at that time belonged to the General Prosecutor of Ukraine, G. Vasilyev.

One of the foreign owners of «Volya» subsequently sold his share in the company, while the Director, S. Boyko resigned from his post on 13 September.

Given such systematic practice involving pressure on the mass media and journalist, the Verkhovna Rada of Ukraine, on 16 March 2004 passed Resolution № 1604-IV, which, in order to ensure the constitutional guarantees of freedom of speech in Ukraine, as well as the free expression and pluralism of opinions, recommended that the State Tax Administration cancel its plan for checks on media outlets for the period of the 2004 Presidential election campaign in Ukraine. Then on 6 April 2004, the State Tax Administration issued a directive, obliging the heads of State Tax Administration offices to refrain from conducting tax checks of the business activities of media outlets during the election campaign for President of Ukraine.

Despite these documents, the regulatory authorities did make attempts to carry out such checks. For example, a check was carried out of the Lithuanian subsidiary «Publishing, News and Advertising Agency «Taki Spravy», which is a co-founder of the «Taki Spravy Plus Chronicle» (June 2004).

In widespread use throughout last year was the distribution by the Presidential Administration of Ukraine of unofficial instructions stating whether or not certain events should be covered, how this or that information should be treated, sometimes indicating specific quotations and certain events on which to concentrate, as well as events and specific individuals about whom to say nothing (so called «temnyki»²⁰⁷). These instructions were not formal, however the non-fulfillment of them led to attempts to put pressure on the media outlet and its owners, for example, by law enforcement bodies or regulatory authorities.

On 3 June, an exhibition of such «temnyki» was put on display in the parliamentary lobby. «Temnyki» from different years were presented on two stands. The first was dated October 2001 while the most recent was from May 2004. Also on display at the exhibition were letters of the President, signed by the heads of the Main Office for Information Policy, which gave instructions to regional TV companies to broadcast specific video footage. Among the «temnyki», there was also a schedule which indicated the order in which topics relating to political reforms were to be presented in broadcasts of private television channels. A unique exhibit was a letter ordering media representatives to report on their compliance with these «temnyki».²⁰⁸

However, the use of «temnyki» was abandoned several days into the «Orange Revolution», this being due more to the position of the owners and top managers of TV and radio companies, as well as protests from journalists, rather than to a change in the regime (the regime in fact only changed a month and a half after this).

The number of suits seeking damages in huge figures for the publication of defamatory material, as well as the overall number of suits, decreased significantly from May 2003 after a law was passed impos-

²⁰⁷ From the Ukrainian for 'theme' or 'topic' (and the adjective for 'dark') (*translator's note*)

²⁰⁸ Based on information from the website of «Ukrayinska Pravda»: <http://www.pravda.com.ua>

ing limitations through the application of a differential rate of State duty, and, consequently, a decrease in the amounts of compensation. This law was also the first to abolish responsibility for the dissemination of value judgments and to limit the right of officials of State executive bodies to file such defamation suits. One should note a clear tendency: suits against media outlets began to concentrate mainly not on compensation for damages, but on ensuring public withdrawal of false information spread.

In 2004, according to information from the State Judicial Administration, courts received 442 claims against media outlets in cases defending honour, dignity and business reputation. A further 280 claims were still in the courts from previous years. In total, the courts considered 514 cases against the mass media during the year.

The courts concluded their review of 250 cases and passed decisions, of which in 158 cases the suit was satisfied. Awards against media outlets were made to the sum of 591 thousand UH. That is, on average, media outlets had to pay 3 744 UH in each case (approximately 700 US dollars). One should note that the amount of compensation sought in these cases was significantly higher: over 20 million UH State duty to the sum of 251 437 UH was paid.

The Civil Code of Ukraine (CC), which came into force on 1 January, contains a regulation stating that «negative information disseminated about a person is untruthful», on the basis of which journalists and media outlets have been persecuted for making critical remarks. A number of other regulations appeared in this code which limit freedom of speech to an unwarranted extent. For example, one must also consider as extremely strange and dangerous the statement in Part three of Article 296 of the CC that «the information presented by an official or functionary when carrying out official duties is reliable». A monopoly on truth by «officials or functionaries when carrying out official duties» not only contravenes Ukrainian legislation, but also defies common sense.

A Draft with amendments to these regulations was introduced to parliament, however by the end of the year it had not been passed. On 12 May, one such draft had actually been rejected by parliament, despite calls from the public to pass the law.

The introduction of new legislation on the protection of public morality in Ukraine began in January of last year (The Law of Ukraine «On the protection of public morality» and related amendments to other laws). In accordance with this law, a State body for the protection of public morality is created. Its functions include stopping the distribution (without a court order) and the use of sanctions against the distribution of material which violates public morality (of a pornographic or erotic nature, or with the use of cruelty or violence, etc). It also introduces licensing of those who are entitled to distribute such products and provides for individual licensing of each item of material. Such licensing constitutes, in effect, preliminary censorship of works, which is prohibited by the Constitution of Ukraine, since, for example, one needs to obtain the relevant licence before printing a book.

One should note here that the above-mentioned legislation does not clearly define what can violate public morality, and its definitions are extremely vague and littered with value judgments. Therefore, an individual, distributing such a work, would not be able to foresee that his or her action was against the law.

Strict sanctions are set out for the violation of this legislation: heavy fines, criminal penalties and the closure of the media outlet. Last year, however, no cases were seen where such regulations were applied. To a large extent this is explained by the fact that the State body regulating the protection of public morality did not actually begin its work last year.

2. TELEVISION AND RADIO BROADCASTING

The level of freedom of speech on television and radio rose only during the Orange Revolution. Before that time, there had been a clear lack of balance in coverage of events.

However, local television channels and radio stations retained their bias and involvement throughout the entire year. This was particularly evident in eastern and southern regions of Ukraine.

Opposition forces were effectively denied access to the national mass media throughout the year. Only during the Orange Revolution did the situation change for the better, and then, not at a local level.

State national and local television channels and radio stations depend entirely on the executive branch of power and give a one-sided view of events with a lack of any normal criticism of executive bodies or the ruling political forces.

In Ukraine, as well as State television and radio, there are television studios and printed publications (newspapers and journals) of various State executive bodies (the Minister of Internal Affairs, the Prosecu-

tor, the Tax Administration, the Armed Services, the Ministry of Foreign Affairs, the Customs Service and other). These forms of mass media do not serve as a source of important information, but rather perform the role of a mouthpiece for positive propaganda about the specific executive body, and present virtually no alternative or critical opinions.

At the same time, the country has virtually no public (civic) television or radio. The Law of Ukraine «On Television and Broadcasting» was passed several years ago, but any decision to create public (civic) television or radio has never actually been taken.

The State body which regulates television and broadcasting (the National Television and Broadcasting Council of Ukraine) is dependent on the President and Parliament which makes it impossible for it to carry out its functions fully. In particular, any member of this body can be dismissed from his or her post at any time, making the members entirely dependent on the decisions taken and on the body which appointed them. As a result of such dependence and of other shortcomings in legislation, the issuing of licenses is carried out behind closed doors and in a biased fashion, while the supervisory functions of the body are largely formal.

This dependence is especially manifested in the discriminatory policy as regards the licensing of television and radio organizations.

The Verkhovna Rada of Ukraine adopted a new version of the Law «On the National Television and Broadcasting Council of Ukraine», however the President used his power of veto against the law. In brief, the objections of the President boiled down to one issue: he did not approve of the existence of an independent regulating body in the sphere of television and broadcasting.

On 11 May, the Verkhovna Rada of Ukraine passed a Law «On amendments to certain legislative acts of Ukraine» taking into regard the President's comments» (Reg. № 2663). This law had previously been passed on 9 July 2003, however the President had used his power of veto. In fact, the deputies passed virtually the same law, the amendments concerning only the definition of confidential information to be considered property of the State.

The amendments introduced to the Law on the Press significantly narrow the boundaries of the constitutional right to information. In particular: Part 1 of Article 2 «Freedom of activity of the printed means of mass media» now declares «the right of every citizen to freely and independently look for, receive, locate, keep, use and circulate any information which is open under the rules of access with the help of printed means of mass media». The main right of journalists to information is similarly narrowed: a journalist now has «the right to freely receive, use, circulate (publish) and keep that information which is open under the rules of access (p.1 of Part 2 Article 26).²⁰⁹

The Verkhovna Rada of Ukraine also passed a Law «On the national radio frequency resource», which came into force on 21 October 2004. According to the above-mentioned amendments, the National Television and Broadcasting Council of Ukraine becomes the only body which can issue licenses for broadcasting in Ukraine. The new version of the law:

abolishes the system of double licensing of television and radio organizations by both the National Television and Broadcasting Council and the State Committee on Communications, the latter being a State executive body, dependent on the President which had been used by the State regime to exert pressure on television and radio organizations;

removes the possibility of unauthorized disconnection by communication firms of television and radio organizations, including disconnection for political reasons.

Opposition television channels were systematically disconnected on local cable networks for supposedly technical reasons. For example, «Channel 5» was disconnected in Donetsk, Luhansk, Kharkiv, Dnipropetrovsk and many other cities. The official position was that this was for technical reasons. However in private conversations, owners of cable operators spoke of incredible pressure being put on them from local executive bodies and law enforcement officers. To this day, none of those responsible have been punished.

3. CHRONICLE OF JOURNALIST PROTEST

Over the last years there have been many conflict situations with various media outlets, the main reason for which have been demands from their owners or managers on journalists to observe an unwritten

²⁰⁹ For more information about this law, see the section about the access to information and the Bulletin of the Kharkiv Human Rights Protection Group «Freedom of Expression and Privacy», No. 2, 2004, <http://www.khpg.org>.

editorial policy, according to which it was in principle impossible to provide positive information about representatives of the opposition, and sometimes even to mention them, or to give negative information about representatives of the pro-regime forces. Such conflicts usually ended in the dismissal of journalists, or their moving to more liberal media outlets.

Larger-scale acts of protest concerning the right of journalists to freedom of speech occurred periodically: in relation to the murder of journalists, the increased use of «temnyki», and other issues.

In the second half of last year, the increase in pressure from the State authorities on the mass media during the election campaign resulted in an according decrease in journalist freedom and at the same time a rise in disgruntlement with the existing situation.

Those opposition media outlets which maintain certain standards with respect to freedom of expression experienced significant pressure from the State authorities, manifested in various ways: electricity being cut off, refusals to print their material, disconnection of television channels from cable networks, issuing of notice for cancelling licences, threats, arson, and so forth. All of this directly affected journalists who could not work in such conditions.

At 9 p.m. on 20 October, instead of broadcasting its usually news program, Channel 5 broadcast live a press-conference of the managers of the channel who spoke about the systematic pressure the channel had been exposed to over a long period.

The final events triggering this move were the decisions of the Commercial Appeal Court to cancel the decision of the National Council to issue a license to the TV channel «Express-Inform» (this meaning «Channel 5» in Kyiv on the basis of a suit filed by the TV channel «TV Studio «News Service» and that of the Pechersky District Court to allow a claim by State Deputy Volodymyr Sivkovych against Petro Poroshenko and NBM Channel, which led to the arrest of NBM's accounts²¹⁰

Employees of the channel made the following demands:

1. To the Pechersky District Court in Kyiv – to release «Channel 5»'s accounts.
2. To the National Television and Broadcasting Council:
 - to call an extraordinary session and there to recognize «Channel 5» the winner of the first, and not the repeat tender for broadcasting on 48 TVK in Kyiv;
 - to ensure the compliance with licensing agreements of «Channel 5» broadcasting on cable networks in the regions of Ukraine.
3. To State Deputy V. Sivkovych:
 - to publicly apologize for his cynical use of «Channel 5» as an instrument of blackmail for his own political purposes.

«The Board of Directors and journalists of Channel 5 find themselves in the position – their statement read, – that in the case of failure to meet the demands of «Channel 5»²¹¹ or if there is no reaction, the management and initiative group of journalists will begin a hunger strike on October 25, at 21:00 p.m.».

Since the demands were not met, the journalists called a hunger strike on 25 October at 21.00, during a live broadcast.

On 28 October, journalists from five central television channels (ICTV, «Inter», «Novy Kanal [New Channel]», «Tonis» and «NTN» publicly spoke of the pressure which was being exerted by both the State authorities and the owners of the channels, leading to a situation where information of public importance was being presented to the viewer in a distorted fashion.

Their position was connected with pressure on the mass media from representatives of the State Authorities, who were forcing television channels and their owners to cover events in a distorted way, or to simply not mention socially important news items.

Journalists who understand the responsibility they themselves bear for the fate of the country made a public statement and called on their colleagues to support their wish to work in a professional manner and to provide the community with many-sided and reliable information about what was happening in Ukraine.²¹²

THE STATEMENT OF JOURNALISTS FROM UKRAINIAN TELEVISION CHANNELS

We, as journalists from Ukrainian television channels, are concerned about the threat of distorted coverage of the decisive phase of the elections.

²¹⁰ More information can be found in the Internet publication of «Telekritika»: <http://www.telekritika.kiev.ua>.

²¹¹ The Internet site of Channel 5: <http://www.5tv.com.ua/newsline/118/1879>.

²¹² For more information, see the Internet publication «Telekritika»: <http://www.telekritika.kiev.ua>.

Despite standards of professional journalism, the State authorities, and under pressure from them the owners and managers of television channels, are seeking to hush up important events or to twist them.

We recognize our responsibility for providing people with information on the basis of which they can take their own decisions.

We therefore demand that the following standards be observed when covering events:

- 1. All information programs must inform the public about all socially significant events;*
- 2. All information programs must present all significant points of view on the events they cover;*
- 3. All information which is broadcast must have been checked and contain references to sources;*

We undertake to adhere to these standards.

We are convinced that full and professional coverage of the decisive phase of the elections is vitally important to our audience.

We call on our colleagues to join us and support our position!

In all, the public statement, which was placed on the website of the Internet publication «Telekritika», was signed by 346 journalists and employees of electronic mass media.

Also on 28 October, seven journalists from the News Service of Studio «1 + 1», (Natalia Fitsych, Yulia Borysko, Viktor Zablotsky, Ihor Sklyarevsky, Fedir Sydoruk, Halyna Betsko and Maryana Voronovych) resigned from the channel after all attempts at negotiation over rejection of a policy of following «temnyki» and censorship with the management of the «Television News Service» (TNS) failed. They said that under present conditions they were unable to fulfil their duties in a professional manner and to provide society with truthful information. «Our television profession has finally become a puppet serving the interests of those to whom «1+1» has been handed by its owners for political use», – the former employees of the television channel commented.²¹³

It was only on 2 November that employees and journalists of «Channel 5» ended their hunger strike, since the accounts of the TV channel were released, however other demands remained unfulfilled. The channel was also reinstated on some cable networks, in particular, in Donetsk.

According to the press service of the journalist movement for professional rights, the presenter of «Visti» news program on National TV Channel One (UT-1), Volodymyr Holosnyak, who had refused to read news according to «temnyki»²¹⁴, was withdrawn from his work on November 9. He was taken off the broadcast timetable for a week without any explanation, although according to plan, he should have appeared on Monday, Tuesday and Wednesday.

The next day, 13 journalists of the program «Visti» on Channel One asked the first Vice President of the National Television Channel of Ukraine, Mykola Kanishevsky, and the Director of the News Association, Artem Petrenko, to approve an agreement on editorial policy. At the same time, journalists unilaterally undertook to observe the agreement which indicated a refusal to work any longer according to «temnyki».

The text of the proposed agreement

«We, as journalists of National Television Channel One, work in one team and carry out a common task.

We do not support any political force and do not plan to serve anyone, except the people.

We have a single aim – to provide society with objective information.

As guard over our work, we place our conscience, skills and commitment to high professional standards».

The agreement on editorial policy

The editorial policy of National Television Channel One is based on the following principles:

1. Information bulletins and programs must objectively cover all main socially significant events. (The Law of Ukraine «On information», Articles 5, 6, 9 and 10).

2. In each information bulletin there must be well-maintained balance: opposing points of view shall be provided on events which are covered. (The Law of Ukraine «On information», Articles 9 and 10).

3. Information being broadcast should be checked, and contain references to sources (The Law of Ukraine «On Television and Broadcasting», Paragraph b of Article 39).

4. The choice of topics and formulation of feature programs is the sole prerogative of the Chief Editor, the issue editor and of the reporters. Suggestions and recommendations from other individuals as to the choice of topics or formulation of feature programs must be considered by the above-mentioned people and decided upon at their discretion.

²¹³ For more information, see Hromadske radio (Civic radio): <http://www.radio.org.ua>.

²¹⁴ For more information, see the Internet publication «Telekritika»: <http://www.telekritika.kiev.ua/news/?id=18448>.

5. *Interference of State bodies, officials, public organizations, individual citizens in the creative activity of journalists and censorship as control over the ideological content of issues are inadmissible. (The Law of Ukraine «On Television and Broadcasting» Article 6).*

6. *A journalist has the right to refuse to carry out instructions of the editorial board if these contravene current legislation (The Law of Ukraine «On Television and Broadcasting», Paragraph 3, Article 38).*

7. *All features should be submitted for broadcast with the signatures of the journalists involved. Exceptions may be allowed only at the request of the journalist who prepared the material if it could endanger him or her. The author of the material has the right to sign it under his / her own name, or under a pseudonym. (The Law of Ukraine «On Television and Broadcasting», Paragraph e, Article 38).*

8. *Only the journalist who filmed a feature program has the right to hand its preparation over to another journalist or editor (The Law of Ukraine «On Television and Broadcasting», Article 39).*

9. *No changes in the subject matter may be broadcast without the consent of the journalist who prepared the material. (The Law of Ukraine «On Television and Broadcasting», Paragraph ж, Article 38).*

10. *The Provisions of this Agreement on Editorial Policy are mandatory for all those who are in any way involved in the creation of information programs and projects of National Television Channel One, regardless of their place of work or form of involvement: on a staff or free-lance basis, or in an independent company-producer.*

The Management of Channel One (UT-1) refused to enter into an agreement on editorial policy with the journalists. Then on 15 November, all journalists who had spoken out against «temnyki» and censorship were in different ways removed from their jobs.

The next day, 16 November, journalists from other television channels held a picket against censorship at the Kyiv television center at 42 Melnikova Street where UT-1 is based.

According to the Internet publication «Ukrainska Pravda», two presenters of TV Channel «1+1» Oles Tereschenko and Andriy Tychyna on 21 November refused to host the Presidential marathon at the channel because of «temnyki».²¹⁵

The very next day, presenters of the Television News Service (TNS) on TV Channel «1+1» refused to go on air. Instead of the TNS on Channel «1+1» there was a program with Vyacheslav Pikhovskek, and everybody watched a review of the news, prepared and presented by one person according to clearly defined «temnyki». That decision put an end to the negotiations of presenters and journalists of the TNS program with one of the channel managers, Volodymyr Oseledchyk. Journalists declared that the negotiations with the management of the channel would continue.

On 23 November, the independent media trade union of Ukraine called on journalists to join a national strike in order to ensure the presentation of honest and objective news.

Journalists of the program «Visti» of National TV Channel One (UT-1) called a strike and stopped broadcasting. In their open letter, they state in particular:

«For a month through negotiations with the management of the National TV Channel of Ukraine we have been trying to change the situation with the presentation of information in news broadcasts towards greater balance and objectivity. Unfortunately, we have not achieved the result we were seeking. The management of the television company is not entitled to influence the content of the news. This violates the law of Ukraine on information, the right of Ukrainians to receive objective, full, socially important information. We consider such news products illegitimate and do not wish to be associated with their creation».

On 25 November, on Channel UT-1, during a news bulletin at 11 in the morning which is given with parallel translation into sign language, the translator into the latter, Natalya Dmytruk ignored the text of the main presenter, Tetyana Kravchenko, about the announcement by the Central Election Commission (CEC) about the results of the elections. Instead of this, she informed her viewers the following: «The results of the CEC are rigged. Don't believe them. Our President is Yushchenko. I am very sorry that until this moment, we had to translate lies. I will no longer take part in this. I don't know if we will see each other again». After this, she joined those who had earlier declared a strike.

On that same day, Channel «1+1» rejected «temnyki», reinstated full information coverage and guaranteed the presentation of full and unbiased information. On a live broadcast which was transmitted in top viewing time over more than 90 percent of the country, journalists and management of the television channel issued the following statement:

²¹⁵ Ukrayinska Pravda Internet edition with reference to the source at the channel

Statement of TV Channel «1+1»

We are conscious of our responsibility for the biased nature of the information, which has thus far been disseminated by the channel under pressure and on the instructions of different political forces. The present confrontation in society compels us to clearly state our principles for future work. From now on, only staff and management of Studio «1+1» will be responsible for the television product's content. We guarantee that any information presented by our channel, will be complete and unbiased in accordance with professional standards of journalism.

On broadcasts of «1+1» all significant events both in Ukraine and beyond will be given coverage and equal opportunities will be provided for all participants of socio-political life to state their positions. These principles will be observed as long as the channel continues broadcasting»

Oleksandr Rodnyansky, Volodymyr Oseledchuk, Maksym Varlamov, Alla Mazur, Lyudmyla Dobrovol'ska, Anna Bezulyk, Oles Tereschenko, Andriy Tychyna, Maryna Kukhar, Anatoliy Borsyuk, Vakhtang Kipiani, Olha Herasymyuk, Yuriy Makarov, Serhiy Polkhovsky, Serhiy Dolbilov, Yevhen Zinchenko, Marichka Padalko, Anatoliy Yerema, Vyacheslav Pikhovshek and all the staff of «1+1» Studio.²¹⁶

That same day, almost all national TV channels refused to use «temnyki», and began presenting the news in a predominantly balanced form, presenting different viewpoints and giving the opposition the right to speak

4. OVERVIEW OF THE MOST IMPORTANT FACTS

The former director of Radio «Continent», Serhiy Sholokh, left for the USA, where on 28 October he was granted political asylum. Radio «Continent» broadcast news of foreign radio stations, in particular, of Radio «Liberty». For that reasons, the radio station had experienced constant pressure from State executive bodies and governmental and regulatory bodies. Then on 3 March, 2004, the broadcasting equipment of the radio station was seized on a charge of broadcasting without a licence from the National Television and Broadcasting Council of Ukraine.

Volodymyr Chistilin, the editor of the news agency «Status Quo» (the only regional agency in Kharkiv), was dismissed on October 29 in Kharkiv supposedly for unexplained absence from work, although he was told of this only on November 1. He claimed that he had been fired for the political publications of the agency. Within the framework of the Legal Assistance Fund of the Ukrainian Helsinki Human Rights Union, lawyer Petro Buschenko filed a suit demanding that Chistilin be reinstated at his work. The case is now in court.

The editorial board of the Donetsk opposition publication – the weekly «Ostrov» [«Island»] – encountered problems with printing facilities being blocked. The printing company «Donbas» informed the editorial board that it would no longer print its newspapers. The reason given in the letter was the huge load on their equipment and regular failures of their printing presses. The Director of the printing press, during a telephone conversation, assured the Editor of «Ostrov» that there were no other reasons, besides technical difficulties, for terminating their agreement. Later «Ostrov» met with refusals to provide printing facilities with similar reasons given from 14 (!) printing presses, not only in the Donetsk area, but in neighbouring regions.

On 28 January, the Shevchenkivsky District Court in Kyiv passed a resolution to close the newspaper «Silski visti» which, in contravention of Ukrainian laws, had been provoking inter-ethnic hostility. The suit was filed in court by the International Anti-Fascist Committee and the United Jewish Committee of Ukraine, headed by Vadim Rabinovych. The court passed its decision to suspend issue of the newspaper «Silski visti» on the basis of the violation by the newspaper of Part 1 of the Article 3 of the Law of Ukraine on the Mass Media (printed versions) by dissemination information which advocated inter-ethnic hostility. According to the court's verdict, the newspaper «Silski visti», in issues from 15 November 2002 to 30 September 2003 had published articles by Vasyl Yaremenko «The Myth about Ukrainian anti-Semitism» and «Jews in Ukraine today: the reality without myths». The court recognized that these articles contained information which were an incitement to hostility between different nationalities. However the decision of the court has still not come into force as an appeal was lodged. The review of the appeal has still not ended.

²¹⁶ See the Internet website of «1+1» Channel: <http://www.1plus1.net/about/news.phtml?637>.

On 5 February, the Pechersky District Court of Kyiv passed its decision on the suit filed by the Minister of Internal Affairs, Mykola Bilokin, against the weekly «Dzerkalo Tyzhnya» and its Deputy Editor, Yulia Mostova, defending his honour, dignity, business reputation, and seeking compensation for moral damages. The court ruled that the information contained in the Article «No air to breathe»²¹⁷ about the Ministry of Internal Affairs of Ukraine was not true and was a smear against the honour, dignity and business reputation of Bilokin. The Court of first jurisdiction bound the weekly «Dzerkalo Tyzhnya», within a month, to refute the information on the same page of the newspaper, in the same font and size, and awarded Bilokin 2,000 UH from the joint stock company «Dzerkalo Tyzhnya» and 1,025 UH from Mostova. According to its representatives, the newspaper partially accepted the claim. However, according to information in «Telekritika», this was connected with the author's refusal to name the source of the information.²¹⁸

The State Committee for Nationality and Migration Affairs prepared 12 suits against the Lviv newspaper «Idealist» for disseminating material which advocates inter-ethnic hostility. The first court hearing began in the middle of August and had not finished by the end of the year.

On 29 December, the local court of the Frankisky district of Lviv accepted a suit by State Deputy V. Yavorivsky against the newspaper «Moloda Halychyna» defending honour, dignity and business reputation and demanding a withdrawal of inaccurate information about him. The newspaper had written that the Deputy had, in Soviet times, been an agent of the KGB and had written denunciations, and that he had also been involved in the murder of the Chief Editor of «Literaturna Ukraina», L. Plyusch. As well as demanding that the information be refuted, the court awarded compensation to the State Deputy of 30 thousand UH (approximately 5.6 thousand US dollars), instead of the 100 thousand which Yavorivsky had demanded.²¹⁹

According to information from a Crimean news agency, on 11 February, the Appeal Court of the Autonomous Republic of Crimea (ARC) accepted a claim made by State Deputy of the Verkhovna Rada of the ARC, Mykola Kotlyarevsky, against the editorial office of the newspaper «Yevpatoriysky Tyzhden» and its Editor, Volodymyr Lutyev, defending honour, dignity and business reputation, and seeking compensation for moral damages. The court declared the information presented by V. Lutyev about the Deputy incorrect and bound the editorial board to refute the information on the front page of the newspaper (which has a circulation of 20 thousand) and in the same font and size. The court also awarded damages to the claimant of 300 thousand UH (about 56 thousand USD) from V. Lutyev and 10 thousand UH from the editorial board of the newspaper.

On 23 June 2004, the Appeal Court in Kyiv accepted the appeals of the newspaper «Holos Ukrainy» and journalist, Serhiy Lavrenyuk. The court reversed the decision of the Darnitsky District Court of 27 June 2003, concerning the defence of honour, dignity and business reputation, and withdrawal of false information, and refused to accept the original claims in full from the closed joint-stock company «TNK-Ukraina-Invest», the joint-stock company «Lisichanskyaftoorgsyntez», and O.G. Kredentser. The Ruling of the Darnitsky court had awarded damages to «TNK-Ukrainia-Invest» from «Holos Ukrainy» and journalist Serhiy Lavrenyuk of 238,500 UH

Previously, on 22 April 2004, the Court Chamber for Civil Proceedings of the Supreme Court of Ukraine had accepted the appeals from «Holos Ukrainy» and Serhiy Lavrenyuk, had annulled the decision of the Appeal Court in Kyiv of 17 September 2003 and had sent their claim to the Appeal Court for review. The Resolution of the Supreme Court states that «by annulling the decision of a first instance court and imposing a new ruling, the appeal court was guilty of serious infringements of procedural law» (the claim was considered in the absence of the defendant). Moreover, «by using norms to established circumstances, errors were made by the court in the interpretation of Article 7 of the Civil Code of Ukraine». In violation of the demands of Paragraph 7 of Part 1, Article 203, and Article 203 of the Civil Procedure Code of Ukraine, the court did not identify the extent to which the decision applied to each of the plaintiffs and, in contravention of the content of the law, had obliged the editorial board to publish information that, in the opinion of the claimants, was true.

In this way, on 23 June, the Appeal Court effectively established that the information in the articles by S. Lavrenyuk «Special Operation «Readjustment», «Special Operation «Readjustment» – 2» and «Why pay more» was true.²²⁰

²¹⁷ Newspaper «Dzerkalo tyzhnia», <http://www.zn.kiev.ua/nn/show/474/44736>.

²¹⁸ «Telekritika» Internet website: <http://www.telekritika.kiev.ua>

²¹⁹ More information can be found on the Internet website: http://korpunkt.ru/razdel10_2_0.html.

²²⁰ cf, the Internet website of «Telekritika»: <http://www.telekritika.kiev.ua>.

On 17 September, the Leninsky District Court in Vinnytsa passed a decision to temporarily suspend the publication of the newspaper «Vinnytska gazeta» for violations of the Law on the Presidential elections. The court took this decision after reviewing the complaint of Viktor Petrov, authorized representative of Petro Simonenko. Petrov complained that assessments and commentary about the platform of a Presidential candidate had been provided by the newspaper, this being forbidden by law for municipal and State means of the mass media. The court closed the newspaper until 21 November – the end of the election campaign.²²¹

On November 28, police officers in the Luhansk region detained a car carrying the print run of the newspaper «Tviy Vybir» [«Your choice»], supposedly for containing calls to overthrow the constitutional system. These calls had allegedly been placed in human rights material, in particular, in an academic article on the right of a nation to uprising which is set out in some Constitutions of other democratic countries. In the course of the detention, regulations of many Ukrainian laws were violated, and action taken in excess of their authority by the law enforcement officers. The print run was shortly released, yet nobody was ever punished.

On 19 May, the Supreme Court of Ukraine reversed the verdict of the Sosnivsky District Court in Cherkasy and the resolution of the Appeal Court of the Cherkasy region, finding the Chief Editor of the newspaper «Svoboda», Oleh Lyashko, guilty of resisting police officers. The case was sent back for a new review. In April 2002, following the seizure of two print runs of the Svoboda newspaper, which resulted in the criminal case which is now referred to, Oleh Lyashko had been imprisoned for 10 days. The seized issues had contained the text of an appeal for information made to State Deputy, Hryhory Omelchenko, about some aspects of the activity of the former General Prosecutor of Ukraine, Mikhaïlo Potebenko. On 5 February 2003, a judge of the Sosnivsky District Court, Anna Chehot, had found Oleh Lyashko guilty of a crime of medium gravity and ordered him to pay a fine of 255 UH²²²

Last year, the Russian Centre of Extreme Journalism recorded 5 cases of detention or arrest of journalists:

1. Zaporizhzhye region, February 27: Andriy Tokovenko, Dmytro Kapustin²²³
2. Zaporizhzhye region, March 18: Artem Tymchenko²²⁴
3. Kyiv. April 28. Volodymyr Boyko²²⁵
4. Transcarpathian region. May 22: Kostyantyn Sydorenko²²⁶
5. Lviv. May 28. Irena Tershak²²⁷

5. RECOMMENDATIONS

1. To implement a program for reforming State 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.

2. To reform the institute for state regulation of television and radio broadcasting – the National Television and Broadcasting Council of Ukraine – in accordance with the Recommendations of the Committee of Ministers of the Council of Europe № 23 (2000), 1 (1999), Directive № 95/47/EC of the European Parliament and Council, dated October 24, 1995. The independence of the state authority regulating television and radio broadcasting must be ensured both through legislation and in practice. The National Television and Broadcasting Council of Ukraine should obtain sufficient financing to ensure its independence and the proper fulfilment of its functions.

3. To repeal the laws «On the procedure for mass media coverage of the activity of State executive bodies and bodies of local social government» and «On State support of means of the mass media and social protection of journalists»; including the cancellation of individual privileges for journalists of State mass media.

4. To adopt a new version of the law on television and radio broadcasting which would comply with the standards of the Council of Europe, OSCE and the European Union.

²²¹ cf. the Internet publication «Ukrayinska Pravda»: <http://www.pravda.com.ua>.

²²² According to the Mass Information Institute. At the Internet site: <http://imi.org.ua/?id=read&n=3612&yy=2004>.

²²³ For more information, see the Centre's Internet site: http://www.cjes.ru/monitoring/view_monitoring.php?id=3729.

²²⁴ http://www.cjes.ru/monitoring/view_monitoring.php?id=3817.

²²⁵ http://www.cjes.ru/monitoring/view_monitoring.php?id=3899.

²²⁶ http://www.cjes.ru/monitoring/view_monitoring.php?id=3922.

²²⁷ http://www.cjes.ru/monitoring/view_monitoring.php?id=3923.

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5. To 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.

6. To ensure quick and transparent investigation into all reports of violence and murder of journalists and to guarantee that journalists can exercise their rights.

7. To bind mass media owners to make their editorial policy public and to promptly inform of any changes in the editorial policy; to establish legal liability for not making public their editorial policy, making it public with a delay or giving untruthful information about their editorial policy.

8. To introduce a State program of support for local printed mass media of national and language minorities in places with large communities of the relevant groups.

9. To accelerate the procedure for ratifying the European Convention on trans-border television, the Additional protocol to the Convention on trans-border television, and to 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».

10. To disband the National Committee for Television and roadcasting during the consideration of Draft amendments to the Constitution of Ukraine.

X. THE RIGHT TO FREEDOM OF PEACEFUL ASSEMBLY²²⁸

1. OVERVIEW OF UKRAINIAN LEGISLATION ON THE RIGHT TO FREEDOM OF PEACEFUL ASSEMBLY

1.1. THE CONSTITUTION OF UKRAINE AND INTERNATIONAL DOCUMENTS

The right to peaceful assembly is guaranteed by Article 39 of the Ukrainian Constitution:

«Citizens have the right to assemble peacefully without arms and to hold meetings, rallies, processions and demonstrations, upon notifying in advance the bodies of executive power or bodies of local self-government. Restrictions on the exercise of this right may be established by a court in accordance with the law and only in the interests of national security and public order, with the purpose of preventing disturbances or crimes, protecting the health of the population, or protecting the rights and freedoms of other persons».

In addition, Ukraine has undertaken to fulfil the commitments of a number of international documents which concern human rights and which contain references to the right to peaceful assembly – the Universal Declaration of Human Rights (Article 20), the International Covenant on Civil and Political rights (Article 21), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 11).

The Constitutional Court of Ukraine in its ruling of 19 April, 2001 stated that the right to peaceful assembly is an «inalienable and inviolable» right of citizens and gave an official interpretation of Article 39 of the Constitution, in particular, as regards time periods for informing State authorities of plans to hold a mass action. The Constitutional Court also indicated that certain provisions of Article 39 of the Constitution should be specified in more detail by a separate law which has yet to be adopted.

1.2. THE USE IN UKRAINE OF LEGISLATION ON PEACEFUL ASSEMBLY OF THE FORMER USSR

There is no Law in Ukraine regulating the protection of the right to peaceful assembly aside from constitutional provisions and limitations of a general nature.

State executive bodies, bodies of local self-government and the courts continue to use normative legislation of the former USSR, such as the Decree of the Presidium of the Supreme Soviet of the USSR of 28 July 1988 «On the organization of meetings, political rallies and demonstrations in the USSR». This is, in our opinion, illegal.

The Resolution of the Verkhovna Rada of Ukraine «On the temporary legal force of certain legislative norms of the USSR on the territory of Ukraine» from 12 September 1991 provided that «until adoption of the relevant norms of Ukrainian legislation, the legislative norms of the USSR shall be used with regard to issues not regulated by Ukrainian legislation, on condition that they do not contravene Constitution and Laws of Ukraine». However, this does not at all mean that the given decree has legal force.

This Decree establishes a permission-based procedure with a 10-day time period for notification of the holding of mass gatherings. The permission-based procedure involves the issuing of a permit by an executive body for the holding of a meeting on submission of the relevant application by the organizers of the action.

²²⁸ By Volodymyr Chemerys, member of the Board of the Institute «Republic» and member of the Board of the Ukrainian Helsinki Human Rights Union. The materials of the Institute «Republic» and the Ukrainian Helsinki Human Rights Union have been used if not indicated otherwise.

The Decree thus contravenes the Constitution of Ukraine, in particular Article 39, which sets out procedure for notification of the organization of mass gatherings, not for seeking permission, and does not contain the limitations concerning the terms for prior notification. It also runs counter to other provisions of the Constitution.

Nonetheless, the Mukachevo District Court effectively took upon itself the authority of the Constitutional Court and directly stated in its decision on prohibiting pickets from 1 to 4 May 2004 that the Decree of the Presidium of the Supreme Soviet of the USSR from 28.07.1988 «was in force on the day of submission to the Mukachevo District Council of applications to hold a picket.

The notification procedure involves the filing of notification about the planned event to be held by the organizers to local executive bodies, who in their turn should not prohibit the event. Such peaceful gatherings may be banned solely by the court following an application by local executive bodies.

1.3. LIABILITY FOR VIOLATION OF THE RIGHT TO FREEDOM OF PEACEFUL ASSEMBLY

Law enforcement bodies apply general legal regulations for ensuring public order, yet almost all individuals detained when a mass gathering is being broken up are held responsible for «malicious refusal to heed a lawful direction or demand from a police officer» (Article 185 of the Administrative Offences Code of Ukraine) or «breach of procedure for organizing and holding meetings, political rallies, street actions and demonstrations (Article 185-1 of the Administrative Offences Code of Ukraine).

These Articles allow for punishment in the form of warnings, fines from 8 to 25 minimum wages before tax (from approximately 20 to 80 US dollars), community service for a period from one to two months, with twenty percent deduction from wages or administrative arrest for up to 15 days.

Furthermore, law enforcement officers frequently apply the legal regulations of Article 129 of the Criminal Code of Ukraine imposing responsibility for blocking roads or transport communications.

Nor has there been any case where officials or functionaries were punished for preventing individuals from practising their right to free assembly.

1.4. LEGISLATIVE ACTS OF LOCAL EXECUTIVE BODIES CONCERNING THE RIGHT TO FREE ASSEMBLY

The Constitution states that the right to peaceful assembly may only be limited in accordance with the law. In spite of this, local executive bodies frequently adopt their own legislative acts which flagrantly violate freedom of peaceful assembly.

Such decisions have been taken by city councils of the majority of Ukrainian regional centres, in particular, in Kyiv, Kharkiv, Donetsk, Dnipropetrovsk, Sumy, Lviv and in some district centres. One should also add that, in accordance with Article 92 of the Constitution, human and citizens' rights and freedoms, the guarantees of these rights and freedoms, the main duties of the citizen, are determined exclusively by the laws of Ukraine, and not by decisions of local executive bodies.

Most of these decisions by city councils have been based on the Decree of the Presidium of the Supreme Soviet of the USSR, and have imposed a ten-day period for providing notification about actions. These decisions, moreover, have established significant anti-constitutional limitations on the right to free assembly.

For example, «The Regulations on holding mass events in Dnipropetrovsk», approved by decision of the executive committee on 21 August 2003 states:

«18. In order to ensure appropriate conditions of safety, public order, sanitary norms and rules in holding mass events, the organizers must:

1. ensure that a metal barrier is set up around the stage and around the crowd (exactly what it says – the crowd!!!, – author's note);

2. ensure the installation of the required number of mobile toilets;

3. insure their liability before third parties (viewers, guests, participants);

4. hold the mass events not later than 11 p. m.

19. The organizers of the mass events together with the representatives of
– the Dnipropetrovsk local department of the Ministry of Internal Affairs in the Dnipropetrovsk region;;

– the Dnipropetrovsk state communal enterprise of the electricity network for outside lighting «Misksvitlo»;

- the Dnipropetrovsk city electricity network «Dniiproblenergo»;
- the transport department of the city council;
- the department for emergencies and civil defence of the city's population;
- the explosives technical department of the Ministry of Internal Affairs in the Dnipropetrovsk region;

- 8th state fire prevention brigade;

should draw up a report 3 hours before the start of the mass action on the results of the examination of the venue and submit the report to the city council».

As for meetings of religious communities, these «Regulations» establish a permission procedure for holding mass events which contradicts the notification procedure guaranteed by Article 39 of the Constitution and Article 21 of the Law on Freedom of Conscience and Religious Organizations: «Religious events outside the places and buildings foreseen by the Law of Ukraine «On freedom of conscience and religious organizations» are carried out each time with the consent of the executive committee of the city council after consideration of the purpose and program for the holding of the event by the office of internal policy of the city council».

The Institute «Republic» turned to a number of regional offices of the prosecutor with a proposal to register protest at the decisions of the relevant local authorities, who were establishing procedure for organizing and holding mass events. As no responses arrived during the term provided by the Law, the Institute turned to the General Prosecutor of Ukraine with a proposal to protest the decisions of:

- Dnipropetrovsk City Council № 2207 from 21.08.03 – «Regulations for holding mass events in Dnipropetrovsk»;

- Lviv City Council № 367 from 16.04.2004 – «On the procedure for organizing and holding meetings, political rallies, pickets, street actions and demonstrations in Lviv»;

- Sumy City Council № 757-MP from 28.04.2004 – «On regulations for holding mass events in Sumy»

- Kharkiv City Council № 221 from 07.03.2000 «On the approval of temporary regulations «On procedure for Executive Committee review of issues concerning the organization and running of meeting, actions, rallies, and demonstrations in the City of Kharkiv»;

- Chernivtsi City Council № 265/10 from 17.04.96 «On places for meeting, demonstrations and other mass political actions in Chernivtsi»;

- Zaporizhye City Council № 2 from 12.01.01 «Regulations on the procedure for considering applications for holding meetings, political rallies, street actions and demonstrations in Zaporizhye».

The application of regulations which regulate the establishment of «small architectural forms» when fulfilling citizens' rights to free assembly

Some city councils use different regulations for regulating and holding mass events which formally do not touch on the right to peaceful assembly, these being regulations on the establishment on city territory of «small architectural forms». Such regulations have been passed by the councils of many cities, including Kyiv and Donetsk.

«Small architectural forms» are kiosks, stalls, tents and other small constructions, which are erected by businesses of various forms of ownership for commercial purposes. Such «forms» are, moreover, intended to function for a long time. The erection of such «forms» should undoubtedly be subject to regulation by local authorities which does not contravene European practice of issuing permits for the erection of «small architectural forms» for commercial purposes.

However since 1990 during the student hunger strikes in Ukraine, it has become traditional to hold acts of protest in the form of «tent cities». No commercial activity is carried out in these tent cities: their purpose is to draw attention to socially important issues and to publicize the views of their inhabitants. Moreover, such tent cities cease to exist when the protest action ends. For this reason, legal regulation for establishing tent cities should be implemented within the framework of regulations about the right to free assembly, and not regulations about «small architectural forms».

Nonetheless, city councils frequently use regulations about «small architectural forms» in order to restrict the right of citizens to assemble peacefully. This was the case in Kyiv in 2001, when on the decision of the Starokyivsky District Court based on regulations about «small architectural forms», the tent cities of the protest action «Ukraine without Kuchma» were dismantled. This also happened in Donetsk in December 2004, when the Donetsk City Executive Committee applied to the district court to prohibit the erection

of tents on the territory of the city (during the court hearing, in which the Institute «Republic» represented the respondent, an Executive Committee representative withdrew the application).

1.5. DRAFT LAWS ON THE PROTECTION OF THE RIGHT TO FREEDOM OF PEACEFUL ASSEMBLY

In 2004 the parliament of Ukraine considered two Draft Laws on the freedom of peaceful assembly (Draft Law № 5242 «On the procedure for organizing and running peaceful rallies and actions in Ukraine», tabled State Deputies G. Udovenko, I. Mygovych, I. Sporadenko, V. Taran-Teren; Draft Law № 5242-2 «On meetings, political rallies, marches and demonstrations» introduced by the President of Ukraine)²²⁹. The Draft Law proposed by the President was virtually an exact copy of the draft law proposed by the Russian government for the consideration of the State Duma, which caused a wave of protest from Russian human rights activists.

The other Draft Law was proposed by a group of State Deputies, representing parliamentary factions then in opposition. An undoubtedly positive feature of Draft № 5242 was the norm establishing that organizers did not need to notify the appropriate local executive bodies or bodies of local government in written form about a picket by a group of no more than 50 people. No less positive was that organizers were able to give verbal notice of the picket the day before (Article 6). However, considering the practice of Ukrainian executive bodies and bodies of local government, one can assume that precisely verbal notice about a picket could serve one of the ways that certain officials would try to use to hinder picketing on an issue they found inconvenient. In addition, a tent city, as a special and complex form of picketing could exist after normal notification, foreseen by this law, of the relevant authorities.

Among other positive points of Draft Law № 5242 was the identification of a range of activities that did not fall within the force of the Law, such as, for example, weddings, meetings of civic organizations, national festivals, etc, whereas one can assume that in accordance with Draft Law № 5242-2, these would demand such procedure.

Despite the fact that the two drafts were submitted by the representatives of different political forces, to a large extent they were similar. Sometimes the difference was largely one of numbers.

For example, the Constitution of Ukraine does not foresee any limitation on the right to peaceful assembly either with regard to place, time, duration or organizers. Yet both Draft Laws introduced limitations with regard to all of these criteria on the right of citizens to assemble and freely express their opinion. In all cases the limitations are without court decisions, but solely on the decision of officials of law enforcement agencies, State executive bodies or bodies of local self-government.

The President's Draft Law introduced restrictions as to places for holding «public actions» (the Draft's term) – no nearer than 50 meters from the President's residence, buildings of the Verkhovna Rada, the Cabinet of Ministers of Ukraine, the Constitutional Court of Ukraine, the Supreme Court of Ukraine, the General Prosecutor of Ukraine, diplomatic representatives of foreign states, missions of international organizations, that is, places which are most often targets of pickets or protest actions. The State Deputies' Draft law also foresees these restrictions, however in their Draft the distance is 25 meters. The President's Draft demanded that organizers give notice of an action 10 days in advance, whereas the Deputies' Draft stipulates three days in advance.

Furthermore, Article 10 of the President's Draft, in contravention of Article 39 of the Constitution established restrictions in time and duration when holding mass events: «A public action may begin no earlier than 9 a.m. and finish no later than 22.00... The maximum duration of a public action held by the same organizer (s) must not exceed five consecutive hours». Of particular concern to human rights activists was the provision of the President's Draft about «authorized law enforcement agencies, State executive bodies and bodies of local self-government» which would have the power to «take decisions to suspend or stop public actions» (Article 14 of the Draft) and «to «move citizens from the place where a public action was being held» (Article 15) at their own discretion, without a court ruling. The Deputies' Draft law also contained a similar regulation about the right of representatives of law enforcement agencies «to stop» the holding of peaceful actions.

However, on 4 June, 2004 the Verkhovna Rada rejected both Drafts. It is symbolic that the Russian State Duma passed an analogous Draft on the very same day.

²²⁹ The Draft Laws are available in the Internet on the server of Verkhovna Rada of Ukraine: <http://www.rada.gov.ua>. An analysis of the Drafts by human rights activists, as well as material from the public hearings are available on the Internet: www.rupor.org

2. OVERVIEW OF VIOLATIONS OF THE RIGHT TO FREEDOM OF PEACEFUL ASSEMBLY DURING 2004

2.1. A GENERAL ASSESSMENT OF VIOLATIONS OF THE RIGHT TO FREEDOM OF PEACEFUL ASSEMBLY IN UKRAINE

During 2004, there were mass violations of the right to freedom of peaceful assembly by local State executive bodies, bodies of local self-government, law enforcement agencies and courts of first instance

A number of pickets, political rallies and demonstrations (in the majority of cases those of the opposition) were groundlessly prohibited by the courts.

In dispersing political rallies and marches with social demands (even without court-sanctioned prohibition), the police used force, as a result of which participants received injuries.

In some cases, participants of peaceful gatherings were attacked by unidentified individuals, whom the victims believe, not without cause, were connected with law enforcement officers. Despite the fact that in many cases criminal investigations were launched in connection with these assaults, not one of those responsible was detained.

A number of organizers and participants in peaceful events were subjected to administrative persecution.

There were criminal investigations initiated against participants in protest actions – supporters of both main Presidential candidates – for blocking administrative buildings and transport routes. However, these cases were soon closed.

Violations of the right to freedom of peaceful assembly were recorded in virtually all regions of Ukraine.

In 2004, Ukrainian citizens became more active in using their right to political rallies and demonstrations, and the political rallies were more hard-hitting in comparison with previous years. However, one should not attribute this sharpening to the election campaign alone. During the first nine months of the year, political rallies with purely social demands provoked a much harsher reaction from the authorities than rallies of a political or pre-election character. On the other hand, from October to December the many political rallies and demonstrations of opponents of the President and regime took place with a relatively small number of violations of the right to peaceful assembly.

2.2. OVERVIEW OF VIOLATIONS OF THE RIGHT TO PEACEFUL ASSEMBLY DURING 2004

2.2.1. Categories of mass events

Judging by information from the Public Relations Department of the Ministry of Internal Affairs of Ukraine, from January to September 2004 there were 40 thousand mass events in Ukraine, in which more than 25 million people took part. The majority of them were linked to a particular date and took place on State or religious holidays: New Year – 3.8 thousand events with 2.5 million participants; Victory Day – mass events in 7 thousand populated areas with 5 million participants; Day of Kyiv – more than 150 thousand participants; Day of Youth – around 1,100 events and 315 thousand participants; (on Constitution Day there were not many mass events). All these gatherings took place virtually without trouble (with the exception of a few football fans detained after the match «Shakhtar» – «Dnipro» and individuals in a state of alcoholic intoxication).

Another category of mass events were political meetings – those which were held by political organizations under political slogans. The pre-election events should also be placed in this category. There is no information about numbers in official sources. The largest of these were demonstrations on 9 March (the birth date of Taras Shevchenko²³⁰), 1 May, organized by parties of various political leanings, the mass rallies of 4 July in Kyiv when Viktor Yushchenko declared that he would run for President, and in Zaporizhye – when Viktor Janukovich announced his candidacy. According to estimates of the Institute «Republic», there were more than a thousand of such events in various cities of Ukraine in which around 300 thousand people took part.

²³⁰ Taras Shevchenko 1814 – 1861, the great Ukrainian poet

In many cases, course of first instance, on application of bodies of local self-government, banned such political rallies (as a rule – rallies of opposition parties, but in some cases (Lviv) – rallies of the pro-regime Social-Democratic Party of Ukraine (o)).

2.2.2. Court restrictions on the right to freedom of peaceful assembly

According to information from the State Court Administration of Ukraine, during 2004 the courts received 308 applications from bodies of local self-government (executive committees) and local State executive bodies (regional State administrations) to limit the rights of individuals, civic or political organizations to peaceful assembly. One such case had not been dealt with since 2003.

Decisions were passed in 269 of such cases. In 229 of the cases, the application was satisfied and the right of individuals limited. In 15, the case was closed, and in 21 cases the applications remained unconsidered. 3 cases were referred to other courts' jurisdiction. Thus, in all 308 cases were concluded, of which 3 cases not within the terms established by the Civil Procedure Code of Ukraine.

In the majority of cases, courts of first instance «automatically» satisfied the applications of the local executive bodies, which is demonstrated by the number of such decision in relation to the general number of applications to the court. The applications were satisfied in 74.3 percent of the cases.

In all cases analyzed by the Institute «Republic», such decisions were unfounded or based on unconstitutional principles – the Decree of the Presidium of the Supreme Soviet of the USSR of 28 July 1988 «On the organization of meetings, political rallies and demonstrations in the USSR» or decisions of bodies of local self-government which run counter to the Constitution of Ukraine. Appeal courts however, as a rule, reversed (in the case of a rally being banned), or softened (in the case of administrative arrest of participants in rallies) the rulings of district and city district courts, which yet again demonstrates the fact that these decisions were unfounded and incorrect.

Furthermore, in the majority of cases, courts of first instance infringed a number of procedural norms. For example, the Romen City District Court held their hearing on 5 August in the presence of only one of the parties – the representative of the Sumy Regional State Administration – and without a representative for the students who had organized a march on foot from Sumy to Kyiv. The court thus listened only to the arguments of the State authorities, which violates the principles of impartiality and of adversarial proceedings.

In many cases the court disregarded the principle of the presumption of innocence: the rights of citizens were restricted – that is, they were punished – not for real violations, but for «the likelihood» (in the opinion of the claimant and the court) of violations, in other words, for violations which the citizens had not committed. Nor were such assumptions substantiated by any facts (any clashes between the parties in the past, danger presented by the participants, etc).

For example, the district courts of Kyiv, Lviv, Mukachevo and other cities from 28 to 30 April 2004, at the application of local State executive bodies and bodies of local self-government withdrew (limited) the right to hold demonstrations and political rallies on 1 May – International Workers' Day, a traditional day in Ukraine for holding political demonstrations, of representatives of various – left-wing and right-wing²³¹ forces: the Ukrainian National Assembly and the Union of Ukrainian Anarchists, the Communist Party of Ukraine and the political block «Our Ukraine», the Progressive Socialist Party and the Socialist Party, the association «Prosvita» and the charitable fund «Rusin women of Transcarpathia». These bans were unprecedented in the recent history of Ukraine for their mass scale: such a number of prohibitions is characteristic more of a state of emergency and one can only perhaps compare it with the number of bans at the beginning of 2001 (the period of protest actions of «Ukraine without Kuchma»).

The grounds given for such court decisions was «the likelihood» of clashes between representatives of different political forces during mass events, and the above-mentioned Decree of the Presidium of the Supreme Soviet of the USSR of 28 July 1988 «On the organization of meetings, political rallies and demonstrations in the USSR».

We would quote a few of these arguments concerning «the likelihood» of violations:

«Its (the mass event's) direction indicates a strong likelihood of violations of public order in the place where the event would be held» (the application of the Kyiv City State Administration to the Shevchenkivsk District Court of 28 April 2004, signed by the Deputy Head of the Kyiv City State Administration B. Stichinsky);

²³¹ The pairs of blocs / parties named are, despite their names, representatives of the said «left- and right-wing». It should be remembered that since the collapse of the Soviet Union, while «left-wing» may still refer to communist or socialist-leaning positions, «right-wing» may mean a position heralding democratic rule, liberalism, free market forces, etc (*translator's note*).

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The picket of the Mukachevo Town Hall by two organizations (Ukrainian Social-Democratic Youth and the Fund for Regional Initiatives) «leads the court to fear that a situation of conflict may arise between them» (the decision of the Mukachevo City District Court of 30 April, 2004, Chairman: O. Kuropyatnyk).

The fact that for the court justification for banning a political rally could be «the likelihood» or «fear» of clashes between different political forces during mass events, led to the appearance of a new ‘political technology’ for the banning of actions by individual political forces. This ‘political technology’, which had been applied previously, from 1 May 2004 took on a massive character. After one of the organizations had notified of their plan to hold an event, another organization with different political leanings informed the relevant local body of their intention to hold their own event at the same time and in the same places as the first organization. The court then banned both political rallies, referring to the possibility of clashes between different political forces.

Despite the flimsiness of the grounds, the courts in all the above-mentioned cases satisfied the applications of local State executive bodies and bodies of local self-government to restrict the right of citizens to peaceful assembly.

Of course, every demonstration, march or other similar action causes the authorities a lot of problems. However, the European Court of Human Rights has confirmed that Article 11 refers to the positive obligations of the State to defend those who are carrying out their rights to peaceful assembly free of violence from opponents, in particular from counter demonstrations (the case of the organization «The Platform of «Doctors for Life» against Austria, 1985, Paragraphs from 65 to 72). Since both parties have the same right which is guaranteed by Article 11 of the European Convention, where one of the parties is aiming to disrupt the activity of the other, the authorities must in the first instance protect the rights of those who are carrying out their gathering peacefully:

«Any demonstration can irritate or offend those who are against the ideas or demands in support of which it is being held. Nonetheless, its participants must have the opportunity to hold it without fear of physical force being applied by opponents; such fears would hinder them in expressing their opinions on socially important issues. In a democratic society the right to hold a counter-demonstration cannot determine the right to a demonstration. Following from this, the protection of true, effective freedom to hold peaceful meetings cannot lie only in the State’s lack of interference: the purely negative concept of the role of the State contradicts both the subject and the aim of Article 11» – the European Court of Human Rights states with regard to this decision.

In view of this, the widespread practice of prohibiting peaceful gatherings purely on the basis of the fact that peaceful meetings of two opposing sides will be held in one and the same place, cannot serve as justification for restricting the right to peaceful assembly. Such practice should be deemed to contravene European standards.

Decisions to restrict the right to peaceful assembly are, as a rule, taken the day before mass events which does not allow the organizers the possibility of appealing the decision of district courts before the beginning of the event and, thus, effectively deprives them of the chance to reinstate their constitutional right to peaceful assembly.

Another violation by local State executive bodies, in particular, the Kyiv City State Administration, was the refusal to accept notification from organizers of mass events on the grounds that the working day had ended. For example, in the case of the civic organization, Ukrainian National Self-defence, the notification was not accepted at 17.00 on 30 April, although the working day in the Kyiv City State Administration ends at 18.00. Among other reasons, this can be explained by the lack of legislative definition of the procedure for submitting notification of plans to hold peaceful gatherings.

The majority of organizers of mass events on 1 May 2004 did not adhere to the rulings of the courts, arguing that they were unconstitutional. They were only heeded by the bloc «Our Ukraine» in Kyiv (before the decision of the court on 28 April, having considered the suggestion of the Kyiv City State Administration, «Our Ukraine» changed the form and place where its events were to be held) and by the Ukrainian Social-Democratic Youth and the Fund for Regional Initiatives in Mukachevo.

Despite this, no incidents where the law enforcement bodies placed obstacles in the way of holding these actions were recorded. There were also no clashes between representatives of different political forces, which the local executive bodies and judges had been so concerned about. In particular, there were no confrontations in «problem» regions where such clashes had taken place previously – neither in Lviv

between communists and nationalists, nor in Donetsk between representatives of «Our Ukraine» and the Party of Regions of Ukraine²³².

Most court prohibitions were for the rallies on 1 May, however bans continued after this date. For example, the Ordzhonikidze District Court in Zaporizhye banned an event by the opposition bloc «Our Ukraine» on 15 May; The Suvorovsky District Court in Kherson satisfied the application of the Kherson City Executive Committee to limit the rights of the Kherson organization of the Ukrainian People's Party and other organizations to hold a rally on 17 June; the Horodnyansky District Court of the Chernihiv region prohibited the Chernihiv organization of the Socialist Party of Ukraine and the Chernihiv Trade Union of Businesspeople from setting up a tent city in the village of Senkivke on 26 – 27 June during the international festival «Druzhba – 2004».

A protest action by education employees in Lviv demanding that State executive bodies carry out the rulings of the courts of the Lviv region with regard to ensuring social payments to educational workers in accordance with Article 57 of the Law of Ukraine «On education», which began on 7 October, involved setting up a tent city (a traditional form of protest actions since the 1990s) near the premises of the election headquarters of Presidential candidate Viktor Yanukovich, the incumbent Prime Minister of Ukraine. On 29 October, one of the initiators of the action, Andriy Sokolov approached the Executive Committee of the Lviv City Council to give notice that it would take place. In response, on 5 October the City Council turned to the local court of the Halytsky District Court in Lviv with an application to limit the right of citizens to hold this action. The Council argued that the organizers of the tent city had not adhered to one of the requirements of the Decree of the Presidium of the Supreme Soviet of the USSR of 28 July 1988 «On the organization of meetings, political rallies and demonstrations in the USSR», in accordance with which the initiators of the action must inform local authorities about the event 10 days in advance. Moreover, in the view of the City Council, the teachers' action could also be an infringement of the Law on the elections, hampering the work of the regional headquarters of Yanukovich. Such an action would also, they argued, interfere with pedestrian movement and transport. On 7 October, the Halytsky District Court considered and satisfied the claim of the Executive Committee. The participants in the action did not have time to appeal the court ruling (which was given on the day when the action was to begin) and disregarded it. It was not adhered to (and no effort even was made to adhere to it) by the law enforcement bodies and executive bodies.

The Institute «Republic» recorded only two cases where the courts of first instance did not satisfy applications from local executive bodies regarding «limitation of the right to peaceful assembly» from January to September 2004 (the term «limitation of the right» in court decisions usually means simply prohibition): On 19 May the Lutsk City District Council rejected an application from the Lutsk City Executive Committee, and on 9 June, the Leninsky District Court in Kirovohrad turned down an application from the Kirovohrad City Executive Committee. In both cases, the local authorities had been trying to ban actions of «Our Ukraine».

On the other hand, from September to December 2004, «Republic» recorded only two instances of court bans on peaceful gatherings – in Dnipropetrovsk and Lviv (the latter was mentioned above) – however in neither case was the court ruling adhered to, and no repressions against the organizers nor participants in the rallies were applied.

On the other hand, during the final months of the year courts of first instance in the majority of cases did not satisfy the applications of local executive bodies to limit the right to peaceful assembly, deeming there to be no constitutional grounds. Even courts which had previously, «automatically», accepted the call from the local authorities to prohibit peaceful gatherings, now rejected such applications.

2.2.3. Persecution of the organizers and participants of peaceful gatherings

In the majority of cases, political organizations did not adhere to court rulings, considering them to be an infringement of Article 39 of the Constitution of Ukraine which guarantees the right to peaceful gatherings and the police did not use force against them. Nonetheless a number of participants in opposition actions experienced persecution at a later stage.

²³² «Our Ukraine» is Yushchenko's bloc, while the Party of Regions of Ukraine is the party of Yanukovich. The latter is from Donetsk. (translator's note)

In accordance with the demands of Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, persecution of individuals for their participation in peaceful gatherings is a violation of their right to freedom of peaceful assembly.

On 5 May, two activists of the opposition bloc «Our Ukraine» – Ivan Varchenko and Evhen Zolotaryov – were sentenced by a judge of the Kyivsky District Court in Kharkiv, Volodymyr Pletnyov, to 10 and 15 days administrative arrest, respectively, on the basis of Article 185 of the Administrative Offences Code in Ukraine («an unlawful march») during their political action of 1 May «Last shirt for Yanukovych»). After a protest at these decisions was lodged by the Prosecutor of the Kharkiv region, Vasyl Sinchuk, Judge Pletnyov shortened the period of administrative arrest of both Varchenko and Zolotaryov to 3 days. Soon afterwards, by a Resolution of the Head of the Appeal Court of the Kharkiv region, Vasyl Bryntsev, this decision was declared unlawful and annulled.

On 20 May 2004, a resident from Transcarpathia, Andriy Flenko, was detained. Flenko had informed of his intention to picket the Transcarpathian Regional State Administration to demand the implementation of the Resolution of the Verkhovna Rada about the events in Mukachevo from 12 May 2004, and in particular, the resignation of the Governor of Transcarpathia, Risak, the Head of the Regional Department of the Ministry of Internal Affairs in Transcarpathia, Vartsaby and his deputy, Rusin. Despite the fact that there was no court sanction for prohibiting the picket, the activist was detained, and the tents erected in the course of the action were removed. Under pressure from civic organizations, Flenko was soon released.

In Mukachevo on 22 May, Kostyantyn Sidorenko, who had previously taken part in protest actions, was detained. On 25 May, the Mukachevo City District Court sentenced him according to Article 185 of the Administrative Offences Code («resisting law enforcement officers») to 5 days administrative arrest.

In May, a journalist of the Sumy Regional Television and Radio Company, Kostyantyn Yelishkevych, was dismissed for having made a speech at a political rally organized by students in Sumy.

On 10 June 2004, the Zarichny District Court in Sumy began its consideration of the case involving Artem Semenchenko, the Head of the Sumy city organization of the opposition Ukrainian National Party and of the regional youth civic organization «Youth of the Sumy region». He was charged with infringements to the procedure for organizing and holding meetings, political rallies, street marches and demonstrations (Article 185-1 of the Administrative Offences Code of Ukraine) during the cultural and artistic 'extreme' festival «Energy of youth», held on 5 June in the children's park «Kazka» («Fairytale»). On the application of the City Police Department, Semenchenko was accused of having organized a street march at 21.00, after the festival, under the banner of the civic organization «Youth of the Sumy region» through the centre of the city, Independence Square to Soborna Street. However, 22 June, the Zarichny District Court quashed the charge.

There were also other forms of repression against participants in the protest actions of the Sumy students. For example, on 24 September, in the middle of a lecture attended by about 150 people, a student of the Sumy National Agricultural University (SNAU) was informed by the Dean of the Agronomy Faculty, Viktor Kabanets: «We have expelled our main revolutionary and political activist». The expulsion order was signed by the Acting Rector of SNAU, Valery Zhmailov, with the following grounds being given: «In connection with flagrant violations of disciplinary procedure of SNAU and missed lectures which could lead to his falling behind in his studies». Some men in uniform – university guards – then entered the lecture hall and forcibly removed the student from the territory of the university. A few days later, after a query to the Ministry of Education about the above-mentioned events by State Deputy of Ukraine, Valentina Semenyuk, which she made from the tribune of the Verkhovna Rada, Stepanenko was reinstated in the university. Repressions against the students led to a new wave of protest among students and residents of Sumy.

2.2.4. The lack of action by law enforcement bodies during attacks on participants of peaceful gatherings

Although representatives of law enforcement bodies did not directly use force against participants of peaceful gatherings in the majority of cases, there were some incidents where the participants were assaulted by unidentified individuals and sustained bodily injuries. On these occasions, the police did not interfere and did not stop these breaches of public order.

In many cases criminal cases over assault with intent to injure were opened, however these have not to this day been investigated. All of this gives grounds for assuming that the attacks on participants of

peaceful gatherings were carried out by individuals connected with law enforcement bodies or the local authorities.

The European Court of Human Rights has frequently reiterated that the guarantee of the right to freedom of peaceful assembly implies positive obligations on the part of the State to protect those who are exercising their right to peaceful assembly against violence from opponents.

«Any demonstration can irritate or offend those who are against the ideas or demands in support of which it is being held. Nonetheless, its participants must have the opportunity to hold it without fear of physical force being applied by opponents; such fears would hinder them in expressing their opinions on socially important issues». – it states in its ruling on the case «Platform «Doctors for life» against Austria» (1985 Paragraphs 65 to 72).

For example, on 23 October 2004 at about 15.00 in Kyiv, near the Kyiv Regional State Administration which houses the Central Election Commission of Ukraine (CEC) a political rally began organized by supporters of the bloc «Our Ukraine». After it ended, some 100 supporters remained on the square around the premises of the CEC, together with Presidential candidate Viktor Yushchenko and State Deputies from his election headquarters. Around 23.00, a group of young people (according to different accounts – from 50 to 100 individuals), coming from Kutuzov Street and Druzhba Narodiv Avenue, strode up to the people standing near the CEC, on Lesya Ukrainka Square. Conflict arose between the two groups which lasted less than a minute, but left 8 people with bodily injuries. The Department for Contact with the Public of the Ministry of Internal Affairs (MIA) stated that criminal cases in connection with this incident had been launched by detective units of the Central Department of the MIA of Ukraine in Kyiv and offices of the Prosecutor. The State Deputies said that identity cards of law enforcement bodies had been found on the assailants caught.

A slightly different situation arose in Chernihiv on 26 November 2004 where, during a picket of the Chernihiv City Council, both police officers and those taking part in the meeting were beaten up. Encouraged by State Deputy Mikola Rudkovsky, a loosely-controlled crowd attempted to storm the Council building despite meeting legitimate resistance from the police officers who were guarding it. As a result of the actions of the meeting's organizers, a fight broke out in which police officers used special equipment (truncheons, light and noise grenades). As a result of the illegal storming of the building, which was instigated by a State Deputy, several police officers received injuries and were taken to hospital. Despite the absolute illegality of the actions of the participants, and particularly those of the leader of the meeting, nobody was brought to justice for violating the law²³³.

On 29 November 2004, in Luhansk, a column of about 70 Yushchenko supporters were attacked by thirty unidentified individuals, armed with baseball bats and metal bars. They began hitting those in the column and taking away mobile phones, video recorders and cameras from journalists. Four people were hospitalized as a result: Yury Motsny, Oleksandr Veliky, Yevhen Savchenko and a Canadian citizen, Silvie Rossel. A criminal case was launched under Part 2, Article 296 of the Criminal Code of Ukraine (for hooliganism). The Luhansk police did not take measures to ensure the safety of the column of Yushchenko supporters, and stood by, making no attempts to intervene. A criminal investigation is now under way, however there is no sign of its being near conclusion. The Ukrainian Helsinki Union for Human Rights has lodged a claim concerning the unlawful actions of the law enforcement officers who neglected their duty to protect public order and who, in our opinion, are not making proper efforts to investigate this crime.

The police also stood by passively when the tents of Yushchenko supporters in Donetsk were taken down on 10 December 2004.

It is also worth mentioning that not one case of direct confrontation between supporters of Yanukovych and Yushchenko taking part in mass events was recorded, even when these events took place next to each other and at the same time (as was the case in Kyiv, Kharkiv, Dnipropetrovsk and other cities).

On 28 November 2004 in Donetsk, Yanukovych supporters broke up a political rally of Yushchenko supporters. Physical force was applied against thirty people, they had eggs thrown at them and were beaten up. The law enforcement officers distanced themselves and failed to carry out their duty. Furthermore, according to some information, they even helped to break up the meeting. A number of representatives of the political opposition were forced to seek medical assistance in hospitals. Yet the police refused to accept their complaints about the assault.

²³³ Based on material provided by the Chernihiv Civic Committee for the Protection of Human Rights.

2.2.5. Specific features of violations of the rights of participants of peaceful meetings presenting demands of a social nature

Mass actions with a social message were smaller in number, but passed in a much more heated atmosphere than those of a political nature. The State authorities were harsher in their reaction to such actions. Law enforcement bodies resorted to force against those participating in the actions even in those cases where the organizers had informed the local authorities in advance about the planned action and where there was no court order restricting the right to peaceful assembly or banning the action.

For example, on 15 May, the Kyiv police used force to disperse a picket of the protest action «SOS» taking place near the Verkhovna Rada of Ukraine. The participants in «SOS» – the parents of young people (in their opinion) illegally convicted – had informed the local authorities in time about their planned action and the action had not been prohibited by the court. However the picket (a few dozen older men and women) was broken up. Those taking part received injuries which were confirmed by medical institutions, yet the Pechersky District Office of the Prosecutor in Kyiv refused to launch a criminal case concerning the assault and the instances of law enforcement officers exceeding their authority.

Participants in the «SOS» action were again detained on 17 September while holding a picket near the Administration Offices of the President of Ukraine. However, no charges were brought against those detained and they only had «preventive chats. In a few hours, after the briefing of the Deputy Head of this institution, Vasyl Baziv which took place in the Administration Offices, those detained were released.

The largest number of court bans, police actions with the use of force and cases of persecution of participants occurred during the protests by students of the universities of Sumy, directed against the merger of some higher education institutions, and the appointment of State Deputy, O.Tsarenko, as Rector of the merged university. The students made no political demands and did not represent any political party or Presidential candidate.

However, on the night from 31 July to 1 August, the Sumy police detained more than 20 participants of the student protest who were staying in a tent city on Shevchenko Square. Nine of them were sentenced to one day's administrative arrest under Article 185 of the Administrative Offences Code («resisting the police»). Two were detained for 72 hours, but the law enforcement officers could not manage to lay charges of possession of drugs, allegedly found when searching the tent city. At around 12 o'clock on 1 August the Sumy police again attacked the tent city, which had been erected after the organizers informed the local authorities of their intention to carry out this form of protest action. There was no court sanction limiting the right of the organizers of the tent city to peaceful assembly, yet the police officers took the tents down. The attack on the student protest tent city took place in the presence of the Mayor of Sumy, Volodymyr Omelchenko.

On 5 August, the Romeni City District Court of the Sumy region considered an application from the Sumy Regional State Administration «to limit the holding of a walk by Sumy students from the city of Sumy to Kyiv», and decided:

«To ban the walk from Sumy – Romeni – Kyiv by Sumy students under the title «Student Resistance»

In the morning of 6 August, the Sumy police, referring to the decision of the Romeni City District Court, detained around 30 students taking part in the walk from Sumy to Kyiv. All of them were sentenced to one day's administrative arrest under the «traditional» Article 185 of the Administrative Offences Code («resisting the police»). One of the participants – a student of Sumy Pedagogical University, Vyacheslav Kobyljakov, was taken to hospital with serious injuries. On both occasions involving detention – 1 and 6 August, the Deputy Head of the Sumy Police Department, Kostyantyn Bezsarov, was in charge of the police.

The Ukrainian State authorities were also criticized by a number of human rights organizations over the Sumy students.

On 16 August, one of the organizers of the Sumy students' protest actions, Oleksandra Vesnych, with the legal support of the Institute «Republic», lodged a complaint to the Appeal Court of the Sumy region about the ruling of the Romeni City District Court from 5.08.04. The complaint points to the incompatibility of this ruling with Article 39 of the Constitution of Ukraine and Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as to the violation by the Romeni City District Court of a number of procedural norms – consideration of the case in the absence of one of the parties, violation of the principle of equality of arms, and of impartiality during the court hearings. The complaint also mentions that during the walk of the Sumy students there were no breaches of public order, and there was no risk to the health of the population, nor to the rights of other individuals.

The Appeal Court of the Sumy region, having considered Vesnych's complaint, on 8 November reversed the ruling of the Romen City District Court from 5 August. Yet by 2 December the Sumy Regional State Administration had turned to the Supreme Court of Ukraine with a cassation appeal against this resolution, stating that «The Appeal Court of the Sumy region mistakenly concluded that infringements were made in the procedure for resolving issues». The Sumy Regional State Administration asks the Supreme Court to reverse the resolution of the Sumy Appeal Court and to reinstate the resolution of the Romen City District Court. The Supreme Court has yet to consider this cassation appeal.

Several thousand vendors of the «Troeschina» market in Kyiv, in protest at the closing of this market, on 25 August blocked off the transport route across Moskowsky bridge. The Police did not interfere in these events even when scuffles arose between those participating in the political meeting and car drivers. The next day, several dozen protesters were sentenced to 15 days administrative arrest.

On the other hand, protest actions by vendors of the Central Market in Kharkiv, which took place in May, passed off without incident.

A separate place in this category of mass actions should be given to the meetings in Simferopol commemorating the 60th anniversary of the deportation of Crimean Tatars (the estimates of law enforcement officers put the figure of those who took part at 25 thousand), as well as a number of meetings against the war in Iraq, which took place through May and June (Kyiv, Sumy, Khmelnytsky and others) and which were organized both by civic and by political organizations (the Communist Party of Ukraine and the Socialist party of Ukraine, without large numbers of participants. These meetings passed without trouble, and the State authorities took no measures against them.

2.3. SPECIFIC FEATURES OF EXERCISING THE RIGHT TO PEACEFUL ASSEMBLY DURING THE PRESIDENTIAL CAMPAIGN (OCTOBER – DECEMBER 2004)

In connection with the Presidential elections (31 October 2004), the number of demonstrations, political rallies and pickets in Ukraine increased significantly, as did the numbers of those taking part. Virtually all mass actions were of a political nature, with even actions on social issues taking on a political slant.

Basically political in nature were also the actions of ecologists in Kyiv protesting against decisions of the Kyiv City Council which gave a number of pieces of land in the nature reserve zones of Kyiv – Feofania and Pushcha-Voditsa to be used by politicians of the pro-regime camp (to be fair, one should mention that among these politicians were a few figures of the political opposition.

In all, judging by information from the Public Relations Department of the Ministry of Internal Affairs of Ukraine, from October to November 2004 (up till the second round of Presidential elections on 21 November), hundreds of thousands of people in all regions of Ukraine took part in pre-election mass events. The largest of these were students viche²³⁴ in support of Presidential candidate Viktor Yushchenko (16 October, with around 20 thousand people), the political rally of Yushchenko supporters near the premises of Central Election Commission (23 October, 13 thousand people) and the all-Ukrainian charity socio-cultural action «Youth – against! Youth – for!» (basically an event in support of Presidential candidate Viktor Yanukovich which took place in many cities of Ukraine).

In the evening of 21 November in Kyiv, and on 22 November in many other cities, primarily in the West and Center of Ukraine, actions by supporters of Viktor Yushchenko began. The demands of these actions were the annulment of the results of the second round of elections, in which, according to the Central Election Commission, Yanukovich had won, and the declaration of Yushchenko the winner. The actions were, in the majority of cases, indefinite. Meetings took place not only in cities, but also in many villages (in the West of Ukraine, in the Kyiv, Chernihiv and Sumy regions) where there had been no mass events for decades.

After the Court Chamber for Civil Cases of the Supreme Court of Ukraine ruled on 3 December 2004 that, due to numerous violations of Ukrainian legislation during the second round of the Presidential elections, it was impossible to establish the results of the elections, and that there would be a re-run of the second round, and especially after the Verkhovna Rada on 8 December passed a vote of no confidence in the Central Election Commission, and also approved amendments to the Constitution – the «political reform» – the protest actions by Yushchenko supporters began to abate. However, the last tents – in Kyiv – were only dismantled on the eve of the inauguration of the new President on 23 January 2005.

²³⁴ The word «Viche» harkens back to very early times in East-Slavonic lands and refers to public mass gatherings which were called when important decisions needed to be made.. (*translator's note*)

On the other hand, especially after the re-run on 26 December 2004, which Viktor Yushchenko won, mass actions by supporters of Presidential candidate Yanukovych began in the East and South of Ukraine (these actions were, however, on a smaller scale than the actions by Yushchenko supporters).

In general, during these actions from October to December 2004, the number of violations of the right to peaceful assembly decreased markedly in comparison with the previous nine months. One can explain this as a change in attitude of State executive bodies and bodies of local self-government to the right of people to peaceful assembly brought about through mass pressure on the executive bodies by civic organizations and the participants of demonstrations themselves.

Court restrictions on the right to freedom of peaceful assembly in the last months of the year

Throughout this period the Institute «Republic» recorded only two cases where peaceful actions were prohibited by the courts – in Dnipropetrovsk and Lviv (we have discussed this incident already) – however in neither case was the court ruling adhered to, and no repressions against the organizers or those taking part in the meetings were applied.

Instead, courts of first instance did not, in most cases, satisfy the applications of local executive bodies to restrict the right to peaceful gatherings, not finding any constitutional justification for this. Even courts which had previously «automatically» satisfied such submissions from the local authorities about prohibiting peaceful gatherings now turned such submissions down.

For example, on 28 October 2004, the Zarichny District Court in Sumy rejected the application of the city council to restrict the right to peaceful assembly of supporters of the Presidential candidate Viktor Yushchenko, and the Shevchenkivsk District Court in Kyiv twice – on 6 and 20 November – turned down an application from the Kyiv City State Administration to «limit» the right of Yushchenko's headquarters to peaceful meetings which they were planning to hold on Independence Square in the centre of Kyiv. Previously, in 2002, this very court, on the application of the Kyiv City State Administration, had prohibited an action by the political opposition «Rise, Ukraine!» on European Square in Kyiv.

In its ruling of 20 November, the Shevchenkivsk District Court in Kyiv effectively gave «the green light» for Yushchenko's headquarters on the night from 21 to 22 November to hold a «parallel vote-count in the second round of Presidential elections» action on Independence Square, which in the morning of 22 November turned into an indefinite protest action against the official results of the elections.

Moreover, on 22 November, the Kyiv City Council, whose executive body is the Kyiv City State Administration – the initiator of the court bans on peaceful gatherings mentioned earlier, under the leadership of the Kyiv Mayor, Oleksandr Omelchenko, decided to support the protest actions by Yushchenko supporters on Independence Square. Similar decisions were taken by the majority of city councils on the territory of West and Central Ukraine.

Nor did local councils in Eastern and Southern Ukraine from October to December apply to the court to limit the right to hold peaceful actions of Yanukovych supporters, and as for attempts to gain court restrictions on the right of Yushchenko supporters to hold peaceful meetings, «Republic» recorded only one such attempt, in Donetsk.

On 10 December, several Yushchenko supporters, who had arrived in Donetsk from Kyiv, erected tents near the monument to John Hues, a British founder of Donetsk. Within twenty minutes, the tent city had been demolished by a group of unidentified individuals. A criminal case was opened into the assault on the tent city activists and the journalists present at that moment (which is yet to be investigated), but on the same day, the Executive Committee of the Donetsk City Council lodged an application with the court to limit the right of Ostap Kryvdyk (who had notified the Executive Committee about the planned action) to erect tents on the territory of the city of Donetsk. In its application, the City Executive Committee referred to the ruling of the City Council back in 1999, which regulated procedure for organizing and holding mass events in the city, and the ruling of the Mayor's Office from the current year (11 June 2004) on «small architectural forms» with the supplements to it adopted on 25 November, at the height of the protest action. In these supplements, the Donetsk City Council decided: *«To introduce supplements to the ruling of the City Council of 11 June 2004, № 11/11 «On the approval of Rules for locating small architectural forms on the territory of Donetsk», by supplementing Paragraph 12 of the Rules with the following paragraph: «On the territory of the city it is prohibited to erect small architectural forms, including tents, with the intention of living in them».*

On 13 December 2004, the Voroshilivsky District Court in Donetsk began its consideration of the City Executive Committee's application to limit the right of Ukrainian citizen, Kryvdyk (whose interests are represented by a lawyer from the Institute «Republic») to erect tents in Donetsk, however during the

court hearing, a representative of the City Executive Committee, Maksim Rovinsky, withdrew their application.

Repression of those taking part in peaceful meetings, and police dispersal of peaceful gatherings

From October to December 2004, there was one recorded incident involving the dispersal by the police of a peaceful gathering without court sanction. This incident was yet again in Sumy.

Near the building of the Kovpakivsky District Court in Sumy, on 13 November, an unplanned political meeting took place, with 100 – 150 participants. The reason for the meeting was the detention of Presidential candidate Viktor Yushchenko's observers at polling station № 46. On the same day, 6 people were sentenced to 10 days administrative arrest for «resisting officers of law enforcement bodies» during the night after the first round of the elections, when they demanded that the results of the voting be displayed on the premises of the polling station. Neither defending lawyers, nor journalists, nor the parents of those detained were admitted to the hearing of the Kovpakivsky District Court, where the observers' case was being considered. Later, the individuals convicted at this closed court process were declared prisoners of conscience by the international human rights organization «Amnesty International» – Ukraine's first prisoners of conscience.

The participants of the spontaneous demonstration demanded an explanation and prevented the police vehicle which was to carry those detained to the place where they were to be held in custody. A special detachment of the police, «Berkut», together with unidentified individuals in civilian clothes, dispersed the demonstration. Bats were used, as well as teargas. The journalist, Irina Cherny had her dictaphone machine taken away, and was also beaten up. Several participants of the demonstration were hospitalized with serious injuries.

Such action by the police led to a new wave of mass actions of disobedience in Sumy, in particular, Sumy students erected a tent city near the Regional State Administration building, and over 20 students declared a hunger strike. Ukrainian human rights groups, and the Human Rights Ombudsperson, all came out in defence of the observers. According to the ruling of the Sumy Appeal Court, they should have been released on 17 November, however they were held for all 10 days of the administrative punishment. On 21 December 2004, the Kovpakivsky District Court of Sumy reconsidered its ruling of 13 November and concluded that the observers representing Presidential candidate Yushchenko had not committed any violations. The latter have now lodged complaints about their illegal convictions and are demanding compensation.

Some participants of peaceful meetings also experienced repression after the meetings. For example, some participants of the All-Ukrainian Student Viche in support of Presidential candidate Viktor Yushchenko, which took place in Kyiv on 16 October 2004, were, a few days after returning home, accused of various criminal acts (dealing in counterfeit money, theft of mobile phones, etc). Such incidents were recorded in the cities of Chernihiv, Vinnytsa, Sevastopol and Poltava. In all these cases, local courts declared the charges groundless.

In particular, on 18 October 2004 in Chernihiv more than 20 students of local institutes were detained. Some of them, in contravention of current legislation, were not even charged. However some of them were told that they looked suspiciously like people who had, the day before, stolen a mobile phone, or to somebody who, a month earlier, had raped a person in a city park. They were soon released however in the evening of that same day, a third-year student of the Chernihiv State Pedagogical University, Oleksandr Kovalenko, was detained. He was accused of buying and selling counterfeit money, however as a result of pressure from civic organizations and the help of a lawyer, found for him by the Chernihiv Civic Committee for the Protection of Human Rights, the criminal case against him was dropped.

Later – at the end of October in Kyiv and other Ukrainian cities, there were searches on a huge scale of offices and private homes of civic activists who had organized or taken part in the organization of pickets, political rallies and demonstrations. In the course of these searches, the police found nothing illegal.

The Institute «Republic» considers such actions by law enforcement officers to be persecution and intimidation of those taking part in peaceful gatherings.

Applications from representatives of State executive bodies and bodies of local self-government to limit the right to peaceful assembly

While the number of cases where the right to peaceful assembly was infringed between October and December decreased, it should be noted that the heads of State executive bodies and bodies of local self-government continued to call for restrictions of this right and gave instructions to law enforcement bodies to use force to stop political rallies and demonstrations. However, in the vast majority of cases, law enforcement officers, the courts and subordinates of these officials did not follow their instructions.

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For example, on 5 November the Head of the Kyiv City State Administration, Oleksandr Omelchenko, told journalists that the local authorities would not allow an action under the banner: «The People shall not be overcome» on Independence Square. He also stressed, referring to the ruling of the Kyiv City Council № 317/418 from 24 червня 1999, that it was not permitted to hold mass actions (with the exception of general national holidays) on Kreshchatik (Street) and Independence Square.

Such applications contravene Article 39 of the Constitution of Ukraine which does not allow for restrictions, as regards place or time, on the right to free assembly, and, according to Article 92 of the Constitution, neither bodies of local self-government nor State executive bodies have the authority to establish any norms which impinge on human rights or limit these rights on their territory. In accordance with Article 39 of the Constitution of Ukraine, it is sufficient to merely inform local authorities of planned peaceful gatherings, and no permission as such is required.

In November 2004, a special session of the Odessa City Council adopted an appeal to the citizens of Odessa. Taking into account heightened tension around the social and political situation in Ukraine, bearing in mind the proposals of the Mayor of Odessa, Ruslan Bodelan and of different factions, the city council suggesting prohibiting the holding in the city of any political rallies, pickets or other actions which would not contribute to stabilizing the socio-economic situation, and to also ban any illegal bodies, committees or other formations (by this was meant civic coordination bodies which were taking charge of organizing and holding demonstrations).

Similar calls were heard from the Head of the Council of Ministers of the Autonomous Republic of the Crimea, Serhiy Kunitsyn. He suggested imposing a moratorium on all political actions in the region «aimed at politicizing the situation».

On 22 November 2004, a joint appeal from the General Prosecutor of Ukraine, the State Security Service of Ukraine, and the Ministry of Internal Affairs of Ukraine, was issued, in which these bodies called on Ukrainians to refrain from mass actions after the second round of Presidential elections. While we have nothing against calls from citizens to take part or not take part in various actions, we must nonetheless point out here we have an appeal from State executive bodies, the so called «enforcement bodies». Moreover, the tone of this appeal enables one to interpret it as a warning to citizens of Ukraine to refrain from exercising their constitutional right to peaceful assembly.

3. CONCLUSIONS AND RECOMMENDATIONS

Despite the lack of national legislation, courts do not in the main apply the practice of the European Court of Human Rights, but use instead norms established by unconstitutional rulings of local authorities. As a result of this, the majority of rulings of national courts, especially those of first instance, contravene Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Local authorities, law enforcement bodies and the overwhelming majority of courts interpret the time period for prior notification extremely broadly. Most of them think that this period should be no less than 10 days, as was used in the USSR. The Constitutional Court has stated that specific time periods should be defined by law, saying that: «These time periods must not limit the right of citizens as foreseen by Article 39 of the Constitution of Ukraine, but should serve as guarantee of this right and at the same time provide the possibility for the relevant State executive bodies and bodies of local self government to take measures to ensure that gatherings, political rallies, marches and demonstrations, held by citizens, pass without impediment, and to guarantee public order and the rights and freedoms of other people».

Clearly, a norm requiring organizers to warn the authorities of plans to hold public peaceful gatherings does not contravene European practice however it is obvious that such time periods must be reasonable and flexible. Experience shows that administrative and court practice often infringe these demands and impose unwarranted restrictions on people's rights. In the majority of court rulings restricting the right to peaceful assembly, the grounds for such restrictions were the submission by the organizers of mass events of notification outside the time limits determined by rulings of local councils.

In this way, the administrative practice as actually applied in Ukraine, prohibits the holding of spontaneous mass meetings, the relevance and need for which may disappear within a few days. This, in turn, does not comply with European human rights standards.

Courts of first instance, as a rule, satisfy the applications for State executive bodies to prohibit peaceful gatherings. Over the first nine months of 2004, courts of first instance (except for a few cases, for example, in Lutsk and Kirovohrad) satisfied the applications from local authorities to ban meetings. This,

among other factors, is explained by the dependence of these courts on the local authorities. One from October to December, during the pre-election campaign and the subsequent mass protests and to a large extent under the pressure of human rights organizations, did the practice of the courts begin to change. For example, the Shevchenkivsk District Court in Kyiv and the Kovpakivsky District Court in Sumy, which in the first half of the year had satisfied applications from local authorities to ban political meetings, in October rejected such applications. No court restrictions on the right to peaceful assembly were recorded in December.

Appeals against «automatic» rulings of courts of first instance take months to be considered, this making it impossible to effectively defend the infringed right and have it reinstated. Moreover, it is impossible to demand compensation for such rulings since unfounded rulings from courts of first instance are usually reversed by the appeal courts.

We would also mention the large number of court rulings prohibiting peaceful gatherings the day before they were due to take place, this eliminating the possibility of appealing such a ruling, and also resulting in the postponement of such actions which creates additional conflict.

The State, as represented by law enforcement bodies (the police) does not fulfil its positive obligations in accordance with Article 11 of the European Convention, in particular, as regards creating the conditions for holding peaceful gatherings and ensuring law and order. At the least, even theoretical, threat to public order the courts ban these actions, especially when a demonstration or other mass actions by the opposition are involved. Peaceful gatherings are always banned when two opposing political organizations intend to hold peaceful meetings in the same place and at the same time. This is often used by political opponents to disrupt a mass action by the other side. Such court and administrative practice does not comply with European standards, yet it can be observed in virtually all cases where peaceful meetings are banned throughout Ukraine.

One should also note that law enforcement bodies often use excessive force to disperse peaceful gatherings, and apply levels of suppression to peaceful individuals which are disproportionate to the threat presented.

In general, the authorities cannot establish a blanket ban on peaceful meetings in any places. However such bans may be imposed on a temporary basis in certain circumstances and on the basis of specific facts. This applies in particular to central districts of populated areas, since providing the possibility of holding public actions on the outskirts of a city, or beyond its territory, contradicts the very aim and essence of the right to peaceful gatherings. Administrative practice in Ukraine demonstrates that bodies of local self-government pass separate normative acts (which, incidentally, does not fall within their authority and contravenes the Constitution of Ukraine) which prohibit the holding of any public and peaceful mass actions in the centre of populated areas. They then provide places for holding political rallies and demonstrations on the outskirts of the city or in stadiums which contradicts the very essence of the right to peaceful gatherings.

Another widespread administrative tactic is for bodies of local self-government to accept notification of the planned holding of peaceful meetings on the basis of procedure for prior notification. There are no demands relating to this notification or the procedure for its submission in any normative legislative act, this creating grounds for frequent abuse by officials of State executive bodies.

In view of the above, it is necessary to introduce through legislation the legal means for protecting the rights of individuals to exercise their right to peaceful assembly.

4. RECOMMENDATIONS:

1. To draw up instructions for law enforcement bodies which regulate their behaviour during peaceful gatherings.

2. To carry out training of employees of special units and patrol units of law enforcement bodies 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. To translate into Ukrainian the rulings of the European Court of Human Rights on Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which concerns freedom of peaceful assembly, and to submit these translations to all local and appeal courts.

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5. Taking into account practice of the European Court of Human Rights, to 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 in court practice with regard to applications from executive bodies to ban peaceful gatherings.

6. It would be expedient for the Supreme Court of Ukraine to provide general principles for court rulings on limiting the right to peaceful meetings and demonstrations

7. To draw up a Draft law on holding peaceful gatherings, taking into consideration practice of the European Court of Human Rights, as well as positive practice of democratic countries, and to encourage its adoption by parliament.

8. Bodies of local self-government and State executive bodies should reverse their rulings as to approving the Regulation on procedure for running peaceful gatherings and using «small architectural forms», bring their rulings into compliance with the requirements of the Constitution of Ukraine and Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Prosecutor of Ukraine should appeal through court procedure such rulings of local authorities where the latter have failed to respond.

9. The Human Rights Ombudsperson should pay more attention to violations by local authorities and law enforcement bodies of the right to peaceful assembly.

10. Organizers of peaceful gatherings are advised to use court procedure to complaint against any rulings by courts of first instance on limiting the right to peaceful gatherings, and also against illegal actions of law enforcement bodies. The Institute «Republic» and the Ukrainian Helsinki Union on Human Rights consider such cases to be of priority in for providing legal assistance where such violations occur.

XI. FREEDOM OF ASSOCIATION²³⁵

The situation with regard to freedom of association did not change significantly in 2004. The registration of non-profit organizations became more complicated, and legal regulation in general still failed to comply with contemporary conditions and the requirements of civic society.

Ukrainian legislation allows for many types of organizations which can be categorized as non-governmental (NGO) and non-commercial (or non-profit-making, hereafter NPO): associations of individuals (political parties and civic organizations), youth and children's civic organizations, employers' organizations, trade unions, charitable organizations, religious organizations, creative unions, associations of businesses, and others.

Civic organizations can exist by creating a legal entity, or without such a legal entity, however they must give notification of their creation. Religious communities may exist even without such notification. All other non-commercial organizations may exist only in the form of legal entities. A shortcoming of legislation is the legally unclear status of an unregistered organization and the impossibility for them to defend their rights.

Most of these organizations may form associations of such organizations.

However Ukrainian legislation does not allow for the creation of organizations which unite both legal entities and individuals, as members of the organization (founders), and also associations of different types of non-governmental organizations. We consider such restrictions by the law to be unfounded.

NPO in legislation differ as to the purpose for which they are created, and also as to their procedure for formation. Each type of NPO has its own special aspects of legal regulation which are defined by a separate law in which the procedure is outlined for their founding, activities and liquidation.

Such a quantity of types of non-governmental organizations has little justification. This is confirmed also by the fact that, from the point of view of tax legislation, they are not differentiated at all. Nor are they differentiated in their essence, as forms of exercising freedom of association. The given unjustified division has survived from Soviet times and now presents serious obstacles for the development of NPO, by artificially limiting their legal capacity.

There is, therefore, a certain contradiction in legislation. Tax legislation identifies only two forms of organization: businesses and non-profit-making organizations. The status of a non-profit-making organization is obtained through separate procedure. We therefore have the situation where, for example, a civic organization or charity register, but are not given non-profit-making organization status. This means, that from the point of view of tax legislation, they are businesses. And such organizations can not be considered «non-commercial» (non-profit-making) organizations» in the full understanding of this term, since they can engage in commercial activity virtually without restrictions.

In accordance with Article 14 of the Law of Ukraine «On citizens' associations» «activity of citizens' associations, which are not legalized or which are forced to disband by court order, is illegal».

According to Article 186-5 of the Administrative Offences Code, «the management of citizens' associations, which have not been legalized according to legally prescribed procedure, or which have been refused legalization, or which have been forced to disband by court order, yet continue to engage in activity, as well as participation in such associations, shall be punishable by a fine from twenty five to one hundred and thirty minimum wages before tax (approximately 80 to 415 US dollars). Thus, the head of an «undesirable» organization could be fined 2,210 UH (an average salary for half a year) purely because the registering body has refused to register the organization on formal grounds. For comparison, the fine for engaging in business activity without registration is fixed by the same Code as 8 – 15 minimum wages before

²³⁵ Prepared by Volodymyr Yavorsky, Executive Director of the Ukrainian Helsinki Human Rights Union.. In the Chapter, some points from the expert report of Oleksandr Vynnykov «Analysis of the conformity of the Law of Ukraine «On citizens' associations» to the Convention on human rights and fundamental freedoms» are used.

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tax. Unfortunately, the law does not allow for automatic legalization of citizens' associations in cases where the registering body does not give notification of a motivated refusal to legalize the organization within the legally stipulated time period.

We are not aware of any examples where Article 186-5 of the Administrative Offences Code has been applied. However its application in the future could violate the right to freedom of association, since it effectively changes the right to establish an association into an obligation.

The founders (founder) of a charitable organization can be citizens of Ukraine, foreign nationals or stateless individuals, who are at least 18, but cannot be legal entities. Founders of civic organizations can be citizens of Ukraine, foreign nationals or stateless individuals, who are at least 18, or, in the case of youth or children's organizations – 15 years old. In order to establish a citizens' association, there must be an agreement between at least three people who fulfil the above-mentioned conditions.

Foreign nationals or stateless individuals may not form trade unions, but they can join them, if this is foreseen by the unions' charters. Such restrictions violate their rights: the basic function of trade unions is to protect the labour and social rights of employees, this effectively being denied «non-citizens». This concept is a relict from Soviet days, when trade unions were viewed as a political organization of the proletariat, and any aliens as potential threats to national security.

Religious organization may only be formed by citizens of Ukraine who are at least 18 years old, and where there are no less than 10 people. These restrictions regarding foreign nationals and stateless individuals also fail to comply with international standards.

Creative unions are established by groups of creative employees of the corresponding professional direction in the field of culture and the visual arts (national, where there are no less than 100 members, regional (local) – not less than 20) who can show completed and published works of culture or art, or their interpretations.

From this year, as a result of the new Civil Code of Ukraine coming into effect, it has become possible to establish institutions – non-commercial, non-profit-making organizations based on the allocation of property and which does not have to have their own members²³⁶. Until 1 January 2004, the establishment of such organizations was not possible.

The creation of a non-governmental organization by one or two individuals, or in accordance with a will and testament, are not allowed for by legislation.

NPOs gain the status of legal entity from the moment of their legalization. They then enjoy the same rights as any other legal entity.

Nonetheless, certain limitations in the legal powers of non-governmental organizations are foreseen by legislation. For example, citizens' associations may, according to the law, own exclusively that property which it uses for its activity as per its charter. We are, however, unaware of any cases when this provision has been applied. Considerable limitations are also applied by the legalizing body as regards the activities of a NPO.

For Ukrainian legislation, the purpose in creating a citizens' association or other NPO remains important, although neither in the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 11), nor in the Constitution, does the purpose in establishing the organization have any importance. The exception here would be the creation of political parties and trade unions.

The Law «On citizens' associations» directly contravenes Article 36 of the Constitution of Ukraine and Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in determining the purpose in creating a civic organization. We would note that the definition of a civic organization in Article 3, as an association of citizens to satisfy their legitimate social, economic, creative, age-related, national-cultural, sport or other common interests, is treated by the executive organs literally, that is, it is considered that civic organizations ***are created purely to protect their own rights and interests, or the rights and interests of their members***. It should be noted that political interests are not present in this list, that is, strictly speaking there are no legitimate grounds for the creation of civic-political NGOs, in particular, human rights organizations. Using this provision of the law, the Ministry of Justice of Ukraine and its local bodies refuse to register human rights organizations. There have been many reports of refusals to register on the grounds that the charter's goal did not comply with Article 3 of the Law. For example, in Kyiv activists submitted documents for registration of a Kyiv human rights group. However, the Kyiv City Department of the Ministry of Justice of Ukraine turned down the application for registra-

²³⁶ For more details, see Paragraph 3 of Article 83, Article 86, Paragraph 3 of Article 87, Paragraph 3 of Article 88, and Articles 101 – 103 of the Civil Code of Ukraine.

tion stating that the purpose in creating the organization (the protection of human rights and fundamental freedoms) ran counter to legislation. A similar reason was given for refusing to register the Kyiv organization «Helsinki – 90». The chances of a court appeal succeeding are, moreover, small: in its Letter № 01-8/319 from 6 July 2000, the Higher Appeal Court of Ukraine emphasized that «citizens' organizations are formed in order for its members (participants) to exercise their rights and freedoms on the basis of united interests and fulfilment of duties which reflect the main aim, task, directions, forms and methods of activity of the organizations». Thus it was precisely non-compliance with Article 3 and the above letter which the Luhansk Department of Justice used to justify their refusal to register amendments to the charter of the Luhansk NGO «Progress», which declared its main purpose to be «to carry out cultural and educational activity among children and young people, and to stimulate the creative activity of children and young people».

Limiting the purpose for establishing citizens' associations to satisfying their legal common interests does not comply with either the voluntary nature or the common exercising of the rights and freedoms of citizens in Article 1 of the Law «On citizens' associations», or «the voluntary forming of a group for a common purpose» in the interpretation of the European court of Human Rights²³⁷.

On the other hand, without provisions in the charter regarding the protection of the rights of others, the tax inspectorate can accuse the organization of activity which is not in its charter which could result in serious financial consequences.

Certainly, in such cases one can assert that it is specifically exercising my rights and interests to protect the rights of others. Nonetheless, it is obvious that the legislation needs to be amended.

The property of non-governmental organizations with non-profit-making status, on liquidation of the organization, may not be divided among its members, but must be used for carrying out the tasks of the charter or for charitable purposes.

Another specific feature of NPO is their registration in accordance with territorial status: local, national or international. Organizations do not have the right to expand their activity beyond the territory of activity defined in their charter. At the same time, the expansion or change in territorial activity of an NPO is directly related to the presence of centres of the organization in other (new) territorial and administrative units. No such limitations are imposed on businesses.

In Kyiv many civic organizations experienced real problems in connection with this after the redistribution of districts in the city. As a result of this, rulings of the City Council about changes in district boundaries meant that a lot of legal entities found themselves in different districts. Businesses in this case simply and swiftly re-registered themselves in the controlling bodies of other districts (the tax inspectorate, social security fund and pension fund). However, NPO could not do this. The problem was exacerbated by the fact that for civic organizations there is no procedure for re-registration as a result of change of location: for this it is necessary to introduce amendments to the charter which the territorial department of the Ministry of Justice of Ukraine then refuses to register because the registration of the organization at the new address makes it no longer within that department's territorial competence. Therefore, civic organizations, as a result of ill-planned legal regulation, were effectively advised to dissolve their organization in one district and register it in the other, albeit at the same address, with all the associated consequences (the cost of liquidation and registration of the organization, the time required for this, the termination of contracts, suspects of projects, dismissal of employees, and so forth). In such instances, the organizations needed to find an easier solution and change address in the same district wherever that were possible (for example, the district had not disappeared entirely). Such situations create clearly artificial and unwarranted difficulties in exercising the right to freedom of association. In this context, the regulation of Part 4, Article 9 of the Law «On citizens' associations», which guarantees the right of civic organizations to independently determine the territory of their activity is paramount to mockery.

The procedure for registration is very complicated in comparison with that for other legal entities (for example, businesses), where the length of time of registration is considerably less. The average time taken to register an NPO, depending on its type, is from one month (for a political party) to three months (for a religious organization), although in practice documents are repeatedly returned for reworking by the legalizing body, and such registration takes on average 4-8 months. For comparison, the registration of a business takes between 5 and 10 working days.

This year the procedure for registration became even more complicated due to the coming into force of the Law of Ukraine «On State registration of legal entities and individuals – businesspeople»²³⁸, which

²³⁷ ECHR, *Young, James and Webster v. the United Kingdom*, European Court of Human Rights, Series B, No. 39, p.47.

²³⁸ The Law came into force on 1 July, 2004

contains several regulations which lend themselves open to differing interpretations. In particular, according to this law, legalization of all citizens' associations and other NPO should be duplicated by registration with the State registrar of the city council executive committee.

The State Committee of Ukraine on Regulatory Policy and Business, in its letter № 7801 of 9 November 2004 explained that:

«After registration in these bodies (stipulated by the laws on NPOs), the above-mentioned subjects approach the state registrar in the executive committee of the city council of a city of regional significance or of a district or district state administration in Kyiv and Sebastopol depending on the location of the legal entity to record the fact of its formation and inclusion into the Single State Register of Legal Entities and Individuals – Businesspeople. A completed registration card (form № 6) is submitted at the same time, with the original of the certificate of State registration with the appropriate body and the identification code received from the statistics agency (if this is a newly formed association). On confirmation of inclusion in the Single State Register, the State registrar processes and issues a certificate of state registration of a legal entity of the stipulated form».

That is, it confirmed the fact of duplicated registration of NPOs.

The grounds for refusing to register an NPO are vague, leading to the need for interpretation of the legislation by the legalizing body and the consequent abuses. For example, registration of an NPO, regardless of the lack of amendments to legislation, is constantly being changed towards greater complexity. If documents submitted for the registration of an NPO run counter to any demands of legislation, the legalizing body turns down the application for registration. In this, clear grounds for refusal are not defined by the law, and they are also not usually explained in the response of the legalizing body, which limits itself to a general phrase about being in conflict with Ukrainian legislation. At best there is a reference to the articles of the law which the documents do not comply with, however in this all positive articles are listed and no specific shortcomings of the registration documents are indicated.

The Law on citizens' associations contains a list of permitted forms of activity. While it is very extensive, it is considered by executive bodies (the Ministry of Justice and the tax inspectorate) as being comprehensive, which in principle conforms to neither the spirit nor the letter of the law. The organizations may engage in other forms of activity only in cases where such rights are provided for by other laws. This at least is the position taken by the main legalizing body – the Ministry of Justice. Administrative practice does not allow non-profit-making organizations to engage in publishing activity, to provide partially paid social services or engage in any other activity which even theoretically could be aimed at making profit.

In addition, to engage in certain types of activity requiring a licence, an organization must declare itself an economic subject, which can lead to its losing its status as a non-profit-making organization. This does not apply to obtaining a licence for the carrying out of social services. This licence is compulsory for non-governmental organizations providing so-called «social services». At the same time, the term «social services» is defined in an extremely vague way, making it possible to use it about any activity by individuals. The introduction of licensing is a significant obstacle to the activities of such organizations.

Last year, parliament considered a Draft law on introducing amendments to the Law of Ukraine «On social services»²³⁹ which suggesting limiting the scope of this law, in particular, by giving it force only on measures financed by the State or local budgets. Only on October 21, 2004 was this law was passed in the first reading (as a basis).²⁴⁰

Another important drawback of Ukrainian legislation is the lack of any incentive to engage in charitable activity. For example, the system of State concessions is based on a wrong system in that certain types of organizations receive these concessions, effectively regardless of whether or not they engage in such activity. In this way, a charity, having received tax incentives (non-profit-making status), carry out a considerable range of activities which will bring profit and which may not be directed at carrying out charitable activities, whereas businesses, even when carrying out charitable actions, receive no tax incentives. It would therefore be expedient to restructure the system for tax incentives towards a situation where the incentives are provided exclusively because of the type of activity, and not because of the type classification of the organization. This would stimulate the development of charitable activity in the country, as well as the development of the activity of non-profit-making organizations.

²³⁹ The Draft law No. 5254 from 15 March on amendments to the Law of Ukraine «On social services» (regarding those involved in the services market) introduced by State Deputy A. Matviyenko. The Draft was given a positive assessment by parliamentary committees and expert departments of the Verkhovna Rada.

²⁴⁰ See also the human rights website RUPOR: <http://www.rupor.org/index.php?r=7>.

There is a worrying tendency to impose legislative limitations on the possibilities for non-commercial organizations to receive financing either from Ukrainian donors or from their own economic activity. when in the Law «On the State Budget of Ukraine for 2004», the State refused to stimulate donations to NPOs and deprived such NPOs of the option of earning money through their own activity. Such a position blocks the access of national investors to the public sector and forces Ukrainian NPOs to seek financing abroad to carry out their projects.

A Draft Law «On non-commercial organizations» is being prepared in parliament which unites and provides general regulation for all these types of organizations, and which in general meets European standards.

RECOMMENDATIONS:

1. To adopt a new law «On non-commercial organizations»²⁴¹, which defines clear and unified conditions for the creation or termination of activity of all types of NPO, including organizations, whose creation is not allowed for by Ukrainian legislations, and also for the obtaining by them of the appropriate tax incentives through gaining the status of a non-profit-making organization.

2. To simplify the procedure for registration of non-governmental organizations by creating one procedure for both NPO and businesses, and to abolish the double registration of NPO by two State executive bodies.

3. To abolish the territorial division of NPO activity and the restriction of their activity to the administrative-territorial unit they are registered in.

4. To abolish the practice of licensing social services which are provided by NPO, and not from State or local budgets.

5. To 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.

6. To eliminate the practice of limiting the sources of financing and suspending benefits to businesses which carry out charitable activity through the law of Ukraine on the State budget for each year.

7. To define in legislation the conditions for State purchase of social services and for the provision of State assistance to non-governmental non-profit-making organizations.

8. To remove Article 186-5 of the Administrative Offences Code which establishes liability for the activity of unregistered civic organizations.

9. To sign and ratify the Convention on recognizing the legal identity of international non-governmental organizations (ETS № 124) that came into force on January 1, 1991.

²⁴¹ Draft Law № 0961 from 14 May 2002 poky «On non-commercial organizations», tabled by State Deputies A.S. Matviyenko, H.O. Omelchenko and A.V. Yermak. The Draft Law was accepted on its first reading, however since June 2002, it has not been tabled in Parliament for its second reading.

XII. THE RIGHT TO FREEDOM OF MOVEMENT AND FREEDOM TO CHOOSE ONE'S PLACE OF RESIDENCE²⁴²

1. GENERAL OVERVIEW

During the Soviet period, there was a permission-based system of registration of citizens («propiska»), where the State executive bodies at their own discretion decided whether or not to allow a person to live permanently at any address.

On November 14, 2001 the Constitutional Court of Ukraine ruled that the permission-based procedure for the choice of a place of residence was in conflict with the Constitution of Ukraine. However this procedure basically continued in practice as a new procedure for registering citizens had not been adopted.

A new Law «On Freedom of Movement and Freedom to Choose Place of Residence in Ukraine» (hereafter «the Law») came into force on 1 January, 2004. It was only on 28 July that the Cabinet of Ministers approved new application forms and registration coupons, meaning that for half a year registration had been tacitly carried out largely according to the old procedure.

On 26 May 2004, the Ministry of Internal Affairs (MIA) in its Order № 571 «On the organization of registration and cancellation of registration» approved procedure for processing documents and control over the registration of where individuals are resident or staying in Ukraine. Later, following limits on the practice of using absent ballot papers, the Ministry of Internal Affairs was accused of having issued detachable passport enclosures in huge quantities to enable registration in another city and voting there. As a result of these activities of the MIA, the General Prosecutor issued a protest about this order, and the MIA temporarily suspended it.

The Law «On Freedom of Movement and Freedom to Choose Place of Residence in Ukraine» has many advantages in that it does abolish the permission-based system of registration of individuals, however it also establishes the opportunity for imposing strict control over the movement of people around the country. Thus we have a kind of «controlled» freedom, an incompatible product of a post-totalitarian state.

And as practice demonstrates, the Law has not liberated this procedure from the administrative bureaucratic self-will which to a large extent retains the permission-based elements in the system.

In implementing the ruling of the Constitutional Court of Ukraine, the Law replaces the «propiska» (permit) with place of residence registration using relatively simple procedure.

In order to register one's place of residence, the following documents should be submitted:

1) a written application; young people between 15 and 18 submit the application in person. If there are good reasons for a person not being able to apply to the authority in person, his/ her registration may be carried out on the application of another person acting on the basis of duly certified Power of Attorney;

2) passport documentation; where a person is under the age of 16, a birth certificate or certificate of citizenship of Ukraine shall be submitted. A foreign national or stateless person shall also submit his/ her certificate of permanent or temporary residence;

3) Receipt of payment of state duty or a document on state duty exemption;

4) Two copies of the previous registration cancellation slip.

The authorities are not allowed to demand any other documents, however in practice, they often do. In particular, it is logical for practical purposes to require the written consent of the owner of the residence where the given person is to be registered (a contract, application, etc). This is stated indirectly in the regulation on the application model, that the grounds for registration should be indicated, which, in turn of course, should be supported with documents.

²⁴² Prepared by Volodymyr Yavorsky, Executive Director of the Ukrainian Helsinki Human Rights Union.

Other logistical difficulties also arise, for example, with individuals who do not have documents. In order to receive documents, they need to apply to the relevant State executive body determined by their place of residence, yet in order to get an official place of residence, which requires documentary confirmation, they need to present their personal documents, and we have a vicious circle. There are certain ways around this however they are difficult, because they require proper legal aid. In such situations, one can apply to the court to establish the legal fact of residence at a particular place. Yet, again an individual without personal documents does not have the right to submit an application to the court, since the applicant is then not identified. However even this can be overcome in the same court process by establishing the individual's identity through court procedure. Then try to imagine that all of this procedure has to be coped with by a homeless person. It sounds absurd, yet at the same time it negates all hope of reinstating the rights of the homeless.

A Draft Law²⁴³ has been tabled in parliament by L. Chernovetsky, which is aimed at simplifying the registration procedure for individuals without documents. In particular, the State Deputy suggests that documents should be submitted according to where the person is staying. However, such a suggestion would be difficult to put into practice. This is due to the fact that the person still needs to prove the legality of his/her being in this place, and the necessary agreement, for example, on renting accommodation, cannot be drawn up without the person's ID.

The place of residence, according to the Law, is considered to be the place where the citizen has generally lived for more than 6 months. If someone lives in another place for more than 6 months, he/she needs to change the place of registration. On arriving at a new place of residence, one must register oneself within 10 days.

One can therefore state that the Law has conceptually changed the right to choose one's place of residence into an obligation to register, the non-compliance with which is punishable. Administrative responsibility in the form of a fine is established for living somewhere without registration. In accordance with the Law, the police can stop you on the street and check you, and if you are unable to prove that you have been in the different city less time than the Law dictates, you will be fined, and then try to establish your innocence in court.

The Law also introduces certain new concepts for Ukrainians: together with registration of one's permanent place of residence, registration has been introduced for staying at a place temporarily from one to six months. Such registration is carried out within 7 days of the date of arrival in this new place (a business trip, holiday, hospital stay, tourist trip and others, if they last for more than one month).

The law on freedom of movement is not particularly clear in outlining the obligation to register one's temporary address. In particular, the Law establishes that «individuals spending more than one month outside the boundaries of the administrative-territorial unit their residence is registered in, and who have unfulfilled property commitments imposed through administrative procedure or by court ruling, or who have been called to do military service, or who are taking part in a court process in any capacity are obliged to register their temporary address».

Registration is carried out by special State executive bodies dealing with registration within the system of the Ministry of Internal Affairs. However statements have already been made by executive bodies about passing these functions on to the Ministry of Justice of Ukraine, as the Council of Europe requires.

A significant shortcoming of legislation is the linking of the possibility of registration to the property (residence) of an individual which is extremely ill-considered in a country where a third of the population have very real housing problems. This means that these people will simply not be able to obtain registration, or will not obtain it at the address where they actually live. Moreover, individuals living in rented accommodation in the overwhelming majority of cases are also not registered at this place of residence. This is because it does not pay for either parties: the owner faces tax obligations, certain problems with the possibility of engaging in business activities, and potential problems if the need should arise to evict a tenant within any time period without providing the latter with alternative accommodation (which is in principle counter to the spirit of the Soviet housing code), while the tenant has no wish to pay extra because of the owner's tax bill, nor to have unnecessary problems with processing documents.

Other problem connected with this Law arises if you are living in State (municipal) accommodation or property belonging to a State department. You decide to visit your grandmother for the summer for two or three months, need to change your registration which, in accordance with legislation, automatically leads to your losing the said accommodation.

²⁴³ Draft Law on the introduction of amendments to the Law of Ukraine «On freedom of movement and freedom to choose one's place of residence» (№5357) by L. Chernovetskyj, passed in its first hearing, as a basis, by parliament on 11 January 2005.

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Then Article 7 of this law states that an individual's registration shall be cancelled as a result of a court ruling depriving the person of the right of ownership to the residence or the right to use it, although in no other article is registration linked in any way to housing and property rights.

Experts comment that this Law has also not defined in detail the transition from the «propiska» system to registration, which leads to negative social and economic consequences.

In particular, it declares, that the provision of rights cannot depend on one's place of residence, yet in practice all social, pension, medical and communal services are linked to the place of registration and no mechanism has been developed to change this.

In the administrative practice of State executive powers, one encounters cases where people's job applications are turned down due to lack of registration. This happens, for example, in the Ministry of Foreign Affairs which turns down candidates on the grounds that they are not registered in Kyiv. This is naturally done verbally to make it impossible to appeal such decisions.

Most experts also consider that registration at the same time of one's place of residence and the place where one is staying makes no sense. Such a provision effectively introduces double registration of individuals, which in turn limits the right of the individual to freedom of movement and free choice of place of residence.

To sum up, the new law which came into force last year makes life difficult for those who do not have documents, or their own home. It also clearly provides great scope for abuse, especially from the patrol service of the police. A significant number of associated problems remain unresolved, in particular, those connected with social services which are closely linked with registration.

Furthermore, an automated system has yet to be created in Ukraine for keeping records on registration which reflects negatively on the effectiveness of the actions of the authorities and the exercising of the rights of the individuals. For example, during the elections one problem was caused by the numerous mistakes in voter lists, when hundreds of citizens were put on the lists according to no longer current information about place of residence.

A negative aspect of administrative practice is the need to basically always carry one's passport or other ID. One's passport is needed for carrying out a lot of everyday activities, including gaining access to all buildings of State executive bodies.

It is also very common for law enforcement bodies to detain individuals purely because they do not have any identification with them. Legislation gives law enforcement officers the right to detain any person for several hours or even some days until they have ascertained the person's identity. This right is often taken advantage of by law enforcement officers who engage in blackmail, extortion of bribes or other misuse of their official position.

In order to travel abroad, all Ukrainian citizens must have a foreign passport²⁴⁴. As a general rule, it takes three months to get this passport, and involves a lot of bureaucratic red-tape. This length of time is a scarcely justified restriction on the right of a person to freedom of movement, including travel abroad. The cost, moreover, of the entire procedure (counting all fees for receiving all the documents which need to be submitted) is approximately 50 Euros, which is the equivalent to 1.3 of the minimal monthly wage. As a result, a large number of the poorer part of the population, in particular, the retired or disabled cannot get a passport, making it impossible to freely travel out of the country.

There are categories of people prohibited from going abroad for reasons of national security. They voluntarily sign an undertaking to not leave the country as a condition for receiving access to certain information containing State secrets. This practice arouses well-justified reservations, as it is not set out by law and it does not achieve the aim of protecting information given the existence of the Internet and other forms of information technology which lessen the significance of state borders. These restrictions are clearly a relic of the Soviet era and should be abolished.

2. THE RIGHT TO FREEDOM OF MOVEMENT DURING THE PRESIDENTIAL ELECTIONS

During the election campaign, law enforcement bodies, in particular patrol officers of the Ministry of Internal Affairs and of State Automobile Inspection (SAI) frequently created pretexts for obstructing peo-

²⁴⁴ In Ukraine, as in other post-Soviet countries, people have an «internal passport» and (perhaps) a «foreign» passport for travelling abroad (*translator's note*).

ple's movement, in order to limit their right to take part in civic public protest actions or meetings with representatives of the opposition. The traffic flow was restricted by simply blocking roads, frequently stopping and checking drivers of buses and cars with subsequent fines being imposed on fabricated grounds, or with the number plates of the vehicles being removed. As a result of such aggressive actions, drivers of public transport and buses refused to travel in the required direction.

Cases were also recorded of unwarranted refusals to sell people train tickets to Kyiv during the first days of the Orange Revolution. The trains were half empty while hundreds of people could not receive the capital.

The following examples of such violation of the right to freedom of movement were typical.

Back on 9 August 2004, students from Sumy set off on a march to Kyiv and were stopped and dispersed by special units of the MIA. The authorities and law enforcement officers claimed that the students did not have the right to cross the territory of the Romen district of the Sumy region in accordance with a ruling of the Romen City Council.²⁴⁵

In the evening of 15 October, four mini-vans carrying a large group of students planning to take part in the Student Viche in Kyiv, were not allowed to leave Odessa. The number plates were removed, and the drivers had their licences taken away. Similar pressure was imposed on all transport enterprises of the city. The same situation was seen in Mikolayiv and in Kherson.

In Mikolayiv, on 22 October, a large group of students planning to go to the capital to take part in the Student Viche encountered resistance from law enforcements bodies when trying to get on the train to Kyiv: they were searched, their documents were checked and many were detained.²⁴⁶

Presidential Candidate Viktor Yushchenko's headquarters informed, that the State authorities were preventing the participants of the action «The Power of the People against Falsifications» from getting to Kyiv. The head of the Kyiv headquarters, Yevhen Zhovtyak, told of police officers in the Kyiv region going around people's houses and threatening to take away their driving licenses. He also asserted that on 22 October, there had been an instruction to almost all vehicular transport companies in the Kyiv region to remove the number plates off all scheduled coaches and public transport minivans which were planning to go to the capital the next day. In Zgurtivka (in the Kyiv region) the police also went around houses and threatened, that if they did go to Kyiv on 23 October, their driving licenses would be taken away.

The head of the Chernihiv Yushchenko headquarters, Vladislav Atroshenko, said that on 23 October, all scheduled routes to Kyiv from the Chernihiv region had been cancelled.

Law enforcement bodies of the Cherkasy region blocked exits in order to stop the coaches of a delegation from Kamyanka leaving the city. As a result, city residents were forced to block the railway. It was only after this that the scheduled coaches were permitted to leave. There were also cases where number plates were removed under various pretexts from coaches leaving from other districts of the Cherkasy region for Kyiv. In Cherkasy, law enforcement officers refused to let a mini-van carrying journalists leave for Kyiv. As a result the journalists had to make their way in cars. The press-service of the Yushchenko headquarters informed that in Uman law enforcement officers had even resorted to puncturing the tyres of delegation coaches.

On 22 October at 22.00 the exits in all directions from Ivano-Frankivsk were blocked. The roads were obstructed by trucks with punctured tyres, simulating road accidents. The police present explained only that the drivers had supposedly gone off to look for a way of repairing the tyres. As a result, the roads were so blocked that only a car could get through, and then under the supervision of the police.

On 23 October, a delegation from Rivne was stopped by SAI officers on the 51st km of the Zhytomyr motorway. According to the press-service of the Yushchenko headquarters, while the inspection of documents was under way, the tyres of the coaches were punctured.²⁴⁷

In Ternopil on 23 October, the SAI stopped coaches as a result of which only forty people, instead of the original 200, were actually able to get to Kyiv, and those went to the capital by train. Four of the coaches were taken away by officers of the SAI the day before the planned departure for a motor inspection and were returned to the depot to fix minor faults. The coordinator of the youth coalition of «Our Ukraine», Igor Hirschak, is convinced that the SAI officers only looked for technical niggles in order to stop the students from leaving the city. Four of the best coaches had in fact been provided for the students'

²⁴⁵ see the website of Civic Radio in the Internet <http://www.radio.org.ua/reports> http://?eid=&id_num=20951

²⁴⁶ Information Agency Hot Line in the Internet <http://hotline.net.ua/content/view/2962/37>.

²⁴⁷ Internet-resource Ukrayinska Pravda (Ukrainian Truth) <http://www2.pravda.com.ua/archive/2004/october/23/2.shtml>.

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long journey, and these were already setting off on scheduled journeys the next morning without any objections from the SAI²⁴⁸

Similar obstacles were on a large scale against those trying to reach Kyiv between 21 and 23 November in order to take part in protest actions against the rigging of the election results from the second round.

The motor rally «Train of Friendship» was repeatedly blocked from 15 – 24 in Odessa, the Crimea and Donetsk.

None of the cases we are aware of was investigated by the law enforcement bodies and those responsible were therefore not found and brought to justice. At the same time, one should note that the absolute majority of these violations were carried out by law enforcement officers of the Ministry of Internal Affairs of Ukraine, not without the knowledge of its top officials, but rather on their orders.

RECOMMENDATIONS:

1. To bring to completion an automated record system of registration of citizens, using the best models using in other countries;
2. To guarantee protection of personal data related to registration and movement of individuals;
3. 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;
4. To conclude the process of reform of legislation as regards registration, taking into account positive international experience and the Law of Ukraine on freedom of movement and freedom to choose one's place of residence;
5. To abolish the practice of restricting travel abroad for people having access to state secrets;
6. To introduce amendments to legislation aimed at introducing procedure for guaranteeing the rights of the homeless and people without documents.

²⁴⁸ Студенти стали невізні // Газета «Аргумент», № 43 (154) / «Students under city arrest» // The newspaper «Argument», № 43 (154), 27 October 2004 (an approximate translation of the title since the word in the original refers to the Soviet reality of having no chance to travel. (translator's note)

XIII. PROBLEMS OF DISCRIMINATION AND INEQUALITY IN UKRAINE²⁴⁹

This section considers issues of discrimination and inequality in Ukraine on the grounds of race, colour, citizenship, ethnic origin and language. Discrimination on the grounds of religion and gender is considered in the sections devoted to freedom of religion and to women's rights.

1. A BRIEF SUMMARY OF THE PROBLEMS OF DISCRIMINATION AND INEQUALITY

The following problems, where discrimination and inequality can be an issue, are typical for Ukraine.

1. Equal rights of access to education

Inequality in enjoying the right to education is connected exclusively to family income and the ability to pay for education.

2. Non-discrimination in the school curriculum

- *the presentation of the role of minorities;*
- *the program for different subjects, in particular history.*

The totalitarian legacy makes itself felt in the humanities where the role of the national majority and the roles of national minorities and ethnic groups are involved.

3. Equal rights in employment, in particular:

- *access to the labour market;*
- *conditions of work;*
- *the possibility of access to all levels of employment;*
- *conditions of dismissal.*

This problem involves to a certain degree people once deported who have returned to Ukraine, as well as the members of some ethnic or national groups, for example, those originally from the Caucasus, from parts of Asia or of Africa, the Roma, etc.

4. Equal rights to ownership and housing conditions, especially:

- *compensation for lost property;*
- *access to former property (reinstatement of rights);*
- *access to and quality of temporary accommodation in the case of the loss of property, damage of property or occupation of property*
- *privatization of land*

This problem is, perhaps, most acute for members of the formerly deported peoples. It is worth noting that they are on an unequal position to descendants of those once deprived of their property as «kulaks»²⁵⁰, who, at least in theory, have the right to get their property back in accordance with the Law of Ukraine «On the rehabilitation of victims of political repression» «There are grounds for speaking about inequality in distributing land in the Crimea, where a large number of Crimean Tatars cannot participate in the process of privatization.

5. Equal access to social services

- *access to social welfare and care (including for mothers and children, pensions, etc);*

²⁴⁹ Prepared by Yevhen Zakharov, Head of the Ukrainian Helsinki Human Rights Union and Co-Chairman of the Kharkiv Human Rights Group

²⁵⁰ «Kulaks» were more prosperous peasants. In the first decades of Soviet rule, they were treated as class enemies (although their wealth as such was relative, and sometimes they were simply good farmers with a little bit more than average). They were either murdered, sent to the GULAG or deported in the late 1920s and 1930s. (*translator's note*)

- access to basic services such as water, electricity and plumbing;
- equal rights to social and communal services.
- quality of services and facilities

One of the consequences of the return of families of those formerly deported is lack of equality in living conditions and access to communal services. This problem also affects certain groups of those repressed on political grounds, but not rehabilitated. In particular, a large group of those convicted by Soviet courts before 1991 for refusing to do military service on religious grounds. These people do not receive compensation and benefits foreseen for those rehabilitated. The same applies to former soldiers in the Ukrainian Resistance Army (the UPA)²⁵¹ who have not to this day been rehabilitated.

6. Equality of access to economic projects, in particular, participation in development projects

This problem concerns weakened ethnic groups, who are unable to obtain the financial assistance for their social, national, cultural and other needs, as well as to the Crimean Tatars, who, on the contrary, present substantiated demands for the allocation of financing on a level which the State is unable to provide.

7. Equality in issues involving citizenship, in particular, conditions for obtaining it.

One of the five conditions for receiving Ukrainian citizenship, proof that the person is not a citizen of another country, is quite often simply impossible to satisfy because of the threat to a person's life if he or she returns for the documents required to the country where they previously lived, or because of prohibitive fees for renouncing one's previous citizenship.

Equality in exercising the right to return (linked with the reinstatement of citizenship and travel documents, security, housing, employment, access to social services, reconciliation)

This problem again concerns members of deported groups who have returned to their original home.

9. Equal treatment from law enforcement officers;

- freedom from intimidation and the use of physical force;
- treatment in the course of arrest;
- treatment while in custody.

The important problem in general of torture and cruel treatment of detainees is exacerbated when those involved are from the Caucasus, Asia, Africa or are members of certain ethnic groups such as the Roma.

10. Equal treatment in pre-trial detention centres and in penal institutions

- the conditions of imprisonment;
- treatment by the personnel in places of deprivation of liberty.

The staff of pre-trial detention centres and prisons are more brutal in their treatment of immigrants from the Caucasus, Asia, Africa or towards members of certain ethnic groups such as the Roma.

11. Equality in exercising the right to safety and personal security

- state protection against violence, harassment, intimidation
- freedom from arbitrary arrest and detention.

Immigrants from the Caucasus, Asia, Africa and members of certain ethnic groups such as the Roma are particularly vulnerable.

12. Equality in exercising the right to freely vote and to be elected, and the right to take part in the government or bodies of local self-government.

Representatives of the Crimean Tatars and some national minorities and ethnic groups complain that they do not have equal rights in this area, and demand the introduction of special quotas in the electoral system.

13. Equality in exercising the right to freedom of thought, conscience and religion

In different regions of Ukraine, different branches of the Orthodox and Greek Catholic Churches feel that they do not have equal rights. There is a lot of talk about discrimination; however the issue involved is more one of property than of freedom of conscience. There are some grounds for speaking of discrimination with regard to non-traditional religions, with this inequality varying from region to region.

15. Equality of national culture and languages

- the use of one's native language in public and private life;
- teaching one's own language

²⁵¹ The Ukrainian Resistance Army (UPA from the Ukrainian) was formed in 1942, mainly by Western Ukrainian nationalists. Its soldiers fought the Soviets, Nazis (and sometimes Poles) they saw as all being enemies. It went underground at the end of WWII, continuing to wage war against the Soviet powers until it was finally crushed in the 1950s. (*translator's note*)

- *studying in one's native language*
- *access to cultural values.*

This problem has the greatest resonance, and requires attention both at the ethno-political level and with amendments to legislation.

2. SPECIFIC FEATURES OF THE ETHNO-POLITICAL STATUS OF UKRAINE

The present ethnic and national structure of Ukrainian society according to the last census (2001) can be described as follows. The largest group is that of Ukrainians, the national majority with a population of 37.5 million. Russians form the largest minority with 8.3 million people. Eight national minorities have populations from 100 thousand to half a million: Byelorussians (275 000), Moldavians (258 600), Crimean Tatars (248 200), Bulgarians (204 600), Hungarians (156 600), Rumanians (151 000), Poles (144 100), Jews (103 600). Eight national minorities or ethnic groups have populations from 30 – 100 thousand. Armenians (99 900), Greeks (91 500), Tatars (73 300), the Roma (47 600), Azerbaijanis (45 200), Georgians (34 200), Germans (33 300), Gagauzy (31 900). Other ethnic groups are represented by less than 30 thousand people.

One should stress that the most characteristic tendency in Ukraine's ethnic and national development in the years since independence (1991) has been the decrease in the general population from 52 to 48.5 million, and the drop in numbers of a range of ethnic groups (among them Russians, Jews, Byelorussians, Poles) against a rise in the number of Ukrainians, Crimean Tatars, Armenians, Georgians and Azerbaijanis.

The main feature of settlement of ethnic groups is their dispersed nature. There are only a few regions with a strong presence of non-Ukrainian ethnic groups: Odessa, Kharkiv, Donetsk and Luhansk regions (where Russians comprise from 20 to 39 percent of the overall population); the Chernivetsky region with Rumanians and Moldavians (12.5% and 7.3%, respectively); the Transcarpathian region (where Hungarians make up 12,1% of the total population). In the Crimea, Crimean Tatars comprise 12 % of the population of the Peninsula; Bulgarians are concentrated in the Odessa region (where they make up more than 6% of the total population).

In these and other regions there are places with more concentrated settlements of Greeks, Gagauzy, Germans, Poles and the Roma.

It should be noted that the legal concept of national minorities given in Article 3 of the Law «On national minorities in Ukraine» is imperfect. It does not reflect the true ethnic situation in Ukraine, or the tendency which has prevailed since the Second World War of ethnic heterogeneity, which foresees possibilities of self-identification of ethnic groups. The Crimean Tatars, Gagauzy, Krymchaks and Karaims, whose ethnic origins were on the territory of modern Ukraine, cannot be classified as national minorities. These ethnic groups have no state formations outside Ukraine. In our opinion, considering the number of Crimean Tatars (there are around 260 thousand), their sense of self-identification and unity, as well as other features, they should be identified as a people. Karaims and Krymchaks have a special status, and could, we believe, be considered indigenous peoples.

On the whole, population size is not a leading parameter. The model «national majority – national minorities», typical for western countries, can be applied to Ukraine with significant reservations. It can apply to the western part of Ukraine, however the situation in other regions of the country is quite different. There one still feels the old vector of the national policy of the Communist Party of the Soviet Union with its pronounced Russian dominant, according to which the peoples of so-called «sovereign» republics were, in fact, national minorities, whose rights were, in practice, consistently ignored. The Ukrainian ethnic group, having been weakened by 350 years of «Russification», continues to feel itself a national minority, as it once was in the USSR. At the same time, Russians cannot reconcile themselves with the status of national minority and do not wish to adapt to new circumstances, particularly since in many regions of Ukraine, together with Russified Ukrainians, Jews, Bugarians, Byelorussians, Greeks, etc, they form a socially dominant component.

As a consequence of these specific features, one could expect violations of national rights in two directions: in Halychyna (Western Ukraine), there could be encroachments upon the rights of national minorities – Russians, Poles, Jews, etc (for example, when seeking employment), whereas in the East and South the

rights of the ethnic majority – Ukrainians – are infringed (the right to educate one's children in one's native language, to use the State language, etc). Thus, in order to maintain harmonious inter-ethnic peace, Ukrainian ethno-politics, legislation and administrative practice must stipulate the protection not only of the rights of national minorities and ethnic groups, but also of the weakened national majority. While the latter remains weakened, society will not be guaranteed from conflict.

The Ukrainian people have no other place, except Ukraine, where they can exercise their right to self-determination. The assertion that the national character of Ukrainian statehood automatically leads to the infringement of the rights of national minorities is the result of long standing anti-Ukrainian propaganda, on which it is quite inadmissible to build the future of Ukraine. On the contrary, the longer the Ukrainian people are denied the right to build their own State, the more acute will be the forms of their protest. For this reason, the rights of national minorities can be reliably protected only if they acknowledge the national character of the Ukrainian State. In their turn, radical Ukrainian political groups must realize that the rights of the Ukrainians cannot be defended through the violation of the rights of other nationalities.

A general principle of State ethno-politics, in our opinion, should be the guarantee for all inhabitants of Ukraine without exception of a certain level of enjoyment of civic, political, social, economic and cultural rights, together with a broad program to promote the development of the culture and language of those ethnic groups which were artificially weakened in the past (Ukrainians, Crimean Tatars and others), on the condition that such support does not impinge upon the rights of other ethnic groups.

3. THE STATUS OF FORMERLY DEPORTED PEOPLES

As mentioned above, members of different ethnic groups in Ukraine were affected by the deportations of the 1940s. The problems of deported peoples have specific regional and local features. The most likely to lead to conflict is that in the Crimea, and therefore we provide here a short analysis of the situation of formerly deported peoples in the Crimea. In addition, we briefly consider the situation with Krymchaks and Karaims who require urgent State assistance.

3.1. CRIMEAN TATARS

A major influence on the present position of the Crimean Tatars, who were deported en masse in 1944, has been the incomplete process of their return to their ethnic homeland – the Crimea. The return was impeded by the reaction of the regional authorities of the Crimea, by the absence of an effective state policy for the settlement of repatriates and by a deep economic crisis which lasted for 15 years (1987–2002). According to various estimates, the number of Crimean Tatars, who were living on the territory of the former Soviet Union and wished to return, was around 450-500 thousand, of whom only around 260 thousand have actually been able to return to the Crimea. This means that there are fairly large groups of Crimean Tatars who are forced to live separately from each other in different post-Soviet countries.

Social and humanitarian position

As of the end of 2002, of the number of Crimean Tatars who had returned to the Crimea, approximately 120 000 people, or about 30 000 families (out of 70 000), that is, 43% still did not have homes. Of 136 623 people of working age, 71 379 Crimean Tatars do not have jobs. The majority of Crimean Tatars returning move into 300 new settlements. The Tatar settlements are 75% supplied with electricity, 43% supplied with running water (via pipelines), and no more than 3% with gas. There is virtually no plumbing or heating, and only about 5% of the roads are sealed. There are no schools in these settlements or medical centres. The lack of basic living conditions has led to a dramatic decline in the state of health of the Crimean Tatars, and also to a rise in mortality among those who have returned.

For 45 years, the Crimean Tatars were deprived of the right and the opportunity to teach their children in their native language and to develop their native culture. In many cases the renaissance of the Tatars' self-identification comes with the beginning of repatriation. In order to open schools with lessons taught in the Tatar language, textbooks in the Tatar language (which had not been written for 50 years) need to be created and published, and teachers of the Tatar language need to be trained. At pre-

sent there are only 9 such schools in the Crimea. The level of Russification of the Crimean Tatars has reached critical proportions.

Only two newspapers are published in the Crimean Tatar language in the Crimea, they are issued once a week with small print runs. The total TV and radio broadcasting in the Tatar language constitutes only a few hours a week.

Legislative provisions of the repatriation process and restoration of the rights of the Crimean Tatars

This is one of the most immediate and, at the same time, unresolved aspects of the Crimean Tatar situation. Not a single law has yet been passed in Ukraine to regulate the legal procedures connected with the process of return of the Crimean Tatars and restoration of their rights. The lack of legislative base minimizes the effectiveness of the Ukrainian government's efforts to resolve practical issues related to settlement, and also creates additional problems in the economic, legal and political integration of the Crimean Tatars into Ukrainian society.

The most urgent issue remains that of representation of Crimean Tatars in the elective and executive bodies of the Autonomous Republic of the Crimea. The importance of resolving these problems for the Crimean Tatars is obvious since, during their enforced stay in the places they were deported to, the Crimea underwent fundamental demographic and ethnic transformations. The majority of non-Tatar inhabitants of the Crimea still hold anti-Tatar stereotypes. Consequently, a large number of questions related to their development, which are vital to them, are not supported by local executive bodies. During the formation of representative bodies of the Crimean Autonomous Republic, representatives of the Crimean Tatars have virtually no chance of being elected to these bodies under a normal system of elections, since the authorities settled the returning Crimean Tatars in such a way as to ensure that they would not form a majority in relation to the rest of the population in any region of the Crimea.

Any proposals from the Crimean Tatars aimed to creating legal mechanisms to ensure real representation of the Crimean Tatar people in the Crimean bodies of power, are boycotted by the ethnic majority. Accordingly, the deliberate policy of not admitting Crimean Tatars into the bodies governing the life of the autonomy is contributing to the self-isolation of the Crimean Tatars and leading to increasing estrangement among people and a tendency towards confrontation.

The lack of laws establishing the principles for the restoration of the rights of the Crimean Tatars creates new problems which could have been avoided. These problems arise in questions of citizenship, land reform, privatization of State property, the restoration of cultural values and in other spheres. This all takes place against the background of no legislative definition for the forms, mechanisms and time periods for compensation for the material damage inflicted both on the Crimean Tatar people as a whole, and on each deported person or his / her descendants. One need only mention that during the deportations from the Crimea, more than 80 thousand houses were illegally confiscated. A large number of these buildings are still standing however they were passed by the State to other individuals.

The attitude of the authorities to repatriation. Difficulties of dialogue

The communist political elite which ruled in the Crimea, actively exploiting the separatist mood of Russian settlers who had arrived on the peninsula in the post-war years, succeeded in persuading the central State authorities in Kyiv to provide the Crimean region with autonomous status. The new powers gained were actively used by the Crimean authorities to limit the possibilities with regard to political, socio-economic and cultural integration of those Crimean Tatars who were returning. Only after the position of the authorities of independent Ukraine in the Crimea strengthened (after 1994), did the number of openly anti-Tatar statements by the Crimean authorities decrease significantly.

Relations between the Crimean Tatars and the official State authorities at different stages of development of the independent Ukraine may be described as mixed. However the key element remained the wish of the State to encourage the return of the Crimean Tatars to their native lands and the practical actions by the government in providing assistance during the process of repatriation. The discussions about the legal status of the Crimean Tatars in Ukraine are quite another matter. In this question there is a fairly wide range of opinions amongst the Ukrainian political elite – from wanting total assimilation of those Crimean

Tatars who return, to supporting the idea of national-territorial status of Crimean autonomy within the Ukraine, as a form of self-determination of the Crimean Tatar people within Ukraine.

A narrowing of differences in seeking the best solution for all parties in such a many-sided issue as the return, settlement and restoration of the rights of an integrated people, has been hampered to this day by the unwillingness of State bodies to recognize de jure traditional elective national institutes of the Crimean Tatars: the Kurultay and Mejlis (formed by Kurultay) as bodies which can represent the interests of the Crimean Tatar people until such time as the State creates effective mechanisms for such relations which ensure the preservation and development of Tatar original culture, language, traditions and religion within the Ukrainian state.

It should be noted here that the most productive and consistent relations between State bodies and the Mejlis have been achieved by the President of Ukraine and structures connected to the Cabinet of Ministers. At the same time, representative bodies of the Crimean Autonomous Republic demonstrate an especially negative attitude to working together with Crimean Tatar national institutions. In the Verkhovna Rada of Ukraine there is openly expressed opposition to the restoration of the rights of the Crimean Tatars from certain left-wing factions, in particular, from the Communist Party of Ukraine. Right-wing and right-of-centre factions are in favour of seeking constructive dialogue with the Crimean Tatars

3.2. OTHER DEPORTED ETHNIC GROUPS OF THE CRIMEA: BULGARIANS, ARMENIANS, GREEKS, GERMANS

Like the Crimean Tatars, these ethnic groups were also deported en masse, in what was, effectively, a policy of ethnocide. In 1941, 51 thousand Crimean Germans were deported (in Ukraine as a whole there are around 450 thousand ethnic Germans), in the summer of 1994 – 38 thousand Bulgarians, Armenians and Greeks. According to official data, as of 1 January 2000, of those previously deported, 536 Germans, 1865 Greeks, 306 Bulgarians and 320 Armenians were now living in the Crimea. According to unofficial data (including information from civic organizations of these ethnic groups), about 12 thousand formerly deported Bulgarians, Germans, Greeks and Armenians live on the peninsula.

These ethnic groups suffer from many difficulties, which we have already mentioned in connection with the Crimean Tatars. Yet, there are essential differences. These ethnic groups never had such well-organized national movements as the Crimean Tatars during Soviet times. That is why, during the mass repatriation (late 80s – early 90s), they could not create sufficiently powerful civic organizations to defend their rights. Their organizations are of a purely cultural nature and they are entirely dependent on State institutions when it comes to resolving problems. The regional authorities have used this situation, cultivating their wary attitude to the Crimean Tatars, who take an active position in defending their own rights. The position of the authorities in constantly suggesting that Armenians, Bulgarians, Greeks and Germans show more loyalty fosters a psychological perception, and in some fields, actual inequality and discrimination in the relations between Crimean Tatars and other formerly deported Crimean ethnic groups.

3.3. KRYMCHAKS AND KARAIMS

There are approximately 1200 Karaims (800 out of them in the Crimea) and 550 Krymchaks in the Ukraine. Over the last 100 years, their numbers have decimated. These peoples, in terrible conditions, remain without any educational or cultural institutions, have almost lost their languages and are close to dying out as a people, yet they still preserve a sense of ethnic identity.

These peoples need extremely careful attention to their languages, cultural and religious establishments and values from both the State and from other ethnic communities. These groups are in such a critical position, where indifference also becomes a form of discrimination and permanent inequality, since they themselves already have no potential for ethnic renaissance.

Of particular urgency is the passing of special legislative acts aimed at preserving the dwindling numbers of these groups and their cultural heritage (for example, their architectural constructions). The issue of the national sanctuary of the Karaims – Chufut-Kale, needs to be resolved, as well as the Kenas (place of worship) in Simferopol and two Kenas on the territory of the Bakhchiserai reserve.

4. THE PROBLEM OF XENOPHOBIA IN UKRAINE

4.1. GENERAL COMMENTS

In our opinion, the level of xenophobia in Ukraine is no higher than in other post-totalitarian countries. It is, moreover, lower than in Russia, Rumania, Poland, Hungary and Slovakia. Nonetheless xenophobic incidents directed at Russians, Jews, Crimean Tatars, the Roma and immigrants from the Caucasus, Asia and Africa are fairly frequent. We have witnessed acts of vandalism against Russian and Jewish sacred places and symbols; sometimes these acts of vandalism are carried out against Ukrainian sacred places and symbols. In some publications we have met texts with clear xenophobic overtones. There are, in general, small groups of people (one could call them «professionals Ukrainians / Russians / Jews», or, using the term coined by the well-known Russian philosopher, Grigory Pomerants, «nationally concerned»), who insult one another on the pages of their own newspapers which are printed in very small numbers. As a rule, the exchange of offensive articles is accompanied by law suits defending honour and dignity. In our opinion, the courts deal with these claims adequately.

However, since the middle of 2002, the number of publications with xenophobic overtones has increased, and they have begun to be published in newspapers with big circulation. For example, on 15 November 2002 the newspaper «Silski visti» (with a circulation of around half a million) published an article by Professor Vasyl Yaremenko «The Myth about Ukrainian anti-Semitism». The author in particular writes: «The State and the public must regulate the mass infiltration of particularly dangerous Zionist elements into higher State executive bodies, the financial sphere and the mass media». The Anti-Fascist Committee of Ukraine responded by applying to the court to withdraw State registration of this newspaper. Court consideration of such cases usually takes a long time. On 28 January 2004 the newspaper «Silski visti» was closed down by the Shevchenkivsky District Court in Kyiv. On 26 November 2004, the Appeal Court in Kyiv reversed the ruling of the court of first instance as unfounded, and sent the case back for further consideration. This case, provocative in character, has brought about an increase in xenophobic tendencies in Ukrainian society (more details below).

Results of sociological research also suggest that the level of isolationism and xenophobia, beginning from 2002, has increased²⁵². Whereas from 1992 to 2001 there had been a gradual decrease in the average indicators for general national estrangement, in 2002 there was a sudden burst, a sharp increase in «the sense of estrangement» from practically all nationalities. The overall results of the research must be a matter for concern: as Natalya Panina writes, «in ten years of independence the relative percentage of psychologically open (inclined to national tolerance) people has decreased by more than 3.5 times; virtually half the population now consists of people with isolationist attitudes as far as inter-ethnic relations are concerned; particularly worrying is the rise in xenophobic attitudes: the number of people expounding these has quadrupled in the last ten years».

The reaction of State executive bodies to cases of xenophobia has, we believe, been too slack. This confirms the need to prepare and implement special measures aimed at preventing xenophobia; these measures must be planned taking into account specific regional and local features.

4.2. THE ROMA

According to the 1989 census, the number of Roma people comprised 47,900, with 12,131 living in Transcarpathia. However, the findings of special research carried out by the Uzhhorod Regional Council suggest that the number of Roma people in Transcarpathia is in excess of 20,000, that is, 1.6% of the population of the region. The results of the 2001 census were as follows: 47 600 indicated their Romani ethnic origin, 14,000 of whom lived in Transcarpathia. According to the data of the civic organization «The Romani Yag», the number of Roma people in Transcarpathia is over 40,000. In Odessa, there are more than 4,000 Roma people (according to the census of December 2001).

Attitudes within society to the Roma remain negative, and sociological surveys suggest that prejudice against the Roma is more widespread than against people from other national minorities. Studies into na-

²⁵² Nataliya Panina. A distance not overcome /Krytyka, No. 7-8, 2003. – p.17-20.

tional tolerance applying the Bogardus scale²⁵³, which were carried out several times during the 90s by the Institute of Sociology showed that the level of intolerance registered more than 5 on this scale. This suggests that in the mass perception, the Roma are not considered permanent residents of Ukraine. To characterize the attitude to the Roma, we could cite the following examples. On a television program «Seven days» (4 March 2001, 21.00 channel «UT-1») viewers were asked: «Do Ukrainian citizens want to see camps of beggars or gypsies on Kreshchatik Street?», on 5 March in the program «Accents», the TV presenter V. Lopicur named the activists from the tent camp on Kreshchatik «political gypsies». In an open letter to the president of the National Television and Broadcasting company of Ukraine, Vadim Dolganov, representatives of the Transcarpathian Roma voiced their protest against the «offensive use of the name of their ethnic minority» in programs of TV Channel One (UT-1), and demanded that the UT-1 journalists of «publicly apologize to the Roma community». Unfortunately, no apologies were heard.

The Roma experience the highest degree of intolerance and suffer greatly from social discrimination. The level of unemployment among the Roma is, on average, the highest, their living conditions are worse than those of other ethnic groups. They experience more difficulty with access to education, medical services and the judicial system. School attendance figures for Roma children remain low.

In Transcarpathia, where the number of Roma people is the largest, intolerance towards them is also very widespread. This attitude is one of the reasons why Roma people do not have work. Many of them live below the poverty line. According to the most recent sociological studies in Transcarpathia, 87.5% of Romani families had not been engaged in agricultural work in the last 9 years. 50% of family members had been unable to find other sources of income besides salary, and only 25% had small additional sources of income²⁵⁴.

The Roma discuss issues related to the right to own land. Among non-Roma, one of the most fixed stereotypes about the Roma is the notion that historically they have never worked on the land, and that they don't care whether they are allocated land. The results of research have shown that more than 62.5% of Romani people would like to own land and make a living from agriculture. It is to be regretted that during our visits to Roma camps (128 in the region) we found only a few Romani people who had been allocated their own land. This situation creates tension in the country given that several thousand Romani families will soon depend entirely on State social assistance and there is usually a large number of children in Romani families. The mistake of State policy is that it leaves a large part of the rural population (among them Roma) without any opportunity to earn their own living. During the first Czechoslovakian republic, the majority of Romani people owned land, had horses, cows and agricultural equipment. This gave them the opportunity to provide for their own families and not resort to begging as is extremely common now. In response to the question: «What were the main reasons for your migration from your city or region?» 75% of Romani people answered that they had lost any hope of living in normal conditions, while 12.5% said that the reason had been the impossibility of practising their traditional professions. 62.5% replied that they had never looked for work outside Ukraine, while 12.5% travel as migrant workers several times or once a year. The results of our research show that the Roma have suffered most from the economic crisis and that for them it is especially difficult to benefit from market reforms²⁵⁵.

The number of tuberculosis patients among the Roma in Transcarpathia is rising all the time. In one of the Uzhhorod camps, 25% of the 300 inhabitants have contracted tuberculosis. The regional Health Department has confirmed that 80% of the Romani children in Transcarpathia are ill with tuberculosis²⁵⁶.

Many cases have been recorded of violence, discrimination and bad treatment of Romani people. This also applies to officers of law enforcement bodies. The most blatant examples are given below:

1. On 28 October 2001, the European Roma Rights Center (ERRC) demanded that the Ukrainian authorities investigate the deaths of five members of a Romani family in Kriukov (district of Kremenchug, Poltava region). According to the ERRC, Major Ivanov of the Kriukov District Police Unit and two unidentified individuals had set fire to the home of Yuri Fedorchenko with seven family members inside. The five who died were aged from 3 to 25. Two members of the family survived. One of the survivors, 50-year-old Yuri Fedorchenko, claimed that Major Ivanov had set fire to the house because the family had refused to pay a bribe each month of 215 UH (approximately \$40) to ensure Ivanov's protection for drug dealing,

²⁵³ Emory S. Bogardus. «Measuring Social Distances». *Journal of Applied Sociology* (1925)

²⁵⁴ «Romani Yag», №3, 27 March 2002

²⁵⁵ Ibid

²⁵⁶ «Romani Yag», №10, 14 August, 2002.

which Fedorchenko's daughter had previously been involved in. The police detained two individuals and dismissed Major Ivanov, although no legal action was taken against him²⁵⁷.

2. To: The General Prosecutor of Ukraine,

S. Piskun

Cc: Ministry of Internal Affairs, Yu. Smirnov

On 6 July, 2002, Kalman Kalmanovych Buchko, a Roma, was beaten to death by a group of drunk adolescents in the Shakhtsky district of Uzhhorod. His mother's family has been left without their only breadwinner. The Uzhhorod police launched a criminal investigation and the case was returned to Uzhgorod where the Roma community expected an objective ruling. However, those detained were released from prison and the charges were dropped. Even the person who dealt the fatal blows to Kalman Buchko's head with a metal pipe and who has admitted his guilt was released and only told not to leave the country. In the past three months, the eight Ukrainians accused of Kalman Buchko's death have been freed. We, the leaders of the Roma organizations in Uzhhorod are disappointed that the Roma continue to be jailed for minor offences, whether collecting metal or stealing a chicken, crimes which do not endanger the lives of other Roma or non-Roma people. The young Ukrainian who committed the crime against Buchko used the fact that his father works in legal department of the local Transcarpathian State executive body and the law does not apply to him. It is difficult to understand how Ukraine can continue to claim that there is no discrimination against Romani people in this country. We demand that those who were involved in the death of Kalman Buchko be brought to justice no matter whose children they are. We await justice and objectivity in resolving this matter.

Yours sincerely,

Aladar Adam

President of the Association of Roma Community Organizations «Unity»

Aladar Pap, Head of the Roma Cultural-Educational Organization «Rom Som»

Josyp Adam, Head of the Roma Organization «Roma»

Omelian Pap, Head of the regional Roma Organization «Amaro Drom»²⁵⁸

3. On 8 September, 2002, a fight arose between local Romani and non-Romani youth in the village Petrovka near Odessa. It resulted in the death of a non-Romani boy. Romani people living in the village fled it, fearing violence. The village council declared that «people of Gypsy nationality» must leave the village. There was massive destruction to the Roma settlement in the village with non-Roma villagers burning 10 Roma buildings. Villagers who were interviewed on television claimed that the youths had been drawn into drug dealing by the gypsies. Villagers demanded that they be removed from the village. Five Roma youth gave themselves up to the police several weeks after the incident. Local authorities temporarily called in police teams to maintain the peace; however, there were no reports of subsequent violence²⁵⁹.

4. Letter to the editor of the «The Romani Yag» bulletin

Dear readers of «Romani Yag»,

It is very difficult for me to write this but I feel that it is my duty to describe the attitudes of policemen towards the Roma in the city of Brovary, Ukraine. On 26 December, 2002 police in Brovary decided to «hunt down the Gypsies».

The policemen walked the streets at night and asked dwellers where the Gypsies live and took all the men and some women of the gypsy community to the police station. By the end of the day there were more than 50 Gypsies in isolated cells.

What was their reason?

Three prisoners had escaped three days before and one was known to have some link with the gypsies. The police decided to detain the gypsy men to force the «baron» to «give up» the escaped prisoner.

Respected citizens, how long will our nation be the scapegoat for others? We are all citizens of Ukraine, and I stress «we» because the Romani Gypsies have lived in Ukraine for more than two centuries. Yet the attitudes towards them, as can be seen by what happened in Brovary, have not improved. It is painful to see that non-Romani Gypsies do not look at Romani Gypsies as human beings.

Is it so difficult for educated people living in the modern world to understand that the traditional gypsy way of life and the system of barons does not exist anymore? That every Gypsy family lives separately?

²⁵⁷ U.S. Department of State. Country Reports on Human Rights Practice – 2002

²⁵⁸ «Romani Yag», №14, 9 October, 2002

²⁵⁹ «Romani Yag», №15, 23 October, 2002

That Romani Gypsy children study alongside Ukrainian children in schools, that Gypsies work alongside Ukrainians in industry and business? Why should Romani Gypsies have to suffer this? JUST BECAUSE THEY ARE ROMANI GYPSIES?! It is unfortunate that many feel that the Roma are of a lower race.

Ludmila Kravchenko, Brovary, member of the Roma Youth organization «Terni Zor»²⁶⁰.

5. According to the Uzhhorod-based Romani organization «Romani Yag», on 17 December, 2002, following the killing of a non-Roma woman in the town of Mukachevo, the Transcarpathian region of Ukraine, the police used physical violence against some Roma who had been unlawfully detained for questioning. «Romani Yag» claims that, on the same day, Mukachevo police raided the town's Roma neighbourhood and, at approximately 5 o'clock in the evening, several Roma were forced into police cars and brought to the town police station. It is reported that many of those detained were lightly dressed, as they had not been given the opportunity to take warm clothes with them. Following their arrival at the police station, some of the Roma were kept in the yard and some in the corridors of the police building. It was minus 10 degrees Celsius. The Roma held in the yard were forced to stay there for three cold days, during which time they were brought inside intermittently for questioning. After three days, the group was finally allowed inside the building corridors. «Romani Yag» also informed the ERRC that most of the Roma, who were questioned, had various bodily injuries as a result of physical force applied by police officers. According to victims' testimonies, police officers beat them with sticks and fists. According to «Romani Yag», approximately fifty Roma were questioned in the course of the first day alone. The questioning lasted until December 26, 2002, when the Roma were released without any charges being laid.

«Romani Yag» stated that the perpetrator of the crime was subsequently identified and detained. However, the Mukachevo police never apologized to the Roma for the groundless and unlawful detentions, nor the physical beatings, nor have any disciplinary measures been taken against officers who abused their powers. On 28 December, 2002, «Romani Yag» sent a letter in connection with the events of 17-26 December, 2002, to the General Prosecutor, S. Piskun. On 28 February, 2003, «Romani Yag» received a response from the office of the Chief Prosecutor of Mukachevo in which the prosecutor informed «Romani Yag» that allegations of police abuse of their authority had been found to be unsubstantiated. Therefore, the prosecutor's office rejected the appeal to initiate criminal proceedings against police officers of the Mukachevo police department²⁶¹.

4.3. DISCRIMINATION OF IMMIGRANTS FROM THE CAUCASUS, ASIA AND AFRICA

We believe that the status of these groups must be considered in the context of racial discrimination. Members of these groups may not leave home without documents, or they risk being detained by police to establish their identity. The police have often detained people with a different colour skin to check their documents, whereas it is rare for them to check the documents of aliens of European descent. Although the authorities have disciplined representatives of the police who resorted to force, when these incidents have been brought to their attention, such behaviour remains widespread. Representatives of these groups are the first to be suspected when a crime is committed, they are treated more brutally by police officers and the staff of prison institutions. Reports of the US State Department on Human Rights in Ukraine for 2000, 2001, 2002 and 2003 have spoken of a rising number of complaints of racial discrimination against people of Asian or African origin. Reports of racially motivated incidents of violence against people of Asian or African origin, as well as against «individuals from the Caucasus» have also become more frequent. Representatives of these groups have complained that employees of the law enforcement agencies have consistently ignored, or sometimes even supported acts of violence against them.

Here are several examples.

1. On a clear April evening, two Iranians, Amir Kabini and Askhin were having a walk near the hostels of the medical university on Pekarska street. Both men are trained doctors. Amir, a cardiologist, is 36 years old. He came to Lviv three months ago to do post-graduate studies. Amir Kabini gave his account to the newspaper «Gazeta»: «It happened in the evening, about 7 p. m. Four thuggish types walked up to us and asked where I was from. Unfortunately, I don't know Ukrainian very well yet, so I couldn't understand what he was asking. But they immediately began attacking us.

²⁶⁰ «Romani Yag», №.21, 29 January, 2003

²⁶¹ «Roma Rights», No. 1-2, 2003, p. 130

Amir and Askhin tried to run, but the assailant quickly caught up with them. Both were beaten up. Amir's leg was broken in three places. Both men were robbed: Amir had his jacket, mobile telephone and a wallet with 200 UH taken, while 32-year-old Askhin lost 500 UH.

Amir Kabini is now lying in his room in the medical university hostel:

«I came here to study», he says, «and instead I am lying here. It is just awful what is going on here! I called the police and what? They came, wrote something for a long time, and I never saw them again».

Attacks on Arabs are not rare in Lviv. «Gazeta» has more than once written about similar incidents. It would seem that this is becoming usual in our city.

A friend of Amir Kabini's, 26-year-old gastroenterologist from Lebanon, Mohammed Nadjmeddin, was a victim of a racial attack in February 2004.

«Not far from the club «Liarka» several adolescents, who obviously saw themselves as militant skinheads, attacked me», – Mohammed told «Gazeta». «They yelled «Blacks, get out!».

As a result of this attack, the Lebanese doctor had serious concussion.

In a telephone conversation with a reporter from «Gazeta», the head of the Lviv City Department of the Ministry of Internal Affairs, Mikhailo Kurocha, stated that a criminal case had already been launched into the attack on Amir Kabini. However Mr Kurochka refused to provide more details, saying that he had insufficient information on the case²⁶².

2. In Donetsk, an unplanned funeral procession consisting of 40 foreign students walked along Illych Avenue from the medical university to Lenin Square. This was not only a funeral ritual, but also a protest action against the murder of Indian student Mohammed Ahmed Sartadji.

The 25-year-old fifth-year student from the Donetsk National Technical University was brutally murdered last Thursday in the village of Kommunarovka of the Starobeshevskiy district. The students carried banners with the words: «We want justice!», «Why are we discriminated against?», «Do you have the right to murder me?» and others were written in Hindi, Arabic, English and Russian.

According to information from the Press Secretary of the Prosecutor's Office of the Donetsk region, Irina Ankudinova, the body of the student was discovered in Kommunarovka on Thursday evening, in the well of a private home. The young man had suffered brain injuries, and his genitals had been removed. The young man from India lived in this village with a 20-year-old local resident. According to preliminary reports, on that day, they had been visiting friends at some kind of celebration. During the festivities, a row began between Mohammed and a 26-year-old local resident, and a fight took place. An hour later, Mohammed's body was found in the well. A suspect, accused of «murder with especial cruelty» has been arrested. The main versions of the criminal investigation are jealousy or revenge, but certainly not racism.

Representatives of the association of foreign students have met with Donetsk City authorities and agreed «after the holidays» to hold a joint meeting on «these and other similar cases»

Over the last few years, there have been three murders of Muslims. All victims were married to Ukrainian women. In the other two cases, the murderers have yet to be brought to justice²⁶³.

3. There was a similar case in Odessa. The «skinheads» allegedly not only killed a Sudanese student, but as in the Donetsk murder, cut off his genitals. The journalists, covering this, referred to the accounts of his companions – Arab students studying in higher institutes of this port city. A few days ago, the students held a protest action where they demanded that measures be taken against skinheads who had got out of control.

In the police public information department of the Odessa region, «Sevodnya» was informed that they had no information about a Sudanese student being murdered. The Sudanese embassy, situated in Moscow, gave the same answer. The person we spoke to did, it is true, mention that from time to time students from Ukraine complain to them about attacks by neo-Nazis. The Pro-Rector for International Links, Nikolai Aryaev, told «Sevodnya» that they had specially turned to serious law enforcement bodies in order to check the rumours about the murder of a student, but that nobody had confirmed the information. According to Aryaev, law enforcement officers had spoken to the students who had organized the protest action, had listened to their grievances, and promised to look into each incident mentioned.

Studies into the level of national tolerance using the Bogardus scale, which have been carried out several times since 1992 by the Institute of Sociology of the Ukrainian National Academy of Sciences, show

²⁶² «Lvivska gazeta», 16 April 2004

²⁶³ «Sevodnia», No. 95, 28 April 2004

that the level of intolerance towards these groups is over 5 on this scale. One can conclude from this that in the mass perception, these groups are not considered permanent residents of Ukraine.

It should be noted that, in some circumstances, law enforcement officials collect information about which ethnic group or group of immigrants a person belongs to. For example, they collect statistics on crimes committed by representatives of certain minorities. This data contains detailed statistics on criminal cases against Crimean Tatars, Roma people and immigrants from the Caucasus, Africa and Asia in different regions of the country. It would seem that this activity has no legal grounds and is not based on voluntary identification of individuals. The collection of personal information about whether a person belongs to certain nationalities, without his or her consent and in the absence of any legal guarantees, is a flagrant violation of the right to privacy which is guaranteed by the Constitution and by international standards.

4.4. JEWS

According to the census of 1989, there were 486 300 Jews in Ukraine. During the 90s, this figure decreased significantly; according to the last census, there are now 103 591.

There has been some conflict over the placing of crosses in Jewish cemeteries. Conflict over such crosses in Sambir (Lviv region) and Babi Yar (Kyiv) have still not been resolved. In 2000, the Jewish community of Sambir, with foreign assistance, began construction of a memorial park at the site of an old Jewish cemetery, which was the scene of Nazi atrocities. Ukrainians had erected crosses on the site to commemorate Christian victims of Nazi terror, who are buried in a mass grave at the site. While the organizers of the memorial were in support of honouring all groups who had suffered from Nazi violence in Sambir, they were against the use of Christian religious symbols on the grounds of the Jewish cemetery. At the same time, local nationalist groups remained opposed to the use of Jewish symbols and Hebrew in the memorial park. Jewish and Greek-Catholic leaders attempted to find a solution to this conflict. In spite of a proposal by the memorial's foreign sponsor to move the crosses to another site at his expense, local government leaders still had not resolved the conflict by the end of 2002.

Local officials in Volodymyr-Volynsky (Western Ukraine) continued to support the construction of an apartment building on the site of an old Jewish cemetery despite a court ruling on 17 December, 2002 to halt construction.

Traditional everyday anti-Semitism exists in Ukraine, as in many other countries, but its manifestations, in our opinion, are not as menacing, as some Jewish organizations assert. Some ultra-nationalist organizations and newspapers continue to publish and distribute anti-Semitic materials. Such material is brought here from Russia and distributed without license. The following examples should be noted.

1. In 2002, the Lviv newspaper «Idealist» (the publication of the Organization of Idealists of Ukraine) published the slogan «Let's adopt a law to deport the Jews from Ukraine!» Over many years, this newspaper had systematically printed anti-Semitic articles, such as «Jews are preparing our death!», «Jewish terror» and so on. In June 2002, «Idealist» printed a long list of Jews who, in the editors' opinion, should leave Ukraine. The list included the names of many Ukrainian politicians. Oleksandr Feldman, State Deputy and President of the Association of National-Cultural Unions of Ukraine, directed an appeal to the General Prosecutor to take appropriate measures. On 31 July, 2002, the Prosecutor's office of the Lviv region launched a criminal investigation under Article 295 of the Criminal Code (public calls to actions that pose a threat to public order, in particular, public calls to violent deportation of citizens). «Idealist» suspended its issue. However, the criminal investigation has still not ended, and new issues of the newspaper are printed from time to time.

2. Georgiy Shchokin, Rector of the reputable Interregional Academy of Human Resources Management (IAHRM), used the Academy journal «Personnel» to publish a large article «Zionism: the ideology of Untermenschen» devoted to criticism of Zionism. The author claimed that the Jews had provoked their own mass extermination by the German Nazis. The weekly «Capital news» responded to the flagrant intolerance with its articles «The new world according to Shchokin» and «Rector of the IAHRM steals from blind men». The authors attempted to start a criminal investigation under Article 161 of the Criminal Code, but the Prosecutor of the region refused to open a criminal case. Later the journal published a series of articles, with the aim, according to the authors, of academic discourse with Zionism. The Academy also put out a series of publications with similar content. Most experts deemed the anti-Zionist activity of IAHRM to be anti-Semitic. These assessments led to a number of defamation suits from IAHRM, with its representa-

tives inundating the court with claims in defence of honour, dignity and business reputation should their publications be considered anti-Semitic. Some of these claims, in particular, against the newspaper «Capital news» were satisfied by the court, some rejected.

The court process over the closure of the newspaper «Silski visti» led to a series of publications with attacks against Jews who had, supposedly, closed an opposition newspaper. The Ukrainian public actively discussed various versions and the justice of the court ruling. These discussions still continue. In general, one can say that thus far the inflammatory judgments have not achieved their purpose and have not led to open anti-Semitic actions, although the number of anti-Semitic publications did increase significantly in 2004.

On the other hand, according to information from the Institute of Judaic Studies, the number of publications condemning anti-Semitism has also risen sharply. Publications with various political leanings speak out against anti-Semitism; the number of fundamental articles (by political figures and academics) has also grown. Individuals expressing anti-Semitic views in public, are increasingly made to face criminal, civil or administrative responsibility. For example, the Ministry of Information Policy sent a letter to the Editorial Board of the newspaper «For a free Ukraine», demanding that they cease publishing anti-Semitic articles. The Kyiv State Administration dismissed the Chief Editor of the newspaper «Capital» after the appearance of several anti-Semitic publications. The Kyivsky District Court in Kharkiv satisfied a defamation suit defending honor and dignity in connection with an anti-Semitic articles in the newspaper «Zhuravlik», etc. The leaders of Jewish communities welcomed changes in the editorial boards of «Vechirny Kyiv» and «For a free Ukraine». Under the new editors, these newspapers which had once been among the chief sources of offensive anti-Semitic articles ceased such activity. Although acts of anti-Semitic violence were rare, the attack by youths after a football match on the Great Synagogue in Kyiv in April 2002 was of concern to the Jewish community. However, there were no other attacks on synagogues during the year, and therefore the majority of experts believe that the April incident was not motivated by anti-Semitism.

In 2003, two cases involving violence on anti-Semitic grounds, both in Kyiv, were recorded. On 30 July, a young boy, Anton Miromanov, who was wearing a T-shirt with words in Hebrew, was beaten up on the street, while near the Central Synagogue on 28 August one of the synagogue's rabbis, Uri Feinstein, was severely beaten.

During the election campaign, representatives from Yanukovich' team attempted to accuse Yushchenko supporters of anti-Semitism. There were some grounds for this. For example, opposition forces were uncompromising in opposing the closure of the newspaper «Silski visti», failing to even condemn the paper for printing anti-Semitic material. A member of the faction «Our Ukraine», Oleh Tyahnybok, delivering a speech on Yavorina Mount in the Dolynskiy district of the Ivano-Frankivsk region, called on people to fight Russian and Jewish mafias. After this incident, «Our Ukraine» expelled Tyahnybok from their faction. The State Committee on Nationalities and Migration asked the General Prosecutor to provide a legal assessment of Tyahnybok's speech. On 30 July, the prosecutor's office of the Ivano-Frankivsk region launched a criminal case under Part 1 of Article 161 of the Criminal Code. Tyahnybok appealed the decision of the prosecutor to start a criminal case in the city court, however on 28 September the Ivano-Frankivsk court rejected his appeal. However, the appeal court then satisfied it and reversed the decision to begin a criminal case, as a result of which the regional prosecutor closed the case. In our opinion, this was caused by a vague definition of the crime in Article 161 of the Criminal Code.

Jews are widely represented in the political, business and cultural elite of Ukraine. They, perhaps better than all other national minorities, have managed to use the new opportunities which have appeared in today's Ukraine. There are a large number of Jewish educational and cultural establishments, schools, theatres, publications, etc. Thus, there are no grounds to talk of discrimination of Jews, but it is desirable to further monitor anti-Semitic publications and other anti-Semitic actions.

5. LANGUAGE PROBLEM. UKRAINIAN AND RUSSIAN LANGUAGES IN UKRAINE

5.1. GENERAL COMMENTS

The legal framework regulating the co-existence of different languages, the use of languages in education, science and other spheres of public life, is the point at which ethnic and language-related problems

and contradictions meet. The most heated discussions and political speculations arise specifically around language issues. A well-planned State policy in resolving these issues is the guarantee for avoiding discrimination and conflict. This is why it is so important to analyze the problems, taking into consideration specific regional and local features.

It is important to remember that in Ukraine linguistic and ethnic groups do not coincide. For a large percentage of ethnic Ukrainians, Russian is their native language. Some of them do not feel or consider themselves to be Ukrainians. A survey by the International Institute of Sociology showed that only 58.8% of the 72.6% who are ethnic Ukrainians think of themselves as Ukrainians, whereas 10.8% of ethnic Russians (20.1% of the whole population) consider themselves to be Ukrainians. Thus, every fifth Ukrainian and every second Russian see themselves as having dual nationality. 41.6% named Ukrainian as their native language. Russian is the native tongue of 43.4%. The others replied that they were bilingual.

We believe that these statistics are convincing evidence that the exchange of information is carried out in two languages – Ukrainian and Russian. It is desirable to support both languages, while at the same time introducing special measures for supporting Ukrainian as the State language. Any statements about the existence of discrimination against the Russian language, in our opinion, are incorrect. 2,106,000 school students or 31.7% of all children study in Russian-speaking schools; 280,000 children attend Russian-speaking groups of 17,600 kindergartens; 35% of all students at higher institutes study in Russian. In Ukraine there are 14 State Russian-speaking theatres, 440 million titles, or 55% of the entire library fund is comprised of publications in the Russian language, 90 of new publications are in Russian, Russian language newspapers comprise 49.7% (1,195 newspapers) of the overall number of such publications.

At the same time, one can observe harmful administrative practice which is a legacy of the Soviet administrative system, where, for example, officials forcibly introduce higher education in Ukrainian despite a lack of lecturers able to teach in Ukrainian, of textbooks and of students who wish to study in Ukrainian. Nonetheless, they take a decision according to which teachers may only receive the highest qualification categories if they speak Ukrainian. The requirement to hold entrance exams to universities and institutes exclusively in Ukrainian also seems to us inadequate, since many of those applying do not know Ukrainian sufficiently well. In this way, they find themselves at a disadvantage to Ukrainian-speaking applicants. An opposite, yet similar, situation was seen in Soviet times when young people from Ukrainian villages could not get into higher education institutes because they did not know Russian well. This leads to fears regarding enforced «Ukrainianization» are fuelled by the impatient moves of Ukrainian-speaking Ukrainians and the incompetence of executive bodies. However, this «enforced Ukrainianization» is fairly often used by certain political groups for campaigning aimed at returning Ukraine to a new empire. These two phenomena should not be confused.

Encouraging each Ukrainian citizen to master, within a reasonable time, the Ukrainian language is acceptable and does not contradict international human rights standards. A knowledge of Ukrainian is compulsory for civil servants. Any persecution for using the Ukrainian language or for campaigning to change over entirely to this language is not to be tolerated. One must ensure at the same time that no persecution is allowed for using the Russian language. Any forcible restriction of information flow in Russian must be prohibited, as well as any discrimination when employing people on the grounds of ethnic origin.

It should be stressed that the Government is responsible for creating opportunities and means for efficient teaching and learning of the Ukrainian language. The organization of courses, training of teachers, the creation of modern attractive textbooks and manuals must precede penalties for insufficient knowledge of the Ukrainian language by civil servants, teachers of higher educational institutions, etc.

At the same time, we cannot support demands to declare Russian a State language of Ukraine. This demand only appears democratic. It is quite possible to grant several languages State language status provided that the starting conditions are equal. Bearing in mind, however, that, as the consequence of prolonged Russification, the Russian and Ukrainian languages are not starting out equal, applying the principle of free competition here would inevitably lead to a strengthening of the position of the Russian language. Furthermore, making Russian a State language would «set in stone» the spheres of influence of each language. In conditions where people behave according to totalitarian stereotypes, this division could lead to the languages being opposed, and establish great barriers between the territories where they are used, and thus create a basis for the disintegration of the Ukrainian state.

We reject the division of languages into «of future significance» and «of no future significance» regarding each language as an invaluable creation of humanity. For this reason State protection for the his-

torically weaker Ukrainian language is not only justified, but also necessary. It is also vital to support the free functioning of other languages which suffered from the pressure of Russification.

State policy regarding languages must, therefore, avoid extremes. On the one hand, the State should not give encouragement to citizens who do not recognize the need to study Ukrainian and who declare that any step in this direction is enforced Ukrainianization. On the other hand, it would be inadmissible to ignore the wishes of Russian-speaking citizens of Ukraine or to use coercive measures to force the use of the Ukrainian language. It is necessary to ensure the gradual inculcation of the Ukrainian language in all spheres of our life, taking into consideration the inertia of language processes.

Unfortunately, political speculations around the language issue often prevail over common sense and lead to bad decisions. Some examples are considered below.

5.2. THE RULING OF THE CONSTITUTIONAL COURT ON THE OFFICIAL INTERPRETATION OF ARTICLE 10 OF THE CONSTITUTION

In our opinion, the Ruling of the Constitutional Court on the official interpretation of Article 10 of the Constitution, made on December 14, 1999, is unsatisfactory and even harmful. It has not put an end to political speculations in the language sphere, but has instead fuelled them. The following give the main results of an expert analysis of this Ruling²⁶⁴.

1. In Paragraph 1 of the resolution part of the Ruling of the Constitutional Court of Ukraine, an interpretation of Part 1 of Article 10 of the Constitution of Ukraine is presented, that is, of the following norm: «The state language of Ukraine is the Ukrainian language». Interpreting this norm, the Constitutional Court concluded that «the Ukrainian language as the State language is the compulsory means of communication on the entire territory of Ukraine for State executive bodies and bodies of local self-government when carrying out their duties.

This thesis raises objections since the Ruling of the Constitutional Court is groundlessly imposing the use of the State language on bodies of local self-government which are not a part of the State machinery. Local self-government and its bodies are public, not state institutions.

In accordance with Article 2 of the World Declaration on Local Self-Government (adopted by the World Association of local self-government on 26 September 1985 in Rio de Janeiro), «local self-government denotes the power and duty of local authorities to regulate and manage public affairs under their own responsibility and in the interests of the population».

The European Charter of Local Self-Government of 15 October 1985 (Preamble) states that bodies of local self-government also have the right to participate in the administration of State matters. Article 3 of the Charter stresses that such participation must be undertaken in the interests of the local population. It is clear that any other activity would cancel the sense and function of the local self-government.

It should be noted that the Constitution of Ukraine also treats local self-government as «the bodies of self-organization of the population», whose aim is «to independently resolve issues of local character» (Parts 1 and 6 of Article 140). With regard to the connection between local self-government and the State, Part 3 of Article 143 of the Constitution of Ukraine states that «Certain powers of bodies of executive power may be assigned by law to bodies of local self-government». The Constitution stipulates that bodies of local self-government are under the control of the respective bodies of executive power only on issues of their exercise of powers of bodies of executive power (Part 4, Article 143).

This makes it possible to conclude that the political and legal logic underpinning the existence and functioning of bodies of local self-government, confirmed in international legal documents and adopted by the Constitution of Ukraine does not allow for the said bodies to be treated as State or quasi-State bodies. On the contrary, such bodies have the status of public institutions which in certain instances and on the basis of the law may take part in the administration of State affairs. As is affirmed in Article 38 of the Constitution of Ukraine, the right to participate in the administration of State affairs is also enjoyed by all citizens of Ukraine. However this right does not automatically carry with it the obligation to use the State language. A similar obligation for bodies of local self-government can also not be extrapolated from the given right.

²⁶⁴ Section 5.2 was prepared by the expert on Constitutional Law of the Kharkiv Human Rights Group, Vsevolod Rechytsky.

There can be no doubt that in delegating the implementation of certain State executive powers to bodies of local self-government, the law, based on the Constitutional norm, presumes that such delegation can only be meaningful where the given powers are carried out under local conditions, including the local language and other specific local features. Yet, in the interpretation of the resolution part of the Ruling of the Constitutional Court, it is de facto assumed that the bodies of local self-government should «fit in» with State decisions. This attitude ignores and even overturns the understanding of the mission of bodies of local self-government accepted in the democratic community. Basically, one senses the conviction here of Ukrainian constitutional judges that «the first priority is the State and its rights», and not the belief fundamental for a judge in a law-based and democratic state that «the first priority is the individual and his or her rights».

Part 2 of Article 3 of the Constitution of Ukraine stipulates that «Human rights and freedoms and their guarantees determine the essence and orientation of the activity of the State».. The right to use the language in which one can express oneself most fully and comfortably is a self-evident, basic human right (the list of human rights in the Ukrainian Constitution is not exhaustive). It is natural that this right should be preserved also at the level of local self-government. A law-based and democratic state is not the master, but the servant of the people. It is therefore impossible to accept arguments which force the master to communicate in the language of their own servant.

As to the language in which the state machinery functions, this must naturally be the state language, i.e. Ukrainian. After all, the majority of Ukrainian citizens speak this language. By acceding to the majority, the State, at the same time, fulfils a function of social conciliation, since, in the opposite case, its language policy would generate much more conflict than follows from the actual ethnic situation.

It should be noticed that the use of the term «communication» in Paragraph 1 of the resolution part of the Ruling of the Constitutional Court is unfortunate. This term has no distinct legal meaning (the Constitutional Court also fails to provide an exhaustive list of its uses). In its everyday meaning, this word encompasses a vast range of forms of communication in the workplace (telephone conversations, a talk in a restaurant during the lunch break, in the halls of ministries and departments, in smoking rooms, etc.). It is obvious that forcing civil servants to «communicate» in the state language, the Constitutional Court has attempted to regulate what cannot, by its nature, be regulated.

As for the statement of the Constitutional Court that «the Ukrainian language as the State language is the compulsory means of communication... in other public spheres of social life also», one may agree with the critical comments made in «Dissenting view» by Judge O.M. Mironenko. If the expression «public spheres of social life» is a tautology, then the Ruling of the Constitutional Court does indeed intrude into the sphere of private communication of civic society and is therefore unlawful (in a democratic and law-based state). If, however, one assumes that the Constitutional Court considers this sphere of communication to also constitute State communication, then it is not clear why they need to write twice (in paragraphs 1 and 2 of item 1 of the resolution part of the Ruling) about one and the same thing.

A closer analysis of the Ruling of the Constitutional Court shows, however, that in fact its authors were attempting to broaden the duty to use the State language to «near-State», or «quasi-State» spheres. Not being clear in their understanding of the latter, the Constitutional Court simplified their task by stating that «public spheres of social life» should be defined in law. As a result, the Constitutional Court did not clarify, but rather complicated the legal situation. In its Ruling, in addition to State and non-State spheres of social life, there are glimmerings of another half-State or «public-social» sphere.

2. If one analyzes the text of Paragraph 2 of the resolution part of the Ruling of the Constitutional Court, its legal and political logic clearly follow from the logic of Paragraph 1 of the same Ruling.

Although here the issue is that of the use of the State language in the field of education, the Constitutional Court has here also unjustifiably failed to distinguish between State and non-State (public) realms. Thus, the Constitutional Court has decided that public educational institutions at all levels must follow the same rules regarding language as in state institutions. Yet, Part 1 Article 143 of the Constitution of Ukraine states that public property is administrated exclusively by the bodies of local self-government. It is precisely these bodies that, on the basis of constitutional and other legal norms, create, reorganize and liquidate public enterprises, organisations and institutions, and it is they who have the right to exercise control over their activity.

To put it simply, public educational institutions are public (and not state-owned) specifically because their work should reflect local and not general (State) cultural interests. One hardly needs to prove that local interest in the field of education is most often defined by the language of teaching and studying. After

all, it is primarily in this area that the local specific features appear, and it is this which prompted the regulation about local control over the property that is in public ownership.

To sum up, the Constitutional Court in its Ruling, running counter to the spirit and the letter of the Constitution, attempted a form of norm-creating expansion into the so-called «culturally sensitive zones» (D. Easton) of Ukrainian society. It has thus intruded into the spheres of the life of a civic society which are not subject to State regulation. Of course, the actions of the Constitutional Court can not only be explained by the legal positivism of which O. M. Mironenko accuses his colleagues. Another reason is that in the consciousness even of Constitutional judges, the assumption prevails, now as earlier, that the interests of the State dominate over those of the individual (person and citizen).

Certainly, the circumstances, under which the Ukrainian Constitution was created and adopted, made contradiction inevitable. We have Part 1 of Article 3 of the Constitution of Ukraine which proclaims the individual as the highest social value, and then Part 1 of Article 3 of the Constitution where the State «promotes the consolidation and development of the Ukrainian nation». It is natural that this bipolarity could not but be reflected in the Ruling under scrutiny. This manifested itself both in its governing ideas, and at a legal technical level. However, it is precisely because the Ruling is legally contradictory, that it can be considered relatively «harmless». Whereas the first paragraph of point 1 of the resolution part of the Ruling is full of the idea of language consolidation, the second paragraph of the same Ruling significantly narrows the prospect for State one-language monopoly. After all, bodies of local self-government are permitted to make exceptions to the rule.

A similar situation is presented in Part 2 of the resolution section of the Ruling. Here the second paragraph of Part 2 allows the interested parties to ignore the demands of the first paragraph. On the one hand, the State language is declared to be the language of education, while on the other, it follows from the Ruling that it is possible to be educated in the languages of the national minorities.

All that remains is to highlight the general trend. It is certainly worth recognizing that the trend towards «nationalization» of culture in the given Ruling of the Constitutional Court of Ukraine prevails over the trend towards defence of culture from the need «to kiss the metallic cold of the State» (Simone Weill). An implicitly expressed idea of the cultural submission of the non-Ukrainian minority to the Ukrainian majority prevails in the Ruling. As the intellectual product of a people now denigrated, but once great, it is understandable, but it would be difficult to call it liberal. Our society, the Constitutional Court and our Constitution continue to balance on a thin edge between the past and the future, and with each day this equilibrium looks less and less justified.

5.3. RATIFICATION OF THE EUROPEAN CHARTER FOR REGIONAL LANGUAGES AND LINGUISTIC MINORITIES

A glaring example of political gambling in the language sphere can be seen in the saga with ratification by Ukraine of the European Charter for Regional Languages and Linguistic Minorities. The Charter was signed on 2 May, 1996 and ratified by the Parliament on 24 December, 1999. The law on ratification was signed by the Chairman of Verkhovna Rada of Ukraine and published. The ratification documents were about to be sent to the Council of Europe.

Then, 54 State Deputies lodged a constitutional appeal to the Constitutional Court of Ukraine claiming that the Law of Ukraine «On the ratification of the European Charter for Regional Languages and Linguistic Minorities» did not comply with Articles 89, 93 and 94 of the Constitution of Ukraine. What was involved were infringements of the constitutional procedure for submitting, reviewing and adopting a Draft law, and the coming into force of the Law. The Deputies claimed that: the right to legislative initiative of the President of Ukraine (Part 1 of Article 93) had been infringed given that the Draft Law had been introduced by a parliamentary Committee this being an infringement of Article 89 of the Constitution; there had been a change during the preparation of the Draft law for consideration by the session from the profile Verkhovna Rada committee – the committee on issues involving human rights, national minorities and inter-ethnic relations, which had originally offered to introduce the Draft law into the agenda of the session to the Verkhovna Rada Committee on international affairs and contacts with the CIS; according to Part 2 of Article 94, the adopted Law needed to be signed not by the Chairman of the Verkhovna Rada, but by the President. The Chairman of the Verkhovna Rada objected, stating that agreeing to make international agreements binding did fall, according to Article 9 of the Constitution, within the competence of the Verkhovna Rada, and

Article 7 of the Law «On international agreements of Ukraine» states that ratification of international agreements by Ukraine is implemented by the Verkhovna Rada through the passing of a special law on ratification which is signed by the Chairman of the Verkhovna Rada. In compliance with stipulated practice, laws on ratification did not get sent to the President for signing, and all international agreements were signed for Ukraine by the Chairman of the Verkhovna Rada.

In actual fact, the constitutional claims were inspired by the disagreement of some parliamentarians with the ratification of the Charter, as the law on ratification provided for its application to the Russian language. The State Deputies therefore used procedural loopholes for wrecking Ukraine's joining the Charter.

Having considered the constitutional claims, the Constitutional Court issued a ruling on 12 July 2000 which found that the Law of Ukraine «On the ratification of the European Charter for Regional Languages and Linguistic Minorities» did not comply with the Constitution (i.e. it was unconstitutional), in connection with its infringement of Article 94 of the Constitution. The Constitutional Court also found Article 7 of the Law of Ukraine «On international agreements of Ukraine» from 22 December 1993 unconstitutional on the grounds of procedure for the signing of a law on ratifying international documents. The process of ratification had thus to start again from the beginning.

One can conclude that, regrettably, the Charter was used as an instrument for political speculation. Unfortunately those who insisted on the inclusion of the Russian language in the list of languages used by linguistic minorities which are under the protection of the Charter, did not wish to consider the obvious fact that the Russian language is used by the majority of the population of Ukraine and that the provisions of the Charter can hardly be applied in its case. In the Draft law «On the ratification of the European Charter for Regional Languages and Linguistic Minorities», reintroduced for parliamentary consideration, the Russian language was included in the list of languages to which the Charter's provisions would apply. The very formulation of Paragraph 2 of the Draft Resolution of the Verkhovna Rada on ratification is, in our opinion, incorrect: «the provisions of the Charter shall apply to the languages of national minorities of Ukraine: Russian, Byelorussian, Bulgarian, Gagauz, Greek, Jewish, Crimean Tatar, Moldavian, German, Polish, Rumanian, Slovakian and Hungarian». Firstly, national and linguistic minorities are confused. It is doubtful whether Crimean Tatars can be called a national minority, and instead of «the Jewish language», it would be better to use the terms «Hebrew» or «Yiddish». Surprising is the omission in the list of languages to which the Charter should apply of such languages as Roma and Armenian. In our opinion, these languages should definitely be under the protection of the Charter.

According to Paragraph 4 of the Draft Law «On the ratification of the European Charter for Regional Languages and Linguistic Minorities», the following paragraphs and sub-paragraphs of Articles 8 – 14 of the Charter can be applied to each of the above-listed languages:

- a) subparagraphs a (iii), b (iv), d (iv), e (iii), f (iii), g, h, i of paragraph 1 and paragraph 2 of Article 8;
- b) subparagraphs a (iii), b (iii), c (iii) of the item 1, subparagraph c of paragraph 2 and paragraph 3 of Article 9;
- c) subparagraphs a, c, d, e, f, g of the item 2, subparagraph c of paragraph 4 of Article 10;
- d) subparagraphs a (iii), b (ii), c (ii), d, e (i), g of paragraph 1, paragraphs 2 and 3 of Article 11;
- e) subparagraphs a, b, c, d, f, g of paragraph 1 and paragraphs 2 and 3 of Article 12;
- f) subparagraphs b, c of paragraph 1 of Article 13;
- g) subparagraphs a, b of Article 14.

In our opinion, it would be more correct to use different approaches for different regions as in the Law on Ratification passed in 1999, i.e. one subset of paragraphs and subparagraphs of Articles 8-14 for regions where the percentage of the population using a certain language is higher than 20%; another subset of paragraphs and subparagraphs of Articles 8-14 for regions where the percentage of the population using this language is from 10 – 20%; a third subset of paragraphs and subparagraphs of Articles 8-14 for regions where the percentage of the population using the language is less than 10%. In addition, it would be necessary to take special measures with regard to the languages of the Roma, Karaims and Krymchaks

An explanatory note to the Draft contains the assertion that additional financing for the implementation of the Charter in Ukraine is not required. In our opinion, this is a big mistake. For example, opening schools with instruction in the regional language will need additional financing. Additional budget expenditure is needed to implement virtually every provision of the Charter, and will come to a large sum.

The Verkhovna Rada considered this Draft on 7 February 2003. State Deputies sent it back to the working group for refining. On 17 April 2003, the edited Draft Law was discussed in the Verkhovna Rada.

The working group had taken into account many comments and proposals, including our proposal for different approaches for different regions and languages. However, the Draft was not, unfortunately, passed. It was supported by only 190 Deputies, whereas 226 votes were needed. 211 Deputies voted for the old Draft.

On 15 May the Verkhovna Rada discussed the draft of the Charter again and adopted the old Draft Law that had been rejected twice, on 7 February and 17 April. In our opinion, this law gives no opportunity to adequately implement the provisions of the Charter.

The saga over the Charter did not end here. Although it had been ratified by the Verkhovna Rada, the ratification documents were not passed by the Ministry of Foreign Affairs to the Council of Europe, and therefore the Charter, as far as the Council of Europe is concerned, did not come into force, which one can easily see by looking at the Council of Europe's website. From unofficial sources, it is known that the implementation of the adopted provisions of the Charter would cost more than a billion UH, which have not been planned for in the Budget, thus, the Ministry of Foreign Affairs is holding up the procedure for gaining legal force. Commentary, as they say, would be superfluous.

6. REHABILITATION OF THE VICTIMS OF POLITICAL REPRESSION IN THE CONTEXT OF THE PROBLEM OF INEQUALITY

The Law of Ukraine «On the rehabilitation of victims of political repression», adopted on 14 April 1991 was a great step forward towards overcoming the totalitarian legacy and the restoration of justice. However, it did not cover all categories of victims of political repression. Therefore people who had spent years and decades together in Stalin's and Brezhnev's camps, or who had been deported, found themselves in unequal positions. Those who had been rehabilitated received compensation, with the amount being determined by the period of imprisonment, and compensation for property lost, in particular, housing, and if the houses had remained intact and were not occupied by others, then those rehabilitated were entitled to the return of the property. Those rehabilitated have benefits, among them such significant items as 50% off housing and communal services, electricity, free medicine, and others. Those who were not rehabilitated have received absolutely nothing. This injustice must certainly be set right.

Which then are the categories of those repressed who should be rehabilitated? We will limit our consideration of this question to the context of the issue of discrimination. One can identify three such groups.

1. *The deported.* Unfortunately, the Law on rehabilitation does not consider this category of the repressed. When the Law was being discussed, it was intended that another law would later be passed specifically on the rehabilitation of the repressed peoples. The relevant Draft laws have been presented to the Verkhovna Rada many times, but all have been rejected. The Draft law of the Cabinet of Ministers was adopted in its first reading, but was not supported in its second reading and was sent away for a repeat second reading. Comments and suggestions of President Kuchma were also given. This Draft has still not been considered. It should be noted that the problems of victims of deportation are acute for representatives of other ethnic groups also, those deported between 1944 and 1947 – Germans from Southern Ukraine, Hungarians from the Transcarpathian region, Rumanians from Bukovyna, Ukrainians from Kholmshchina (in particular, Boyks and others).

2. *Those convicted by Ukrainian courts under Article 72 of the Criminal Code of Ukrainian SSR for refusal to do military service on religious grounds (up to the introduction of alternative military service in December 1991).* Here we mean believers of Protestant Churches: Baptists, Pentecostals, Seventh Day Adventists, Jehovah's Witnesses and others. These confessions forbid the use of arms, and alternative service did not then exist. Young men who refused to do service sometimes had to serve two sentences under Article 72 of the Criminal Code, each time for up to three years imprisonment. In our view, these men were undoubtedly prisoners of conscience since they were deprived of their liberty for their convictions. Yet this category of people repressed is not covered by the law on rehabilitation.

3. *Children (under age) of those rehabilitated, who were deprived of parental care as a result of repression.* According to a Ruling of the Constitutional Court of Russia these people are recognized to be victims of political repression, who are eligible for rehabilitation. In this way, a discriminatory situation has arisen where some Ukrainian citizens, rehabilitated according to the laws of other countries of the CIS, have the right to benefits (Commissions on the restoration of the rights of the rehabilitated receive claims

from these citizens on the basis of the Russian law on rehabilitation), and other Ukrainian citizens, whose families were repressed in Ukraine, have neither the status of a rehabilitated person, nor the benefits. We consider this to be a violation of Articles 24 and 46 of the Constitution of Ukraine.

7. OUTLINE OF SOME CHANGES NEEDED IN LEGISLATION

It should be noted that Ukrainian legislation dealing with the problems of discrimination and inequality is inadequate and in need of significant changes. For example, the basic constitutional norm of Article 24 of the Constitution about equality before the law and prohibition of discrimination do not apply to those who legally reside on the territory of Ukraine, yet are not citizens of the country. The concept of «indigenous peoples», which is mentioned in Article 11 of the Constitution of Ukraine has not been developed in legislation, and has remained undefined.

The Law of Ukraine «On national minorities» also needs to be amended. There are several Draft laws on amendments to this Law, in particular the Draft law of the Cabinet of Ministers of Ukraine and the Draft law of State Deputies A. Feldman and I. Gaidosh. The definition of national minorities as groups «of citizens of Ukraine who are not Ukrainian by nationality, and demonstrate a sense of national self-awareness and unity among themselves» (Article 3 of the current Law) is imperfect and this imperfection has unfortunately not been overcome in either Draft law. Firstly, the ethnic contraposition of «Ukrainians by nationality» and those, who «demonstrate their national self-awareness» has been retained. Secondly, the present contradiction with the content of Article 11 on the right to freely choose one's nationality has not been eliminated. In the definition of a national minority it is better to stress the subjective rather than the objective character of a person's identification as representative of a national minority. The formulations in the Draft laws of the Cabinet of Ministers and State Deputies A. Feldman and I. Gaidosh stress first of all objectively conditioned ethnicity: «are not Ukrainians by nationality», «are not Ukrainians by nationality (descent)». It would be better to formulate the definition of national minorities as groups of citizens of Ukraine who do not consider themselves by nationality to be Ukrainians and demonstrate the sense of another ethnic self-identification and feeling of unity among themselves. It would be appropriate to also reinforce the guarantees of the freedom of choice of nationality with the norm «The state may not interfere in questions of ethnic identification of citizens of Ukraine».

One of the shortcomings of the current law is the lack of conceptual underpinning of the content of protection of the rights of national minorities. This concerns the lack of articulation of the right to exist, of a definition of national-cultural autonomy, through which the minority's own identity can be expressed. Nor is there any procedure for creating such autonomy. In the Draft law of the Cabinet of Ministers national-cultural autonomy is defined, but ineptly. Yet it is specifically national-cultural autonomy in its various forms which will promote the fulfilment of the rights of national minorities. It would be useful to remember the norms of a former draft of this law which were then, in 1992, excluded – about the creation of national administrative-territorial units and competencies of Councils of State Deputies on ensuring for national minorities participation in the administration of State and public affairs, the free use of their native language, the creation of conditions for the development of national culture, traditions and everyday life, the opening of national pre-schools and schools, etc. There are corresponding norms in Feldman and Gaydosh' Draft law, but without a link to procedures for implementing them through the structures of local self-government, they remain of a declarative nature.

Article 18 of the current law implicitly prohibits direct and indirect discrimination on the grounds of nationality. The concepts of direct and indirect discrimination are not, however, defined. It is necessary to rectify these shortcomings of the current law, to provide definitions, broaden the range of characteristics discrimination on the basis of which is prohibited: race, colour of skin, language, religion, and to extend the force of the Law to non-citizens. One must resolve also at a legislative level the issue of participation of representatives of national minorities in the processes of taking decisions regarding elections – this can be done in this law or by setting out relevant provisions in electoral legislation. It would, in particular, be expedient, in our opinion, to pass a new electoral law of the Autonomous Republic of the Crimea, taking into account the complex inter-ethnic relations in this region of Ukraine. The creation of a body of executive power should also be allowed for in the Law, the duty of which would be to combat manifestations of racism, xenophobia, anti-Semitism and intolerance at a national level. Yet both Draft laws entirely bypass all of these issues which is unacceptable.

Therefore, in our opinion, the Draft laws should be sent back for reworking. It would be desirable to create a single Draft law and discuss it in detail at public hearings before its presentation to Parliament.

Amendments are also needed to Article 161 of the Criminal Code of Ukraine which envisages punishment for deliberate actions aimed at incitement of national, racial and religious hostility and hatred, of denigration of national honour and dignity, or at insulting the feelings of citizens in connection with their religious convictions. Article 161 should be applied to everybody, and not only to citizens of Ukraine. Moreover, defence of honour and dignity must include other grounds in addition to nationality and religion – for example, race, colour of one's skin, ethnic origin and language. Article 161 does not clearly identify acts of a racist or xenophobic character as crimes. It is specifically this that causes the almost total lack of its actual application. Definitions must therefore be provided of direct and indirect discrimination and discrimination in acts and in expression of views must be clearly distinguished.

It is also necessary to develop the general principle of non-discrimination in civil and administrative legislation, in particular, in the Civil Code. Extraordinary as this may be, in the Civil Code which came into force on 1 January 2004, there are no anti-discrimination provisions whatsoever. Norms on the prohibition of discrimination should be introduced into the section on non-property rights.

8. RECOMMENDATIONS

1. To prepare a Draft law on amendments to the Law «On national minorities in Ukraine», to carry out an expert analysis of the Draft to ensure its compliance with the standards of the OSCE, Council of Europe and European Union.

2. To draw up a Draft law on amendments to the Law on languages, to reconsider the Law on ratification of the European Charter on regional languages and language minorities.

3. To prepare the Draft laws «On national-cultural autonomy», on amendments to the Civil Code and other laws, as well as special programs aimed at developing the principle of non-discrimination, and to set out special quotas for discriminated ethnic groups (the Roma, Crimean Tatars, Karaims, Krymchaks, etc.).

4. To prepare a special electoral law for the Autonomous Republic of the Crimea.

5. To carry out an inventory of land in the Autonomous Republic of the Crimea for resolving the problem of land allocations to representatives of formerly deported peoples.

6. To provide better definition of the nature and components of the crime under Article 161 of the Criminal Code, to introduce norms stipulating civil-legal and administrative responsibility for actions directed at discriminating against individuals and groups of society.

7. To broaden the force of anti-discrimination norms to cover aliens legally abiding in Ukraine.

XIV. HUMAN RIGHTS AND THE ELECTION OF THE PRESIDENT OF UKRAINE²⁶⁵

1. OVERALL REVIEW OF THE ELECTION PROCESS

The events connected with the Presidential elections of 2004 in Ukraine were a severe challenge to Ukrainian society and to its position on observing human rights and fundamental freedoms. The ability of Ukraine to transform in the direction of contemporary democracy, public perception of traditional western values – freedom of choice, freedom of thought and speech, freedom of peaceful assembly, freedom to freely express and assert one's views – were put to the test. Those in power and society itself for the first time openly opposed each other. The force of the State authorities versus the force of the people – that was the formula of confrontation during the election campaign.

For the first time, Ukrainian people had a chance to feel the power and qualitative advantage of civic society in action. By following the development of the election process chronologically, one can see how the way those in power ignored universal human rights led to a gradual rise in social tension. In view of current democratic axioms for the development of society, the policy of reliance on the absolute power of the bureaucratic machine, on absolute pressure on voters, as well as on the use of an administrative scheme for using the mass media to formulate public opinion proved to be fatally flawed.

From May the processes indicating the approach of an election marathon began to be evident in Ukrainian society. Headquarters of opposition parties formed lists of people to make up future district and electoral commissions and begin instructing them about electoral legislation. At the same time, monitoring of the electoral situation in Ukraine was undertaken by civic organizations, such as the Committee of Voters of Ukraine, its local centres, the Kharkiv Human Rights Group, the Kherson Fund for Charity and Health, the Chernihiv Civic Committee for Human Rights, the Ukrainian Helsinki Human Rights Union, the International Helsinki Federation for human rights, Article 19 and other international human rights organizations.

In this way, civic society from the very beginning of the election process demonstrated its potential to be of influence. In May, a number of civic organizations stressed the need for a broader approach on the part of all involved in the election process to the issue of human rights. Voter awareness and ability to defend their rights and the understanding of these rights are the hallmark of a stable democratic society and considerably influence the expression of the will of the people. However, at the beginning of the election process in Ukrainian society, neither those in power, nor the opposition, had any understanding of the importance of this issue. The overwhelming majority of political forces did not place any emphasis in their activity on human rights violations. Events, however, taking place at the time, gave grounds for thinking that the observance of human rights in future might take on the status of a nationwide problem in the election process.

Already back in April, students in the Sumy region had started active protest against the establishment in their region of a mega-university. In future this conflict was to become a symbol of the crisis and turn into a catalyst for student resistance in Ukraine. In general, students, particularly activists of the civic campaign «Pora», emerged at the elections as a force which from the beginning of its activity set itself the aim of monitoring and publicizing all violations of legislation and of mass human rights violations, as well as being the force which was subjected to the most serious repressions from those in power.

The civic campaign «Pora» («It's time!») appeared in the night from March 28-29, 2004, together with the change to new time, and made itself known through the simultaneous appearance in 17 regions of

²⁶⁵ Prepared by the Director of the Ukrainian Helsinki Human Rights Union, the head of the Chernihiv Civic Committee for Human Rights (CCCHR) Oleksy Tarasov, Natalya Romanova (CCCHR) and Viktor Tarasov.

Ukraine of stickers asking «What is Kuchmism?» This apparently neutral question without any assessment of the period of Leonid Kuchma's Presidency, provoked a sharp reaction from State authorities, with 10 people detained that very day (4 – in Chernivtsi, 4 – in Lviv and 2 – in Chernihiv). It was, thus, the law enforcement bodies themselves who provided the assessment of the system built in Ukraine over the years of independence. Half a year before the elections, there was already a clear attempt by the State authorities to use law enforcement bodies to deal with dissenting thought.

The tendency of the State authorities to make total use of all State and municipal mass media in the elections was already becoming apparent at that time. Later this tendency was to develop into a deep conflict that culminated in an information break-through.

From Spring onwards, virtually all State and municipal mass media began hailing the achievements of the government of the future candidate for President of Ukraine, Viktor Yanukovich. The general tone as regards the opposition was either no attitude, or negative. The State authorities, outwardly calm, began actively reorganizing their structures with a view to the elections, at regional level increasing departments of internal policy within the State administrations and conducting official forums of «democratic forces» in support of the current State authorities. The issue of human rights observance as well as anything negative in society were ignored by these «forces», who demonstrated thoroughly Soviet solidarity with the State authorities.

Between June and August, the escalation of events around the Sumy national university led to considerable public resonance. For the first time, the use of force by law enforcement officers and the State authorities did not work. Students, their parents and lecturers asserted their right to freedom of thought and forced Kuchma to annul his decree establishing a single, merged university. The dynamics of the situation showed all the failings of the current State authorities: in violation of the demands of the Constitution and legislation of Ukraine, Article 11 of the European Convention on Human Rights, unlawful compulsion and physical force were used against participants of political meetings and gatherings.

The events had widespread public impact. In June, student movements became active in Odessa, Kyiv, Chernihiv, Lviv, Chernivtsi, Luhansk. However, one can identify the tendency of the authorities of a number of institutes at this time to resist the student wave. Rectors of these educational establishments made a number of public statements forbidding students to take part in opposition actions on threat of expulsion. This marked the beginning of systematic violations of students' political rights aimed at limiting their political involvement.

Constitution Day, 28 June, provided an impulse within society to talk about human rights. A range of publications dedicated to this date appeared in the press. The State authorities reminded the country about the Constitution, installing thematic billboards «It's your Constitution!» «Black Pora»²⁶⁶ reminded the State authorities about human rights violations by distributing copies of the Constitution to officials of State regional administrations and through their latest sticker campaign «Clean up the State authorities in the country». According to reports from human rights organizations and the press, the State authorities tore down the stickers and in some cases used force to detain «Pora» activists.

The information pressure on voters increased from the pro-regime press. The municipal and State mass media assured the electorate that the regime was powerful as never before. In society the ground had been created for citizens' lack of belief in the possibility of freely expressing their views. The Gallup polls taken at this time very often registered the following position of voters: nothing depends on my vote, those in power decided everything for me long ago.

July 4 heralded the official start to the presidential campaign in Ukraine, and at once a distinct tendency emerged of using administrative resources in favour of the pro-regime candidate. State officials, employees and functionaries of village and settlement councils, school directors, teachers and doctors were given strict instructions to gather signatures for candidate Yanukovich²⁶⁷.

The Kharkiv human rights group, the Committee of Voters of Ukraine, the Kherson Fund for Charity and Health, the Chernihiv Civic Committee for Human Rights and other human rights organizations, as well as electoral staff of the candidates, began receiving information that people were being urged to put their signatures at doctor's surgeries, in village councils, at enterprises and institutions. Similar information started to appear in the mass media.

As sociological polls showed, many voters were not aware that they could put their signature down for several candidates. Explanatory work regarding this was carried out by human rights organizations and also,

²⁶⁶ Two groups soon emerged: «Black Pora» and «Yellow Pora». Their ultimate aims remained the same, the differences were largely in how these aims were to be achieved. (*translator's note*).

²⁶⁷ A certain number of signatures indicating support were initially required for any candidate. They clearly also had a more general campaigning purpose. (*translator's note*)

particularly, the public campaign «Pora», the public initiative «Znayu!» («I know!»), the Committee of Voters of Ukraine, and some mass media. At that time the State authorities provided no explanatory programs. It was specifically at this time that human rights organizations began to receive information that many officials of local government bodies and state officials were being threatened, sometimes in brutally direct form, with dismissal if they did not provide priority propaganda conditions for the pro-regime candidate.

In July the candidates of the second echelon start actively visiting regions. Speaking at numerous meetings, within the context of their own platforms, they often address issues involving observance of current legislation, the struggle against corruption and observance of human rights. In Sumy, Chernihiv and Kherson, these candidates actively use the campaign which is being run under the banner of lowering prices for municipal services to force the resignation of the present mayors. In July, the staff headquarters of the candidates start working.

An incident which gained prominence during this month was «the Labazov case». Activists from the Pryluky staff of «Our Ukraine» in Chernihiv region attempted to report the presence of a Yanukovich election headquarter in the building of the Pryluky Pedagogical Institute (this being in violation of Article 64 of the Law of Ukraine «On the election of President of Ukraine»), and, instead, had a criminal case launched against them. The events in Pryluky became known all over Ukraine because they demonstrated that Yanukovich's team were openly ignoring the law and applying tough pressure, with the police and the prosecutor's office being used as the main weapons against the opposition.

The pro-regime mass media during this period actively exaggerated the theme of not allowing the «Georgian variant» and pushed the image of Yushchenko as a fanatical nationalist and fascist. July also saw the beginning in the press and work collectives of a mass campaign to clean up Yanukovich's image. The public had it drummed into them that Yanukovich's two criminal convictions were merely cases of youthful folly. Information tactics of this kind resulted both in grounds being provided for the emergence of a kind of legal nihilism and the development of anti-Ukrainian feeling among the Russian-speaking part of the population.

In August, the election campaigning became more intense. Administrative pressure took on more flagrant forms. There were cases of people losing their jobs because of their political convictions. Political meetings in support of candidates in the regions became more dynamic. Very often meetings supporting one candidate were used by their opponents, this leading to crowd scuffles and the intervention of law enforcement officers to restore order. These tactics were often used by the socialists, representatives of the Progressive-Socialist party of Ukraine, the communists, and Ukrainian National Self-Defence (UNSO) activists. Trends of this nature give justification for speaking of a low level of political culture in society, particularly among party activists.

In August, Yanukovich campaigners initiated «meetings with the people». Activists appeared in city streets in a uniform with the letter «Я»²⁶⁸ and distributed campaigning literature – leaflets with the candidate's program and a book about Yanukovich titled «Encounter destiny».

During this time, severe financial pressure began to be imposed on business people in all regions. The financial burden of the elections was being foisted on them. In June, huge numbers of businesspeople approached human rights organizations with complaints about stringent tax checks being imposed upon those who did not support the «single candidate from the State authorities» and who did not pay taxes in advance for half a year. Press stories about cases of detention and beating of people close to Oleksandr Moroz and Viktor Yushchenko were common.

The top stories in the mass media were the unsuccessful attack of Viktor Yushchenko on a road in the Kherson region and the problem of withdrawing the Ukrainian military contingent from Iraq. In the regional press, there were isolated publications dedicated to electoral education. However, such efforts were unfortunately not systematic. In general, August gave all grounds for believing that the election would be tough and brutal, and that human rights violations, connected with the election process, would become systematic.

The most dynamic moves to influence voters began in September and October. The main candidates toured the regions themselves, while the social resonance from the student opposition, particularly, events around the public campaign «Pora», and the scandal over Yushchenko's poisoning suggested the approach of the election finale. Against the background of the information and PR-wars between the main candidates for the post of President, an educational component of influence on the subjects of the election process became a positive pragmatic factor. A series of educational seminars and round tables were run by the

²⁶⁸ Я [ya] – a letter of the alphabet, being the first letter of Yanukovich's name, as well as the word for 'I'. (*translator's note*)

Committee of Voters of Ukraine, the Chernihiv Civic Committee for Human Rights and dozens of other human rights organizations.

Widely publicized statements from prominent Ukrainian and international human rights structures during this period reflect mounting concern, and report a negative situation with regard to observance of human rights in the election process and the appearance of signs indicating that people are being persecuted for their political views. It is specifically civic organizations which consistently affirm the priorities of human rights in the election process irrespective of the political position of voters.

The speeches of the main candidates during their tours around the regions clearly showed their key preferences in the election campaign. Yanukovich's visits to the regions were characterized by the use of administrative resources at all levels of executive power. Directors of factories, heads of institutions, in violation of the right to freedom of choice and expression of this choice, as well as of freedom of peaceful assembly, forced their subordinates to meet the candidate from the State authorities (in many cases people had to sign a piece of paper to prove their presence at the meeting). This tendency was most pronounced in the eastern and southern regions where cases of dismissal for «wrong» political views were not unusual. An ordinary voter could feel the administrative resource everywhere: starting with the doses of information in the mass media which distorted the real situation and ending with shop windows, using only to campaign for the pro-regime candidate.

The situation with Yushchenko's poisoning is a classic example of the distorted information expanse. The lack of unbiased coverage of the event led to a split in society, with some believing that he had been poisoned, while others convinced that this was a private health matter. The pro-regime mass media used the «poisoning» in their campaign to create a negative image of the candidate. The «temnyki»²⁶⁹ in compliance with which these events were covered by the vast majority of State and municipal mass media violated the rights of hundreds of thousands of voters to access to information. This problem was the most acute on television broadcasts. With the exception of Channel 5, which in a limited regime worked mostly in western, central regions and Kyiv, all State and municipal channels provided one-sided information, with all information being in favor of the single State candidate. As somebody said at that time, «there is a poisoning of society with information lies». This trend of 100% biased municipal and state mass media negatively affected voter access to information about candidates during the election of 2004 and led to widespread negative resonance both in Ukraine and abroad. Human rights organizations and politicians from all over the world specifically stressed the unequal access to mass media of presidential contenders during this period.

At this time the strongest opposition to infringements during the election process came from the public campaign «Pora». The State regime's reaction to stickers and actions during September and October moved from persecution of individual activists to mass detentions with criminal cases launched. According to the coordinator of «Black Pora», Mykhaylo Svystovych, over this period of the election campaign, the following number of people were detained:

- Dnipropetrovsk – 2 (for putting up stickers);
- Zhytomyr – 2 (for handing over an appeal to a Territorial electoral commission);
- Ivano-Frankivsk – 30 (for putting up stickers, 1 fine of 17 UH);
- Luhansk – 12 (2 – for putting up stickers, 10 – for picketing a Territorial electoral commission, 2 fines of 17 UH for putting up stickers);
- Lutsk – 2 (for putting up stickers);
- Lviv – 17 (for putting up stickers, 8 – organizing street actions, 2 – handing over an appeal to police officers, 2 fines of 17 UH for organizing street actions); (the record as far as detentions among the district departments in Ukraine was in the Halych district department – 11 people detained).
- Mykolayiv – 30 (24 – for putting up stickers, 5 – participation in street actions, 1 sentenced to 5 days imprisonment with the detainee also being beaten, for graffiti);
- Mukachevo – 4 (for carrying leaflets);
- Pavlohrad – 1 (for putting up stickers);
- Poltava – 7 (for putting up stickers, 1 sentenced to 2 days imprisonment);
- Simferopol – 2 (handing over an appeal to police officers);
- Sumy – 3 (participation in street actions);
- Ternopil – 3 (for putting up stickers);
- Uzhhorod – 3 (for putting up stickers);

²⁶⁹ «temnyk» from the word for «theme» or «topic» (and from the word for «dark») – these were the instructions given journalists as to how to cover those subjects which were 'permitted', and which subjects were to be ignored entirely. (*translator's note*)

- Kharkiv – 8 (for putting up stickers, 1 detained without any grounds, for going to a Yanukovych meeting);
- Kherson – 2 (stickers, 2 fines of 17 UH);
- Chernivtsi – 10 (5 – stickers, 1 – participation in street actions, 5 – handing over an appeal to a Territorial electoral commission members);
- Chernihiv – 12 (11 – for putting up stickers, 1 – organizing street actions).

The purpose of these actions was to intimidate the most aware and active part of the electorate, removing it from the active field of the election process. By infringing the right to information, the pro-regime mass media conveyed materials on detention of «Pora» activists in a biased way, trying to create the image of a terrorist organization which was supposedly planning a series of explosions at polling stations. It was specifically «Pora» activists who were accused of keeping and distributing counterfeit money which had supposedly been used by Yushchenko's supporters to pay students during a student gathering in Kyiv. The State authorities tried to link the actions of «Pora» with «Our Ukraine» and Yushchenko's supporters, stressing their alleged nationalistic orientation.

The culmination of the pressure using force was the regime's use of law enforcement bodies of the Ministry of Internal Affairs. The police initiated criminal investigations against activists of «Our Ukraine» centres, and also infringed the right to freedom of movement, under various pretexts stopping buses with citizens and journalists who were going to opposition meetings or simply to the capital.

The situation with human rights became especially tense just before 31 October. Large groups of people with no clear purpose, without being informed as to why, were driven out and placed in camps near Kyiv in the period since October 28, 29 and 31. This was recorded, for example, by the Chernihiv Civic Committee for Human Rights in a formal statement. All of this attracted the attention of human rights organizations who perceived these actions of unknown people to be a direct threat to the life and safety of citizens, as well as a restriction of movement. As in the case of restrictions to car traffic, the processions were often escorted by police, giving grounds for suggesting the involvement in this of representatives of the State authorities. At the same time, cases were confirmed where trains moved around Ukraine with people who were used by the State authorities to work on rigging the results of the elections with the use of absentee ballots²⁷⁰. All of this gave grounds for human rights organizations, in particular, the Ukrainian Helsinki Group on Human Rights, after the first round of voting, to register the following violations of human rights and fundamental freedoms:

– during the election process systemic persecution and intimidation of the representatives of certain organizations took place, in particular, of the public campaign «Pora» and civic organizations «Student Wave», «The student's fraternity of Lviv region», and also students of the National university Kyiv-Mohyla Academy, which indicates non-observance by Ukraine of Article 11 of the European Convention on Human Rights;

– severe disruption was caused to the freedom of movement of people around the country. On the day of the elections, as well as on days of mass actions organized by the opposition, representatives of the regime in power significantly restricted the constitutional rights of citizens and led to Ukraine violating Article 2 of Protocol № 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms;

– substantial restrictions to the freedom of assembly against the background of the election process, as well as the process of voting, indicate non-observance of standards regarding this freedom, affirmed in the Constitution of Ukraine and defined by Article 11 of the European Convention on Human Rights;

– the practice by law enforcement bodies of detaining large numbers of civic activists during the visits to different regions of Ukraine of the candidate for the President of Ukraine and Prime Minister Viktor Yanukovych; this happened, as a rule, without the bringing of any charges or on the basis of patently absurd or unjustified accusations, which indicates non-observance by Ukraine of Article 5 of the European Convention on Human Rights.

Beginning on October 31, when the first round of elections was held, human rights violations began to be of a systematic nature, spreading rapidly and taking on ever more flagrant forms. The most widespread were infringements connected with written inaccuracies in electoral lists. The facts suggest that these mistakes could only have arisen because they were encouraged or consciously ignored by the State authorities.

²⁷⁰ «absentee ballots», in theory designed to enable voters, unable for various reasons to vote in their own electoral area, to cast their vote elsewhere, were one of the methods used to distort the election results. There are cases recorded of people being transported from one polling booth to another, casting their «vote» several times. (*translator's note*)

Representatives of numerous human rights organizations, observers from candidates' election teams and international observers recorded numerous violations with absentee ballots and the use of voting at home aimed at rigging the results of the elections. In the overwhelming majority of cases, these infringements were initiated by the team of the pro-regime candidate. Numerous international Western observers expressed their concern at the mass infringements during the election. In contrast, observers from CIS countries insisted that the first round of the elections had been held without any significant violations. The head of the Ukrainian Helsinki Human Rights Union, Yevhen Zakharov, in his statement on November 11, 2004 asserted: «the information available today enables us to speak of systematic and State-sanctioned violations of the abovementioned civil and political human rights. Moreover, the list of these violations increases with every passing day. All this shows that top state officials of the country are ignoring the European values and international standards on human rights, the importance of observing which they so recently stressed».

The events of November and December became the final phase of the presidential elections in Ukraine. The extraordinary dynamics of their development surpassed even the most daring forecasts of political scientists. The «Orange Revolution» proved that the State authorities could not determine the results of the elections for voters.

The second round of the elections showed ever more flagrant human rights violations. Inaccuracies in the lists became much more prevalent. There were quite often cases when a person whose political views were known was deliberately left off the electoral. A large number of people who had died, or left the country, or who were not citizens of Ukraine, were included. The excessive number of absentee ballots which were registered even in the most remote villages was proof of the use of dirty means by the team of the pro-regime candidate.

Thus, for example, in Mykolayiv the number of people wishing to vote at home in some district electoral commissions reached 1000-1500, this constituting 30% of all voters.

Delays with delivery and analysis of the information in the Central Election Commission, the scandal over a parallel server in the Presidential Administration that «corrected» in-coming data increased public suspicion that the real will of the people was being flagrantly falsified. Immediately after the elections, people came out in Kyiv on to Independence Square in order to support their choice. After the head of the Central electoral commission declared Yanukovych the winner, all Ukrainian society came out on to city squares in order to protect the democratic choice of Ukraine. The attempt to provide a democratic coating for the election, while filling it with totalitarian content proved to have failed.

The meetings on squares all over Ukraine demonstrated the understanding by the vast majority of Ukrainian voters of their civil rights. The chain reaction of protest against the illegal actions of the State authorities embraced all political institutions in the country. The level of understanding of democracy shown by «Maidan»²⁷¹ demanded adequate response. Under the pressure of civic society, resolutions of no confidence in the Central electoral commission were adopted by a majority of local councils of regional centers. The Verkhovna Rada [Parliament] of Ukraine declared a vote of no confidence in the whole staff of the Central Election Commission and its head Serhiy Kivalov, and the Supreme Court of Ukraine declared the results of the second round of elections null and void. The live broadcast of the session of the Supreme Court bore witness to the establishment in Ukraine of the judicial branch of power as an independent institution. The live broadcast of the whole court sitting without any cuts marked a break-through in the sphere of civil and political human rights.

In Ukraine new trends in society were developing – with respect for law and human rights. Ukraine found itself at the centre of attention of the world community which sympathized with the democratic aspirations of the Ukrainian people and gave them moral support. The re-run of the second round of the elections in general passed more calmly than the previous rounds, and produced a convincing victory for Viktor Yushchenko. The broadcast of the court hearing considering the appeal against the results of the re-run, initiated by the representatives of the presidential contender Yanukovych, once again demonstrated that the Supreme Court was committed to upholding the supremacy of law and was able to protect citizens' interests. Finally, the Central Election Commission proclaimed Viktor Yushchenko the winner. The Supreme Court of Ukraine put an end to this complicated electoral marathon confirming by its decision the legality of the victory of the people's presidential choice. Millions of Ukrainians perceived this as a pledge that from now on human rights in Ukraine would be the recognized and most important value and that the State authorities would have to reckon with them.

²⁷¹ «Maidan», the Ukrainian word for a city, town or village square, has come to symbolize the Orange Revolution and the affirmation of people's right to be heard. Where used in the following with this meaning, it seems better left without translation (*translator's note*)

We describe below some events connected with the observance of human rights during the presidential elections in Ukraine in 2004 that considerably influenced the socio-political situation in the State.

2. PERSECUTION OF REPRESENTATIVES OF STUDENT PROTEST

Some of the most flagrant human rights violations during the elections recorded by human rights organizations were events related to student protests.

The State authorities, understanding that students were the most active part of the electorate, did everything they could to threaten and subdue the students. An event which reverberated through society was the action of the students of Sumy who in April 2004 started protests and sent appeals regarding their disagreement with the decision of the President of Ukraine to establish a National University of Sumy by merging 3 higher educational establishments. On June 28, Constitution Day, they set up a «tent city» in the centre of Sumy on Soborna Street. According to the internet publication, RUPOR, during the month of its existence, the inhabitants of the camp were attacked three times with the use of unknown chemical substances. The students were taken to hospital and one was even placed in an emergency care ward. The police men, who were on duty near the camp all that time, did not react to the young individuals of criminal appearance who tried to provoke the students virtually every day.

The students of Sumy presented an ultimatum to President Kuchma, the deadline for which was to expire on August 1. At about 2 a.m. of that day, police burst into the camp, searched it, pushed everyone into cars and took them to the police department where the majority were held until morning. The students were simply detained without any charges being laid. The next day students demonstrating were surrounded by armed detachments of police which then proceeded to take over the camp. Nonetheless, the students managed to hold out and force the State authorities to back down. The students appealed to all human rights organizations to support them and not to leave them to face the enraged powers alone. The Ukrainian Helsinki Human Rights Union made a statement in support of the students of Sumy, and they were supported by leaders of the opposition parties and prominent state deputies.

In asserting their rights, the students set off on foot to Kyiv. On the border between Sumy and Poltava regions, the column of students was met by 3 buses (2 with only a driver, and the third carrying people in civilian clothes). The operation was headed by the chief of the administration of the Ministry of Internal affairs in Sumy region, Major General Mykola Plekhanov, and the deputy head of the regional state administration, Sokolov who presented the participants of the march with the decision of the court of Romen prohibiting the entry on to the territory of the region of the marchers. After that a mass illegal detention operation of the students was undertaken, however a few of them managed to escape. Together with the students, the state deputy V. Kyrylenko and the political observer of the business information agency «Context» Y. Kuzmenko were detained. Parents and teachers of the detained students picketed the regional state administration of Sumy. The Ukrainian Helsinki Union for Human Rights came out in support of the students, making a statement in which they demanded that the police stop involving themselves in politics and that they observe fundamental human rights and freedoms. In support of this movement, both a committee of mothers and a civic committee to support students and lecturers were organized, which helped the students to stand firm.

The protest of the students of Sumy and the position of the community forced President Kuchma to cancel his decision about merging three educational establishments of Sumy into one National University of Sumy. And although the President explained that his decision was made under duress, this was a victory of public opinion over the interests of those in power.

On the whole, in the election process of 2004, students were a favourite target for the State authorities. Cases where students were detained took place in Vinnytsa (according to information from the Vinnytsa human rights group), and pressure was placed on students with threats of expulsion in Severodonetsk, Luhansk, Nizhyn, Donetsk. We will cite here just a few of the cases.

The most wide-spread violation of students' political rights was the unwritten prohibition against joining opposition parties. For example, in the Eastern-Ukrainian National University, psychological pressure was applied on students if it emerged that they were members of political parties which, while officially registered by the Ministry of Justice of Ukraine, were in opposition to the regime in power. This pressure was expressed in different ways, for example, by calls to the offices of the Dean or Rector, by phone conversations to parents or through threats from the administration of the educational establishment. One could also often hear threats from teachers about problems occurring with their studies which were later reflected in biased marks. While allocating 'budget' (i.e. free) places for pursuing master's studies to gifted students, teach-

ers took into account their students' political views. Actions such as this from the administration of educational establishments directly contravene legislation, particularly, part 3 of Article 8 of the Law of Ukraine «On Education» that proclaims: «A person's membership of any political party, public, or religious organization which acts in accordance with the Constitution of Ukraine is not an obstacle for his or her participation in the educational process».

Awareness that their human dignity was being denigrated, together with a feeling of outrage, were experienced by political science students of the Eastern-Ukrainian National University named after Volodymyr Dal whose course involved a period of practice in a political party. The students were bluntly forbidden from doing their practice in non-centrist parties or in parties which were not pro-regime in their programs. They were, moreover directed to local centres of the «Party of the regions»²⁷² and the local public organization «Region» that closely cooperated with this party in the number which almost corresponded with the number of the whole group. This brazen use of students as free man power in political campaigning work was observed during the whole period of practice in the centres of «the Regions».

For the period of the election even visiting entertainment events took on a compulsory nature for students since the events were exclusively organized at that time to support the pro-regime candidate and were a form of indirect campaigning. Almost every week in the university students were given free youth newspapers where one could easily see elements of propaganda for the pro-regime candidate which is also a violation of those norms of the law which expressly forbid political propaganda in educational establishments.

Direct appeals from lecturers to vote for Yanukovych could be heard almost every day within the precincts of universities. «The duty of students of national universities is to vote for the candidate from State authorities. Or do you think your grant was increased for no particular reason?» – lecturers, deans, pro-rectors repeated in an attempt to sway intractable students.

Incidentally, students were actively used not only as objects of political propaganda, but also as a resource for political campaigning. Students involved in campaigning for Yanukovych were free not to attend classes, while the attendance of lectures and seminars by other students was strictly controlled. Representatives of universities' administrations registered students as having missed classes without a valid reason purely on the grounds that these students were supporting the «opposition» and were actively participating in political activities of opposition candidates for the post of the President of Ukraine.

The administration of the educational establishments in the election period created all conditions for «supergrasses» and denunciations, since teachers, deans, and pro-rectors often asked them to report on any «forbidden» political activities of other students observed. These actions undermined age-old moral values of mutual respect and assistance, tolerance and faith.

For example, the press service of the Donetsk regional headquarters of Viktor Yushchenko informed that Tetiana Suvorova had been expelled from a local teacher training college after serving as an observer from Yushchenko's team at one of the polling stations of the territorial district № 60 in Shakhtarsk, Donetsk region.

This was, furthermore, done without any reasonable grounds: the girl studied well and attended classes regularly. The director of the college in conversation with Tetiana told her that she had better leave town altogether.

The students of Donetsk who actively supported the opposition also spoke of pressure from lecturers and the administration of educational establishments after the day of the election. This was most often observed in technical schools and colleges of the regional centre.

In Luhansk they went beyond just expelling – students were actually beaten up because of their political views. One of the examples was a student of the National University of Luhansk who was attacked, beaten, had his documents taken away, and was after that expelled from the university.

The statements of the Minister of Education and Science of Ukraine, Vasyl Kremin, that it was forbidden to expel students for their political views had no impact on either teachers, or police officers.

In Sumy on the morning of December 22, 2004, officers of the regional administration of the Ministry of Internal Affairs detained an activist of the student movement of protest Andriy Kotyl, without any explanations. As the student's fraternity of Sumy informed, the lad was actually taken away from a lecture in the cooperative technical school where he studies. At his request to be shown a summons, the officer answered: «I'm your live summons», after which Andriy was sent to the regional administration of the Ministry of

²⁷² The party of Viktor Janukovych (*translator's note*)

Internal Affairs for a «conversation». His mobile phone was taken away from him and no one could reach him.

As it turned out later, the reason lay in a note that he had written a month and a half earlier at a meeting against the head of the regional state administration Volodymyr Shcherban. At this meeting, the organizers asked people to write wishes and recommendations to the Governor of Sumy which were to be passed on to him. A. Kotyl in his message recommended that the head of the region «paint a cross on his forehead in bright green». The officers of the regional administration of the Ministry of Internal Affairs interpreted this as being a murderous assault on Volodymyr Shcherban.

In general, throughout the election campaign, law enforcement officer used detentions and intimidation against students, as well as searches in dormitories, eviction from hostels or threats to expel them. They planted explosives or counterfeit money and then launched criminal investigations, had students expelled from educational establishments, etc. Through these methods, the State authorities sought to intimidate the supporters of the presidential contender Viktor Yushchenko and to prevent their public actions. At the same time, one observed the regime's attempts to gather around itself youth organizations of the so-called «democratic direction». Together with official student committees and professional committees, they issued statements appealing on people not to participate in «dubious opposition actions». The International Helsinki Federation for Human Rights, the Kharkiv Human Rights Protection Group, the Ukrainian Helsinki Union for Human Rights, the Chernihiv Civic Committee for Human Rights and other organizations for human rights repeatedly focused attention on mass violations of students' rights in their statements.

3. PERSECUTION OF MEMBERS OF THE PUBLIC CAMPAIGN «PORA»

The nucleus of the students' protests against illegal activities of the government during the election campaign became the public campaign «Pora». Its activity was based on non-violent principles, its aim being to track down any infringements of current legislation in the election process and to put an end to such infringements using non-violent means.

According to information provided by the coordinator of this organization Mykhaylo Svystovych, from the appearance of the civic campaign «Pora», which rapidly formed centers in all regions of Ukraine, it carried out four nationwide sticker campaigns («What is Kuchmism?», an explanation of Kuchmism («Kuchmism is corruption» «Kuchmism is crime», «Kuchmism is unemployment», «Kuchmism is poverty», «Kuchmism is despair»), «Pora to win»²⁷³ and «Kuchmism is Me»), 174 street actions in 53 settlements (among them simultaneously «The face of Kuchmism», «A decade of Kuchmism in Ukraine», «Pora to remember the Constitution», «Student solidarity» (action of solidarity with the students of Sumy) were held in several regions of Ukraine, including Kyiv, Simferopol, Sebastopol and 22 regional centres, the action against the destruction of the tent camp in Sumy, the action of protest against the arrests of the participants of the march to Kyiv of the students of Sumy, the action of celebration of victory of the students of Sumy «Buy a diploma for yourself», «Don't let yourself be bought», «No to terror in Ukraine», «The Police with the people»), 23 actions in association with other organizations in 8 settlements, actively helped the students of Sumy during their protests against the merger of their educational establishments. On September 30, the biggest mass action «Pora to elect fairly» was conducted, when activists of the campaign handed over appeals-warnings to members of the territorial electoral commissions all over Ukraine.

During the time of its campaigns, there were 150 cases where campaign activists were detained by law enforcement officers (for putting up stickers, participation in street actions, and distributing campaign materials, drawing graffiti or even without any reasons). Hundreds of activists of «Pora» in all were detained, some of them – several times.

Among the repressive measures used by the State authorities against «Pora» were expulsion from universities, searches in dormitories and being thrown out of hostels, mass detentions, administrative punishments, being summoned for questioning to the State Security Service of Ukraine, where they were told to stop political activity, planting explosives or counterfeit money and then initiating criminal investigations. For examples, in the information bulletin «Human rights» № 35, 2004, cases of «Pora» activists persecutions are recorded in Ivano-Frankivsk and Chernihiv (breaking up a public action and beating activists), Lutsk, Luhansk, Donetsk, Kirovohrad (intimidation and persecution by criminal elements).

²⁷³ These slogans can be understood if one remembers that 'pora' means 'it's time' (*translator's note*)

The most flagrant violations took place in Kirovohrad, Mykolayiv, Poltava, Kharkiv, and Sumy. In Kirovohrad an activist of the campaign was taken into a forest by unknown people, who covered his head with a sack, threatened him with a knife and beat him up. In Mykolayiv police officers detained an activist of the campaign who was drawing graffiti, beat him up severely, and the court sentenced him to 5 days of administrative arrest. In Poltava an activist was detained while posting leaflets «Kuchmism is Me» and sentenced to two days of administrative arrest, without his relatives being notified. They achieved such psychological intimidation and terror, and kept him in such conditions, that the lad, after his ordeal, ended up in hospital. Two students detained in Sumy during actions of protests had grenades planted on them during detention. The officers then said that these were training grenades, and that when the students had been searched, cold weapons and drugs had been found. Criminal cases were launched, and they were sent to prison but were released in two days. The grenades, cold weapons and drugs had disappeared somewhere. In Kharkiv, two «Pora» activists were detained right after they received a parcel at «Autolux», forced to get into different cars and taken to Leninsky district department, supposedly to find out if there was anything criminal in the parcels. The activists' passports were also taken away. They were kept in the district department for a few hours, the campaign materials of «Pora» which was passed on through «Autolux» – stickers, leaflets, etc. – were confiscated and the activists were released. However, as it turned out, page 11 of their passports had been torn out – the page with registration information. There has still been no response to their formal complaint to the office of the prosecutor regarding this.

As well as this, activists of the «Pora» campaign had psychological pressure put on them. In the University of Luhansk, the pro-rector searched the room of a student while he wasn't there and threatened to expel him because she had found legally printed but opposition press material. An activist from Kherson who formally complained about the head of the regional state administration Dovhan because of the latter's campaigning activity on behalf of the presidential contender Yanukovych (state officials are prohibited from campaigning), was threatened with expulsion by the director of his institute, as was another activist who appeared as a witness at a trial. A «Pora» activist was expelled during her second year at the State Pedagogical University of Kirovohrad.

Police and state officials constantly received instructions to look out for activists of the campaign. For example, police officers searched dormitories of the Kyiv-Mohyla Academy and the State Pedagogical University of Chernihiv, warning that if they found any such activists, the latter would be thrown out of the hostel. In many cities, police officers stopped activists supposedly to check their documents or because of a resemblance to a wanted criminal. At this, police officers noted names and place of study or work of the activists. Also activists of the «Pora» campaign were summoned for warning conversations where they were threatened and intimidated. Many conversations like this took place in Feodosiia.

The Kharkiv Human Rights group, the Litigation Fund of Ukrainian Helsinki Human Rights Union, the Ukrainian Helsinki Human Rights Union, the Vinnytsa Human Rights group, the Chernihiv Civic Committee for Human Rights granted legal assistance in a range of cases where campaign members were persecuted by law enforcement officers.

According to the informational bulletin «Human rights» № 35, 2004, in Kharkiv on November 17, 2004, 6 «Pora» activists were illegally detained (5 from Kyiv and 1 from Kharkiv). They spent a night in the Dzerzhynsk District Police Station, and the next day a trial took place that considered a protocol about an administrative infringement according to Article 185 part 2 of the Code of Administrative Infringements. The lads were defended by lawyer Volodymyr Zinchenko who was invited by the Kharkiv Human Rights Protection Group within the framework of the project for granting legal assistance to victims of human rights violations. A petition was submitted to summons police officers in view of their unlawful actions, the lawyer proving that there had been no grounds for the detention. That very day the «Pora» activists were released, and the hearing was postponed. Later there were two more court hearings on this case, and on December 7 a final decision was made: the charge of administrative responsibility against the «Pora» activists was withdrawn, and the court restricted itself to a verbal reprimand.

According to the internet publication «RUPOR», on October 23 a participant of the public campaign «Pora», Volodymyr Zakaliuzhny, was detained during a concert while distributing leaflets criticizing the activity of Yanukovych. He was taken to Shevchenkivsk Police Station in Kyiv and accused of having stolen a mobile phone. The lawyer of «Litigation Fund» of the Ukrainian Helsinki human rights union, Hanna Yudkivska, lodged a complaint about the actions of the police officers, and gained Zakaliuzhny's release from custody. On November 19, 2004 the criminal case regarding Volodymyr Zakaliuzhny was closed «due to the absence of a crime». Zakaliuzhny's complaint regarding the unlawful actions of the police officers and demand for compensation are presently being considered.

The most blatant persecution of the «Pora» activists took place in Donetsk. According to the information bulletin «Prava Ludyny» [«Human rights»] № 34, 2004, on 10 December, 2004 a camp of tents was set upon and destroyed by about 100 men who looked like criminals. The journalist Serhiy Vahanov was beaten up, and his video recorder smashed. On December 11, 2004 in the building of the Voroshylyvsky District Police Station in Donetsk an unknown person (probably one of the officers) threatened a «Pora» activist Ostap Kryvdyk because he was speaking Ukrainian. This happened in the presence of the «Salon» newspaper journalist and other activists who made a complaint about it to the police.

Detentions took place in some other Ukrainian cities and were reported by the well-known non-governmental organization «Amnesty International».

Andriy Kulibaba, an activist of the Vinnytsa department of the youth oppositional initiative «Pora» was detained on October 20 by police without any explanations. On October 21 he was sentenced to 10 days administrative arrest according to the provisions of the Code on Administrative Offences for «deliberately opposing demands of the police». It was claimed that he had pushed a policeman and torn a button from his uniform. On October 23 he was suddenly released and the arrest was replaced by a fine.

Oleksandr Puhach was detained in Vinnytsa on October 21 and charged, supposedly for refusing to give his name to a policeman, however witnesses' evidences differed and he was released. A few minutes later, while standing on the stairs of the building, he was detained again before witnesses' eyes and kept in the police department for four hours and then informed that he would be charged with «hooliganism».

In Kirovohrad on 21 October, masked police officers detained Oleksandr Tyshchenko while he gathered leaflets and stickers published by the «Pora» initiative for their circulation. He was also accused of «deliberate opposing to police officers», but the case was closed and he was released on 25 October.

On 14 October, police officers announced that they had discovered equipment for producing explosives in the central office of the organization «Yellow Pora» in Kyiv, although during the first search with the participation of a third party, nothing was detected, and the equipment was «found» only when the police 'searched' alone. After that there were similar searches in Chernihiv. A participant of the campaign «Pora» Oleksandr Lomako was detained and accused of keeping explosives, which could lead to a prison sentence of 2-5 years. The Police claimed that they had found in his flat a brown substance that could be an explosive. A criminal case was launched against him. Only the interference of the Chernihiv Civic Committee for Human Rights, and legal assistance provided by a member of the CPCHR, lawyer Oleksandr Trofymov, stopped the lad being imprisoned.

Summing up the stated examples, we would like to stress that activists of «Pora» were saved from mass punishment and isolation in prisons thanks to the extensive involvement of the community and human rights organizations, thus enabling the public campaign «Pora» to make its contribution to the events of the elections of 2004 in Ukraine.

4. ILLEGAL ACTIONS OF THE POLICE

The elections of 2004 demonstrated a dangerous tendency of involvement of the police in political games. Numerous facts of human rights violation against Ukrainian citizens demonstrate the use of police officers in intimidating voters.

Long before the election at one of the Plenary sittings of the Supreme Rada, a report by the first Deputy Minister of Internal Affairs, Mykhaylo Korniyenko, «On the state of reforms and legislative guarantees for the activity of law enforcement bodies of Ukraine» was heard. The speaker acknowledged: «We are justly criticized for non-observance of rights during investigative operations». According to his words, in the structure of the Ministry of Internal Affairs, the post of Minister's Advisor on Human Rights had been introduced, and also a public council established with the participation of well-known public activists, State deputies, scientists, and people with great social authority. He mentioned that similar councils had been established in regions. But such public statements of democracy and transparency as regards police activity are seriously contradicted by electoral practice.

During the election process, the police were used to intimidate those with independent views, to carry out illegal detentions, searches, and to restrict freedom of movement (by blocking vehicles with people going to opposition meetings), freedom of speech and the right to peaceful assembly and gatherings, to strip off stickers, seize the issues of opposition press, damage health during detention of opposition representatives, use physical violence against authorized representatives of candidates, to provide illegal shadowing of the candidate Yushchenko, to campaign for the pro-regime candidate, etc. For example, the information

bulletin «Prava Ludyny» [«Human rights»] № 31, 2004, stated the following facts reported by the Kharkiv regional staff of Viktor Yushchenko:

On November 6, 2004 during a nationwide action «People won't be overcome», in Kharkiv on Svoboda (Freedom) square – an officer of the Kharkiv administration of police, colonel Zherebtsov physically threatened a representative of the regional staff of V. Yushchenko, a correspondent of the «Razom» [«Together»] newspaper Shyshkin (correspondent's card № 26 K). This occurred after Shyshkin had filmed on video numerous officers of police, including chiefs of the city's police, who for some reason were on the square not far from the place of the meeting. The correspondent was also shooting a bus with an original advertisement: «We'll change life for the better together – the Party of Regions». In this bus for some reason there were police officers with shields and sticks.

Police officers also tried to interfere with the course of the meeting, threatening to close it «because of campaigning in favour of one of the presidential contenders».

Police officers repeatedly injured supporters of the opposition presidential contenders.

On August 21 in Dzerzhynsky district of Kharkiv by the metro station «23rd of August» a veteran of World War II, Vasyl Sokolov, was beaten up for distributing opposition newspapers.

On October 4, officers of the municipal police by the building of the Leninsky district executive committee beat up Kostyantyn Kanishev, an authorized representative of the candidate to the post of President, Mykhaylo Brodsky.

On October 12 masked officers of transport police beat up Yuriy Ahibalov who was defending students who had been illegally detained on Pryvokzalna square.

On October 29 officers of the Frunze district police station of Kharkiv beat up Ihor Korol, the deputy chief of Yushchenko's regional staff and assistant to State deputy Filenko.

In one of its digests, the Chernihiv Civic Committee for Human Rights reports that a police officers O. Demchuk beat up an authorized representative of the presidential candidate Oleksandr Moroz in Chernihiv region.

Such cases occurred over the whole territory of Ukraine which gives reasons to speak of the systematic nature of the above-mentioned infringements and their sanctioning by top State officials.

A few cases illustrating actions of the police in Kyiv.

The case which had the greatest impact was probably the beating on October 23 by police officers in civilian clothes of people picketing the Central Election Commission. After this, ambulances were needed to take 12 people to hospital with head injuries. Then at about 10:50 pm a column of about 50 people came up to the Central electoral commission, wedged their way into the crowd and, using hammers and bottles, started beating demonstrators standing by the state institution. The deputies from the faction «Our Ukraine» Dayd Zhvanya, Yuriy Pavlenko and Oleksandr Tretyakov managed to detain three raiders. Two of them had police documents and registered weapons. The detained were pinned down on the floor in the hall of the Central electoral commission. Before that, deputies Zinchenko and Tretyakov were also able to detain the chief of the department for fighting organized crime in Kyiv, Hoshovsky, who, according to their words, had led the special operation attacking the demonstrators.

Later the police officers who had participated in beating peaceful citizens were awarded or promoted. The Ministry of Internal Affairs representatives denied that these people had been police officers, despite clear evidence that they had. There was no information about initiating a criminal investigation into this incident. It is most likely that there was no such investigation. At the same time a clash happened between deputies from «Our Ukraine» and representatives of the special division who were blocking entrance to the Central electoral commission where the question about establishing 400 polling stations in Russia was being decided. This was clearly in order to consider this important question about 1 million votes in Russia in the absence of representatives of the presidential contender Viktor Yushchenko.

On July 23, 2004 a picket was broken up outside a cinema.

An activist of «Our Ukraine», Vadym Hladchuk, was summoned to the Kyiv City Administration of the Ministry of Internal Affairs on a charge which has since been the basis of several demands for an explanation from State Deputies Yuriy Lutsenko and Yuriy Pavlenko.

On August 20, 2004 there was an explosion at the Troyeshchyna market. Police accused representative of «Our Ukraine» of causing it. In fact, police officers were involved in this «black PR»²⁷⁴. Officers of the Ministry of internal affairs produced a false card of a member of the Ukrainian People's Party that was said to belong to one of the «bombers».

²⁷⁴ «black PR» – where questionable or downright criminal activities were carried out by people pretending to be opposition supporters, in order to discredit the latter

On September 17, police officers detained participants of a peaceful action «SOS» involving mothers of unlawfully detained and accused activists from Donetsk, Kirovohrad and Chernivtsi. The detained were transported to the Darnytsky District Police Station in Kyiv. Only the efforts of the community and human rights organizations for release of the participants made police let them go.

Here is the text of one of the appeals given at that time by the internet-site «Maidan»:

«7 buses «Volvo» which belong to the Kyiv municipal auto enterprise № 1, together with drivers are «being held prisoner» of a police special division base somewhere between Vyshhorod and Vyshneve.

The drivers ask through «Maidan» for people to approach the city authorities and ask on what grounds the drivers are being detained by this special division, given no travel allowance, nor any explanation as to why.

The drivers ask for those holding them to be sent away, or at least to allow them to escape from captivity by themselves».

In general, the Maidan web site placed information about law violations by police almost every half an hour. We can cite some examples, placed on the site.

On December 2, during the «Orange Revolution», at Kyiv's radio market a police operation unprecedented for Kyiv was conducted. People in police uniform issued an ultimatum demanding that all orange symbols be removed from the market which had donated 12 thousand torches to the camp of tents, and was also providing other assistance. Employees of some pavilions were ordered to take down orange flags, otherwise they would not be allowed to start working.

According to information received by a correspondent of the internet site «Maidan», officers of the department for fighting organized crime in Kyiv persecuted private businessmen who were supporting Viktor Yushchenko. In one of the trade centres of the capital, certificates were examined only of those businessmen who did not hide their political views. Later they were all summoned to the department for fighting organized crime.

On November 21, 2004 at the district electoral commission № 56 (Mariopol) an elector noticed by chance that the head of the commission was throwing a bundle of voting papers into a ballot-box. He submitted the relevant protest, but in response the police brought a charge of hooliganism against him and he was taken to court.

Sometimes actions of the police were almost indistinguishable from the actions of ordinary bandits. For example, in Luhansk, a campaigner from the regional staff of Viktor Yushchenko, Kyryl Voroshylo, was seriously tortured (receiving an injury to his thorax). The coordinator of the youth coalition «Our Ukraine», despite concussion, was held in a cell 2x2 meters on a concrete floor on the basis of a court order. As a result of the concussion, his ears and nose bled all the time, his pressure increased, and he felt nauseous. Medical aid was, nevertheless, only provided after his mother and students picketed the police administration.

In Mykolayiv 10 police officers beat up the Head of the Mykolayiv regional organization of the Ukrainian People's Party, Volodymyr Hurin. Despite being faint, no one was allowed in to see him. Doctors confirmed very low blood pressure. In Odesa region the head of the Territorial electoral commission № 140 Anatolij Chmil was also beaten up.

The general picture of participation of the Ministry of internal affairs in the election is thoroughly appalling. Instead of affirming voters' rights, the police was transformed into a punitive machine against those voters who had views different from those of the regime. Virtually throughout all of Ukraine forces of the Ministry of internal affairs detained people for setting up camps of tents and sticking up campaigning leaflets, and imposed pressure to stop opposition groups distributing campaigning materials. One is forced, therefore, to conclude that human rights violation by police were of a systematic nature.

The abovementioned facts give every reason to state that the law enforcement bodies, in violation of the Constitution of Ukraine, the laws of Ukraine «On the police» and «On the Presidential elections in Ukraine», actively interfered with the course of the election campaign on the side of the pro-regime candidate, ignoring fundamental human rights.

5. THE USE OF ADMINISTRATIVE RESOURCES BY REPRESENTATIVES OF THE STATE REGIME AND LOCAL BODIES OF SELF-GOVERNMENT

The administrative resource in the election campaign of 2004 became the favourite instrument of the State authorities. Despite the prohibition, contained in point 1 of clause 63 of the Law of Ukraine «On the Presidential elections in Ukraine», against officials and functionaries of State bodies and bodies of local

government participating in election campaigning, officials of the executive government structures at all levels provided a powerful campaigning mechanism for the pro-regime candidate Viktor Yanukovich. Their level of involvement in supporting the regime's choice went beyond all limits. From the beginning of July, numerous human rights organizations started receiving information from ordinary officials of bodies of local government complaining of pressure being brought to bear on them by state administration bodies to coerce them into urging voters to support the pro-regime candidate. People were pressurized into signing documents in doctors' surgeries, the heads of institutions coerced their subordinates, school directors – their teachers and parents, heads of village's councils – the inhabitants of their settlements. The compulsion was also expressed in threats of dismissals against those who objected.

Everything was done in a compulsory way – even attending meetings of Viktor Yanukovich. People were simply taken to meetings supporting the pro-regime candidate in all regions of Ukraine, without anyone being asked for their consent. This practice was especially widespread in Kharkiv, Luhansk, Sumy, Kirovohrad, Chernihiv, Donetsk and Dnipropetrovsk regions. In the September issue of the Chernihiv Civic Committee for Human Rights Digest a typical picture of Viktor Yanukovich's visit to a region is painted.

«The first visit to Chernihiv region of the Prime-minister Viktor Yanukovich took place on September 11. The meeting in Chernihiv had all the hallmarks of a high-ranking official's visit to the provinces. All activists of the region were gathered into the building of the regional drama theatre. A crowd scene outside the theatre was provided by almost a thousand officials of state institutions of Chernihiv, in particular, the regional state administration, the taxation administration, the regional centre on aid and pension budgets, the administration of labour and social policy, officers of the law enforcement bodies in civilian clothes, etc. According to the information given to the Chernihiv Civic Committee for Human Rights by some participants of the event, they were gathered on their day off under threat of dismissal. Before the performance, their names were marked off on a list, for which a representative of the corresponding institution was responsible. As compensation to all those who came to the meeting a day off in lieu was promised. The participants of the meeting were handed out flags, leaflets and some – even T-shirts in support of the presidential contender Viktor Yanukovich.

During the conference in the drama theatre questions were raised regarding salary debts and budget proposals».

«In October a second visit of the Prime-minister Viktor Yanukovich to the Chernihiv region took place. Unlike the previous occasion, this one was «a walk among the people». The people, who, according to different estimates numbered 15-20 thousand, were brought there by the chiefs of institutions and enterprises, with attendance being compulsory. Many people were threatened with dismissal if they did not come. According to witnesses of the event, silent columns approached the square led by their leaders. For instance, the column of education employees was headed by the chief of the city department of education, Leshchenko. Hundreds of participants of law enforcement bodies were brought by buses from all over the region».

An activist of «Our Ukraine» staff in Kharkiv, Vasyl Tretetsky, in the bulletin «Prava Ludyny» [«Human rights»] also gives a picture of meetings supporting Viktor Yanukovich in Kharkiv:

«On July 14 this year, the Kharkiv authorities organized a pompous meeting in support of Viktor Yanukovich, and in order to demonstrate «the people's love» for him, brought more than 50 thousand people, mostly state sector employees and big enterprise workers from all over the region to Svoboda square. The delegations which arrived at the meeting in an organized way were divided into corresponding sectors, where «volunteers» were called over and marked off. Later the Governor of Kharkiv objected to accusations regarding the use of administrative resources, referring to the fact that the organizers of the mass performance in support of Viktor Yanukovich were local organizations of the National Democratic Party. He forgot, however, to mention that it is he who heads the regional organization of the National Democratic Party, and the head of the city branch is the Mayor of Kharkiv, Volodymyr Shumilkin, and that, thanks to them, Kharkiv region has become a kind of reserve of the administrative resource where correct political views are prerequisites, not only for a successful career but even for success in the arts».

The violations of legislative norms of the Law of Ukraine «On the Presidential elections in Ukraine» regarding campaigning were graphically shown by the placing in the streets of Ukraine of a huge number of billboards in support of the pro-regime candidate that the funds of all other candidates taken together would not have been able to finance.

In one of its statements, the Kharkiv human rights group gives the following information regarding this issue.

«At first we all saw an incredible number of billboards with portraits of Viktor Yanukovich, incompatible with any electoral fund of a candidate, as foreseen by the Law of Ukraine «On the election of the President», The government of Kharkiv simply in mandatory fashion, as the Constitution of Ukraine says, «regardless of the form of property», ordered every state sector organization, each joint-stock company, and many private firms to produce this election campaigning material at their own cost (that is, at ours, since these businessmen will take the money off their customers or clients). In Kharkiv, those who emphatically did not support this candidate, initially attempted to add something to these billboards, but then the city authorities ordered that a police officer be positioned near each big board. Quantity exceeded quality so that people neatly renamed billboards into «big mug» and... stopped paying any attention to them at all».

The negative reaction of the population to such «campaigning manoeuvres» of the government led to rumours that in the campaign of the candidate a mechanism for a fictitious contract had been used, with the cost of producing a big board absurdly low, and consequently the state budget did not get any profit out of the agreement with the company producing billboards. Moreover, state expenditure was attested to by numerous messages to human rights organizations telling of considerable sums of money which were signed for by heads of institutions, heads and members of district commissions to obtain the result ordered by the State regime, since the amounts were so far in excess of the limits allowed for in law. In addition, the unofficial funds of the regime's candidate were replenished by means of open blackmail of businessmen from tax inspection and financial monitoring structures. For example, according to information from southern and eastern regions, during a financial examination, an infringement was found at a company for a certain sum of money. The company, having been threatened with punitive measures, including criminal proceedings, were invited to, instead, pay a smaller figure towards the election campaign of Viktor Yanukovich.

The administrative resource worked also in the question of forming electoral commissions. Sometimes, instead of the authorized representatives, lists of commission members to the territorial electoral commissions were submitted by officials. Sometimes this led to absurdities. For example, the bulletin «Prava Ludyny» informed that this way of formation of electoral commissions caused anecdotal and depressing situations. For example, when a respected associate professor, working in one of the national universities of Kharkiv was phoned by a secretary of the electoral commission and invited to a meeting of the commission, he politely agreed. However, when the secretary asked whether this respectable figure was a representative of the presidential contender Roman Kozak, the associate professor was thoroughly outraged, yelled at the unsuspecting secretary and refused to work in the commission. In another commission, headed by a representative of the presidential contender Viktor Yushchenko, where the majority of members of commissions were appointed by the director of the school where the electoral district function, another scandal broke out: 33 (!) members of the commission stated that they all supported the presidential contender Viktor Yanukovich and that they would not work under a head who supported the nationalists! When the head of the commission entirely reasonably remarked that among these 33, there were representatives of the rather notorious Roman Kozak, Dmytro Korchytsky, Andriy Chornovol, Bohdan Boyko who, in contrast to Viktor Yushchenko, call themselves real nationalists, the 33 «warriors» for Viktor Yanukovich answered that they would rather disrupt the election at this district than work under the guidance of Viktor Yushchenko's representative!

As the Kharkiv Human Rights Group have stated, the fact that the administrative resource was used so widely and in such unseemly forms, is of course first of all the fault of the government that, above all, was not able nor willing to work in conditions when it is necessary to fulfil norms dictated by the law. Moreover, the State authorities were convinced that civic society in Ukraine was weak and undeveloped and that parties would not be strong enough to react to such violations. Future events were to prove just how mistaken they were.

Dmytro Groisman in the bulletin «Human rights» issue 26, 2004 informed of the misuse of administrative resources by «Ukrzaliznytsia» (the Ukrainian Railways). During a trip, he noticed that at the Southern railway station in Kyiv behind each of the cashiers there were placards «Because...»²⁷⁵. He asked the administrator to give him the complaint book, because campaigning is forbidden by the Law «On the election of the President», however she refused to do it. After Groisman said that he would immediately send a telegram regarding this to the General Prosecutor, the Ministry of Transport and the Central Election Commission, the cashier spoke to somebody over the phone, having closed the cashier's window off from view. She then opened the window and said: «We apologize. These placards were wrongly placed by one of our cashiers who is a supporter of Viktor Yanukovich. I will remove them».

²⁷⁵ i.e. placards in support of Yanukovich (*translator's note*)

What is most interesting – she really did take them down, removing every single placard «Because...» Dmytro Groisman continues: «After that she said: «Please don't write a complaint, it won't happen again». I asked about the situation at the ticket office of the Central railway station. She told me that she didn't know and that she wasn't responsible for the central office. So I went there. Of course, behind each of the cashiers, there was our Kashchei ²⁷⁶! This time I acted differently.

I simply went to the administrator and asked for the complaint book. The administrator working at a refund desk at the left of the central entrance to the railway station invited me to come in and asked what the complaint was. I refused to say, answering that they would be able to read everything when I finished. She began phoning, a lot of people came, didn't give the book, saying «what if you spoil it and write obscenities there». I took out my passport and said «Here's my passport, if I'm such an idiot as to write obscenities here – call the police and I'll answer for the consequences».

I was given the book and I started writing the complaint. I wrote about half of it, and the administrator said: «well, read it aloud, we're all interested», and I started reading. When they understood what I was talking about, something absolutely paradoxical and unexpected happened. They all started saying «That's right! Well done! We've all had it with that!.. How long do we have to put up with his band of crooks, it would be better if someone threw him under a train tomorrow, and so on». It all ended with the women assuring me that if I ever had any problems with train tickets, I should come to them and they sort everything out. After that I went to the post office and sent a telegram to the Central Election Commission».

As a human rights activist from the Luhansk region, Oleksiy Svetikov informed, the newspaper «Luhanchany» published facts they had learned about the misuse of administrative resources in the Luhansk region. According to the newspaper, during working hours in many state sector workplaces, meetings were held where medical staff, teachers, state officials and police officers discovered that they apparently all unanimously supported Yanukovych. On July 21, in the regional department of the Ministry of Internal Affairs, General Kryzhanovsky gathered all his subordinates and informed them who the police supported. A campaigning group was formed from veteran officers, and was provided with a car. Enterprises and institutions received directions how many people should be «supplied» for participation at the meetings. Stands and placards in support of the «single candidate» were produced. It goes without saying, at the enterprises' and institutions' own expense ... The newspaper also related one shocking case in a village in Kremensky district where the head, having gathered villagers, informed them very succinctly of the needs of the moment: «If even one b... doesn't not vote for Yanukovych – I'll bury you all».

Due to the possibilities provided by the local authorities and bodies of local self-government, Yanykovich's campaign proved most powerful: it also had the almost unanimous support of the municipal mass media and a lot of advantages in the commercial mass media. A free newspaper «Region-Post» began being published (with a circulation of 600 thousand) with material supporting Yanukovych. In every city and village one was confronted with placards and billboards supporting him. Street advertising in the Luhansk region was exclusively in support of «the single State candidate», though the source of the financing of this was never revealed. In August, leaflets supporting the Prime Minister started being put in people's post boxes. The State authorities either held or supported meetings within work collectives in support of Viktor Yanukovich, and various work conferences were also used for campaigning purposes.

Numerous mass events were also held in support of Viktor Yanukovich, incidentally, all identical in terms of technical organization. For example, on July 26 on Teatralna square of Luhansk a regional forum of democratic forces of the Luhansk region took place, after which similar forums were churned out by all towns and district centres of the region. It has to be said, that some scope did remain for local initiative. For example, before the opening of a forum of democratic forces in Kremenne a somewhat novel form of participant registration was adopted: the organizers put down the name of the «collective participant» (an enterprise of an institution) and fixed how many people would come from this work collective to the forum.

On July 26 at 16 o'clock by the building of the state enterprise «Luhanskcoal» a meeting of Viktor Yanukovich's supporters was held, the participants of which were brought by buses of the municipal auto-transport enterprise. After this, similar meetings were held in all towns and district centres of the region. According to the information given during the forum of democratic forces by the head of the Luhansk regional organization of the National Democratic Party, Andriy Cherkasov, meetings of work collectives had taken place in support of Viktor Yanukovich at many enterprises of the regional centres. There had been no meetings in support of other candidates.

²⁷⁶ A less than attractive character from folk tales (*translator's note*)

However, administrative resources surpassed themselves most notably in gathering signatures in support of Viktor Yanukovych. No less than 500 thousand signatures in the Luhansk region were gathered in just two weeks! The Severodonetsk enterprise «Azot» can serve as an example of the use of administrative resources in this «subscription» campaign, «adapted» to comply with legal requirements; its workers signed their names not at their working places, but near it – at the entrance checkpoint. Before that, the workers had been warned that the lists would first go to the personnel department. As a result the process of collecting signatures was rather lively – there was a queue by the tents. In addition, at «Azot» workers were warned that signing in support of other candidates was not possible. In such fashion, the gathering of signatures for Yanukovych was completed in record time».

Administrative resources also attempted to take control of the training process of district commissions. For example, the Chernihiv Civic committee for human rights agreed to hold two training seminars on electoral legislation at the Territorial Electoral District (TED) № 208 (Chernihiv). The head of the Territorial Electoral Commission (TEC) № 208 Oleksy Mekshun invited representatives of the Desnyansky and Novozavodsky district executive committees of Chernihiv who were in charge of preparing lists of voters. Members of the Chernihiv Civic Committee for Human Rights were extremely taken aback to find that the key motif when explaining the Law of Ukraine «On the election of the President» was that mistakes in the lists were no problem, and that one could correct them by hand – as many as one liked! The Civic Committee's expert on electoral law, Svetlana Hlushchenok, drew participants' attention to the fact that this was an entirely wrong interpretation of the law, and stressed liability for any infringements of it. The next day, the head of the Territorial Electoral Commission № 208 was summoned for a «serious conversation» by the member of Central Election Commission responsible for the Chernihiv region, Raykovsky, who arrived from Kyiv to strictly warn that these training sessions must not be run by civic associations. Otherwise Mekshun would be removed from his post as head of the Territorial Electoral Commission.

Misuse of administrative resources created a public basis for human rights violations in all regions of Ukraine, however, it actually caused such a negative reaction from ordinary voters that a great many of them consciously voted less for a specific presidential contender, than against the coercion of the administrative bodies.

6. INVOLVEMENT OF CRIMINAL ELEMENTS IN THE ELECTION PROCESS

The election of 2004 demonstrated attempts of criminal elements to substantially influence the election process. Blackmail and intimidation of activists and voters by criminal structures took on unprecedented proportions. In order to influence the election process, methods were used which had first been applied in Mukachevo a year earlier during the election of the new mayor: theft of voting papers and stamps, raids on polling stations, use of physical violence against supporters of the opposition, etc.

In regions of Ukraine like Kirovohrad and Sumy, the activities of the criminal groups almost led to the disruption of the election. In most cases, the State authorities either ignored this criminal influence or even connived with it. This demonstrated that the interests of the current regime and those of the criminal with regard to the elections coincided.

A vivid example of events with this criminal flavour can be seen in the events which took place at the electoral district № 100 (Kirovohrad).

On October 31, at TED № 91, TEC № 100 late in the evening, long after voting had ending and while the vote count was under way, a policeman opened the door and let in 6 people of criminal appearance. A strange conversation took place with the head of the commission. An observer from Viktor Yushchenko's party began filming this on video, at which points the strangers attacked him and took away the video camera. Following this scuffle, it turned out that the head, his assistant and the secretary of the commission had disappeared together with a sack of voting papers.

The head of TED № 79, TEC № 100 was drunk. In her words, she had passed her stamp and authorities to another person whom she refused to name.

TED № 92, TEC № 100 was raided by 10 armed men who burst in, shooting at the ceiling, loaded and took away the results of the voting in a few cars. It is interesting that they were openly escorted and supported by the deputy of the city council Belov. With these appalling violations, the expression of the will of the people in district № 100 must be placed in doubt.

On November 3 the head of the Territorial Electoral Commission № 100, Volodymir Baby, resigned, giving the pressure placed on him as reason.

On November 10 the Central Election Commission suspended TEC № 100 and decided to ignore all votes from district № 100. However Yushchenko's representatives disagreed with this decision and appealed it in the court.

On November 12, in the district № 100 a new Territorial Electoral Commission № 100 was established.

On November 17 the Supreme Court of Ukraine in response to a complaint from State Deputy Katerynchuk declared the results of voting at TED № 100 valid, thus acknowledging the real will of citizens in district № 100.

However, already on November 18, the prosecutor's office of the Kirovohrad region launched a criminal case against the head of the electoral staff of «Our Ukraine», Kalchenko, and activists of the staff of Viktor Yushchenko for having obstructed police officers of the Holovaninsky District Police Station of the MIA during the execution of their official duties. According to Kalchenko, the police had refused to explain the reasons for detaining a student campaigner who was distributing the newspaper «Silski Visti». Officers of the District Police Station had applied physical force to the student-agitator.

At the district centre № 92 of TED № 102 the observer Holodniuk was dragged out of the building by people from a Volga with number plate «31129», and beaten and his video camera was taken away. The police standing nearby did not react in any way.

Although Kirovohrad became the criminal capital of these elections, the situation was not significantly better in the Sumy and Cherkasy regions. At the district electoral commission (DEC) no 137 (TEC № 165) in Trostyanets a member of the DEC from Viktor Yushchenko, P. Sulima and an observer from this candidate were severely beaten directly at the polling station. The police did not react.

In the Cherkasy region at DEC № 202 in the village Molodetske, Minkivsky district, one morning the body of a district policeman was found. At DEC № 17, TEC № 201 in Smila night a polling station was vandalized, with windows broken and ballot-boxes and tables smashed. At DEC № 38, TEC № 198 (the University of Cherkasy) the video camera of one of Viktor Yushchenko's observer was destroyed: he had been filming a falsification «carousel»²⁷⁷. At DEC № 44, TEC № 198 a journalist was beaten when buses arrived bringing with people with absentee ballots.

Already during the «Orange period», criminal events took place in Transcarpathia. In December Uzhhorod was shocked by events of a totally criminal nature, when in the hotel «Sport», not far from the city's stadium «Avangard», a large group of people was detained (40-50 persons) who were planning provocations against participants of an «orange meeting». Among the detained was the president of the football club «Zakarpattia», Paulio (who had previous convictions for rape, robbery and aggravated robbery). According to the information of police he had guided the preparation of the operation. The detained possessed a large quantity of fire-arms: a few hunting guns «Sayha», four rifles, a submachine-gun «UZI», three guns for combined bullets, a pistol PM, 75 wooden bats and also a big quantity of knuckledusters and «hedgehogs» for puncturing tires. Besides, in the cars of those detained, a few sets of police uniforms were found, cards of the State automobile inspection, Interpol, balance accounts of some regional companies (including the information about companies which gave loans starting from 50 thousand UH), and also original information with sums of money opposite the names of those heads of districts where Viktor Yanukovich had failed. The criminals could hardly have received this information without the assistance of the taxation administration. What was the role and who ruled these people? The material evidence found on those details proves that this criminal activity had some connection with the election process. In addition, according to many citizens of Uzhhorod, including those who had suffered from these criminals, while waiting for new instructions the thugs had amused themselves ripping orange ribbons off people and insulting them. It's interesting that the honorary president of the football club «Zakarpattia» is the deputy Nestor Shufrych, an active participant of the election campaign of the side of Viktor Yanukovich.

One other appalling incident took place in Luhansk: on one o'clock in the afternoon on November 29, a group of 25 activists from a civic movement and from party organizations decided, in view of provocation the previous day and to avoid the threat of bloodshed, to warn citizens of Luhansk that the meeting in support of democratic forces and against election fraud had been cancelled. At the same time, around the headquarters of the Party of Regions, one could observe a crowd of about 400 young people in an excited mood, – supporters of Viktor Yanukovich who began to approach the group of activists from the democratic civic movement. At about 13:10, when the meeting of Viktor Yushchenko's supporters started breaking up,

²⁷⁷ «carousels» were what people called the practice of «bussing» people with absentee voter papers from one small polling station to another. (translator's note)

about 40 persons of criminal appearance armed with hammers and bats suddenly rushed into the group of civic activists and attacked them viciously. They beat up women, elderly people, activists as well as people who happened to be there, kicking, hitting them with hammers or bats, jumping on people as if on a trampoline.

Members of the police stood by and did not intervene, in violation of their professional duty. As a result of the attack, around 10 persons suffered serious injuries. An OSCE representative, Mr. Motsny, received injuries to the head. A video camera was stolen and a mobile phone broken. The citizens of Luhansk who happened to be there were shocked by what they saw. A criminal investigation is now under way as a result of these events, and lawyers of the Ukrainian Helsinki Union for Human Rights have lodged a formal complaint about the unlawful actions of law enforcement officers.

The cases described above were widely discussed in the Press, they were used in the Supreme Court of Ukraine when considering the legality of the second round of elections. This shows yet again what flagrant violations the State authorities were prepared to resort to during the Presidential elections, ignoring such natural rights as the right to life, to liberty and to security of person, while aiding and abetting criminal elements whose political views were similar to their own.

7. THE FREEDOM OF CHOICE IN PENAL INSTITUTIONS

A particular issue in the elections was the observance of electoral rights in places of deprivation of liberty. The use of the administrative resources with regard to people deprived of their liberty was expressed above all in violation of the norms of the Law of Ukraine «On the Presidential elections in Ukraine» with regard to campaigning (point 2, part 1, Article 84). Voters in penal institutions did not receive equal access to information about all candidates. The domination of the pro-governmental candidate Viktor Yanukovych in these closed institutions was absolute. This was encouraged by a strict instruction received by the administration of the secure institutions from the government. Influence over voters was achieved both by means of unlawful actions on the part of the personnel of the secure institutions and by means of involving criminals in this process. The right to free expression of their will in places of deprivation of liberty was unprecedented. Undoubtedly, this process was controlled by the State powers. For non-compliance with «orders» the director of the institution could lose his job (for example – the Lukyanivsky pre-trial detention centre).

During the presidential election, the monitoring of special electoral districts was carried out by the Ukrainian section of the International Society for Human Rights. We can cite here just a few fragments regarding their impressions. At a seminar entitled «The civic society and State in the election process», run by the organization in Kyiv a month before the election, a representative of the State Penal Department of Ukraine officially assured those present that Ukraine can anticipate «a wonder of democracy». The administration of the department was thanked «for proposals regarding their encouragement for the running in penal institutions of activities aimed at raising the level of legal awareness of participants of the election process», and expressed its readiness to «help official observers in carrying out their duties», although it objected to exit-polls.

In fact, the situation with voting in penal institutions proved to be absolutely critical. The administrations of the vast majority of «zones» used all methods of administrative pressure and influence on imprisoned voters through «trusted individuals» from among the prisoners. Virtually everywhere a policy of carrot or stick was used. On the one hand, they tried to buy prisoners' favour, distributing «special rations» – cartons of cigarettes, sweets, tea, etc. On the other hand, supporters of Viktor Yushchenko were thrown into solitary confinement punishment cells, beaten severely, psychologically and physically tortured.

In practice, 200 thousand of prisoners in Ukraine during the first round of elections experienced the usual fare of prison absurdity. One of the prisoners convicted for the case involving «Odessa Komsomoltsi», Ilya Romanov says that 2 weeks before the election, officers of the colony spread rumours that Viktor Yanukovych was preparing a «golden amnesty» for all prisoners and those awaiting trial. A few days before 31 October, the administration started distributing gifts on behalf of Viktor Yanukovych (5 packs of cigarettes «Kozatsky», 10 sweets and a packet of tea). Just before the election, 2 more packets were given. The cook who served out the gifts from Viktor Yanukovych to prisoners accompanied them with a mumbled «from Yanukovych». As a result, in the Odesa criminal investigation cell, the procedure was simple: the person awaiting trial came into the room where an employee nicknamed «Stepanych» handed him a ballot card to be filled in. Stepanych himself proceeded to tick off the name Yanukovych, and then pointed to the ballot box saying : «Put it in!».

Symptomatic is the statement of the prisoners of the corrective penal settlement № 35 in Bila Tserkva, which they sent to the internet site «Maidan» on November 26, 2004:

«In the collective statement of the prisoners of this corrective penal settlement it is claimed that after they all voted for Viktor Yushchenko in the first round, the attempt was first made to bribe them with goodies and promises of eased regulations. However, when they saw that the majority of the prisoners did not intend to change their minds, a campaign of cruel repressions and administrative pressure was initiated against them.

The instructions as to this were given by the Director of the Department for corrective penal institutions, General Karandin who visited corrective penal settlement № 35 personally after the first round.

After this the administration of the settlement started constant pressure on prisoners, those who refused to give in after the first round were put in solitary isolation punishment cells.

The website «Maidan» holds the names of those most active in carrying out this criminal order. The current Director and his assistant are the first among them».

This is how voting was held in the Buchanska corrective penal settlement № 85 (96th electoral district of Irpin and Kyiv-Sviatoshyn). The prisoner Leonid Myronchyk (criminal nickname Liovushkin or Banzay) was thrown into solitary isolation; he had not only openly stated that he would vote for Viktor Yushchenko, not for Viktor Yanukovych, but had also objected to the campaigning being carried out by the administration of the settlement (who, as state officials, do not have the right to do this), which was evidenced by the distribution of gifts (a crime – bribing voters). The punishment of Myronchyk provoked mass outrage among other prisoners who also had no wish to vote for the state regime's candidate (in the first round Viktor Yanukovych received half as many votes as Viktor Yushchenko in this institution), since Banzay (Myronchyk) was respected as being uncompromising in defending his rights in confinement.

The administration of the settlement claimed that they had isolated Myronchyk because of some illegal drugs circulation, with regard to which an official investigation was to be held. The prisoners stated that Myronchyk had nothing to do with drugs and had been isolated solely because of his political views.

The internet site «Maidan» states data of voting in the «cops' penal settlement» in the village Makoshyno of the Chernihiv region.

Before the first and the second rounds the deputy chief of the Penal Department in the Chernihiv region, a certain Oleksandr Vorobey visited. During each of his visits he gathered persons on duty in barracks and gave an explanatory talk to them saying how and for whom prisoners must vote. Naturally, they had to vote for Viktor Yanukovych. After that «foremen» were distributed campaigning literature and they were let go. However, the results of the election in Makoshyno for Vorobey were not cheering. In some sections, more than 30% of prisoners voted for Viktor Yushchenko.

One more detail. In order to vote, prisoners were divided into groups under the control of a group-leader. The group-leader observed the way others voted; it was strictly prohibited to fold voting papers. This was clearly done in order to observe voters' choice.

And here is some evidence of the way the situation in penal institutions is changing together with the situation in the country. «Maidan» cites the deputy head of the Kherson regional organization of the Committee of Ukrainian voters, Halyna Bakhmatova, the newspaper «Vhoru».

«Between the first and the second rounds a prisoner of penal settlement № 90 who had managed to get hold of a mobile phone called me. He had got my phone number from the mass media, thanks to the hotline of the public initiative «Znayu», I'm its coordinator in Kherson. He complained: «Halyna, it's unbearable, do something, they just push our hands away, and don't let us tick our own voting paper». He described how it was: the commission gives a voting paper, and on the way to the polling-booth there are a whole lot of police officers who snatch the voting paper from the voter's hands, and the commission does nothing because it consists of the settlement's employees. Observers are either slow on the uptake, or there are none.

During the second round I went to this settlement, hoping to force my way in. I talked for a whole hour with the person in charge. For an hour he smiled and told me how good everything was in their settlement – that there were observers from Viktor Yushchenko and Viktor Yanukovych, but he didn't let me in. Then I learned that observers from Viktor Yushchenko had been thrown out, all rights of voters in this penal settlement had been violated, almost 900 voters had «voted» for the candidate from the regime and about 200 – for Viktor Yushchenko.

Before December 26, my new acquaintance called me again. He told that in the evening they had been visited by one of the chiefs of the settlement. «I'm not my own man, you understand me, you are also not independent, as always we must vote for whom we must», – he had said without enthusiasm. At this he handed

them cigarettes (with which he wanted to bribe the voters). My interlocutor said hopelessly: «Well, what can you do?»

In the morning I called penal settlement № 90. «Yesterday I received a call, I've had a complaint about you from prisoners». – «That's impossible, our prisoners are not allowed to use phones». – «Well, this prisoner was lucky enough to find one. I can't name him, but the call and the complaint did take place. You understand that that means 12 years in prison?» – «That's all untrue, they just want to do me harm, I didn't do anything like that, I didn't bribe anyone, if you want you may come and check yourself – it's all fair here». – «Will you let me in?» «I will and anyway there are ten observers».

I just was about to go there when my acquaintance called me and said: «Halyna, thank you so much, we've never had such a miracle before: we are allowed to vote humanly». The results of the voting in this colony: 1100 for Viktor Yushchenko and about 280 for Viktor Yanukovich».

The examples above show that the general picture of the election in prison, threats and pressure did not give the result the State authorities expected. They prove that open protest even in conditions of severe pressure exerted in prison was demonstrated by prisoners, asserting their right to free choice.

8. THE RIGGING OF ELECTION RESULTS ON VOTING DAY: «CAROUSELS», «ABSENTEE BALLOTS», LISTS OF HOUSEBOUND VOTERS...

The most flagrant violations during voting different forms of dirty technology. Infringements concerning lists of voters, 'carousels' with absentee ballots, infringements regarding conditions of voting and others were widespread.

Long before the first round of the elections, the Committee of Voters of Ukraine and a number of other human rights organizations drew attention to the likelihood that most mass infringements would involve voter lists. It seemed that the regime was deliberately preparing as many spoiled lists as they could with far more mistakes than during the previous elections. Sometimes there were three mistakes regarding one family. Mass registration of people who had died, confusion over correct spelling of names and surnames, distorted dates of birth and addresses. Sometimes an entire street could not be found in the lists. There were cases of lists being replaced.

Here is some information made public by Antonina Halkina from Mykolayiv in the information bulletin «Prava Ludyny» № 31, 2004: «A few days before the election, lists were replaced, at least in Mykolayiv. The district commissions thoroughly checked and updated lists before the election. On 29 October they were taken from the districts in order to be translated into Ukrainian and «last corrections» were made, that is many were crossed out and «dead souls»²⁷⁸ were inserted. At the district I worked in, we prepared the first polling act at 8:40 in the morning. And within half an hour, 18 persons came in holding invitations where their numbers in the list were indicated, but they were not on the lists. And people pointed fingers at members of the commission and said: «You revised it three times. Here is the invitation written with your hand». After we prepared the act which, incidentally, was signed by the head of the district commission, I took it to the headquarters and the Territorial Electoral Commission, two representatives of the OSCE visited our district as well as representatives of all the presidential candidates. Furthermore, the words of the head of the commission that the lists had been taken from the district were recorded by at least five cameras». In all cities of Ukraine voters actively turned to the courts in order to have their names reinstated on the lists of voters. Some local courts considered from 1500 to 2000 claims on the day of the election.

The use of absentee ballots became yet another lever, used by the State authorities to achieve the result they wanted. Throughout the country there were buses and trains carrying a huge number of people. If anyone had been able to follow the routes that these people took, they would have seen that they had wandered from one polling booth to another.

For example, as the information bulletin «Prava Ludyny» reports, at the district commission for the Ternopol region, in the period between the presidential rounds, there was a wave of applications for absentee ballots for the second vote. Police officers, taxation officers, firemen, employees of Ukrainian railways, forestry workers, vets, etc all 'moved' obediently.

Here is one more example from a member of the Kharkiv Human Rights Group:

²⁷⁸ «dead souls» were originally used for not entirely dissimilar fraud by Chichikov in Gogol's novel *Dead Souls*. In the novel, they were those serfs who had died since the last census, and were not, therefore, yet officially registered as having died. (*translator's note*)

«For example, a week ago an acquaintance called me and asked if he could see me urgently. In my office, he said that his boss had demanded that in the next few days he should get absentee ballots for himself and his wife and give them to the boss. It was advisable not to ask any questions. The same proposals, according to him, had been made to other members of the collective. Otherwise they were told they would have problems with the job. When I asked why people didn't lodge complaints with the prosecutor, he answered: «they all have families and are frightened of losing their jobs».

The statistics also indirectly prove the use of the false absentee ballots. According to the Chernihiv Civic Committee for Human Rights, in the Chernihiv region at some district electoral commissions situated in remote villages (with bad transport systems), with a total number of voters of only about 250-350 people, in the afternoon 10-70 people voted with absentee ballots.

Voting of the disabled from home was a special issue. One of the amendments to the Law on the Elections adopted after the second round concerned specifically the disabled and housebound. Viktor Yanukovich's team stressed their role of defenders of the electoral right of these poor people. But the events of the first and the second rounds of voting clearly proved that the reason for defending the voting rights of the housebound and disabled was to enable the pro-regime team to rig the results of the election. Thus, according to the results of the second round of the election in Mykolayiv, 30% of voters turned out to be unable to vote at polling stations and «voted» from home. During the re-run of the second round, the number of claims submitted by people to the district electoral commission decreased 100 times. If, during the first two rounds, the number of claims submitted to one district electoral commission was about 1500, during the re-run of the second round, this number had fallen to between 10 and 15, indicating the extent of the falsifications during the preceding rounds. In our opinion, restrictions on the right to vote outside polling stations during the re-run on December 26 were proportionate and justifiable. One can come to this conclusion if one compares the damage caused by the infringement of the rights of all people to a just and fair election and the damage caused by the restriction of a significant number of people to vote outside polling stations on December 26. For the results of this election, the damage caused by the infringement of the rights of all people to a just and fair election was much more substantial. Indeed, the misuse of the right to vote outside a polling station led to widespread vote rigging and flagrant violation of the right to free and just elections.

The election fraud at the polling stations where Viktor Yushchenko's victory was forecast was combined with open violence at the stations where Viktor Yushchenko's lead was «unplanned» in the first round. There were numerous attacks of sometimes armed unidentified individuals in civilian clothes on commissions and observers with the purpose of interfering with the vote itself or the subsequent vote count. In the Sumy region, a few people, protecting voting papers were actually injured.

The mass, systematic nature of the election fraud proves that it had been planned in advance as part of the strategic plan of the State authorities to ensure the necessary percentage of votes for the presidential candidate, Viktor Yanukovich, in fact, to achieve a constitutional coup d'etat.

One can quote many more examples of the vote rigging technologies used during the election campaign of 2004, but most important is the fact that their mass use and the brazen disregard by the falsifiers of political and civil human rights led to a different effect from that expected by the State authorities, namely to mass protest of the country's population against having a political system and government imposed upon them. It was specifically the actions of civic society which neutralized all vote rigging and made it possible after all to vote with full compliance with the right to free choice.

9. INCITEMENT TO INTER-ETHNIC AND RELIGIOUS HOSTILITY DURING CAMPAIGNING

Unfortunately, the election campaign 2004 did not pass without incitement to inter-ethnic and religious hostility during campaigning. From the very beginning, the team of Viktor Yanukovich, violating clause 37 (prohibition of propaganda) and clause 2 (integrity and inviolability) of the Constitution of Ukraine played the card of provoking conflict between the Ukrainian speaking West and Russian speaking East. This first of all involved the information policy in campaigning.

For example, the channels «Inter», «1+1», ICTV after the advertisement of Viktor Yushchenko with the brand «Tak!», placed an advertisement with the following message: it showed Ukraine split into 3 parts. The Western Ukraine was marked first class, Center and South – second and third class. The voice heard commented: «This is how Ukraine will look under Viktor Yushchenko».

Such presidential contenders as Kozak and Bazyliuk instead of stating their own vision of a Ukrainian future stated their vision of the future policy of Viktor Yushchenko in order to frighten voters. For example, Kozak in his first campaign broadcast stated that the nationalists hoped that when Viktor Yushchenko came to power, Ukrainian would be the only language. At the same time the campaigning editions of Kozak in Halychyna²⁷⁹ in nationally conscious regions stressed that Viktor Yushchenko was an Easterner who had surrendered national interests. In his second campaign broadcast on central TV channels, Kozak addressed Viktor Yushchenko with the words: «Viktor Yushchenko! Your wife is an American». Bazilyuk's broadcasts were generally aimed at creating the impression that Viktor Yushchenko was antagonistic to the Russian-speaking part of the population. Information of the same nature was also given in the election campaign of Vitrenko.

In many cities of Ukraine (mostly in Southern and Eastern regions) billboards were installed with a broken heart and a torn photo with the words «Don't let them split Ukraine». It is interesting that during the whole campaign, supporters of Viktor Yushchenko spoke only of uniting the nation, explaining that they were not going to ban the Russian language. However PR technologists continued to make Viktor Yushchenko and Yuliya Tymoshenko «utter» phrases like «Let's enclose Donbas with thorny hedges» or «Let's raze the seventh kilometre into the ground» and drummed these ideas into the public mind. As a result of such a policy, a range of phobias appeared, victims of which were first of all the Russian speaking population who were afraid of repressions. Thus, the political game of the team of Viktor Yanukovich playing on differences between national groups led to a rather severe division of political views based on the issue of language, which again indicates the criminal level of the political technologies used by the State authorities towards the people.

Electoral spice with bad taste can be seen in the active use by the Ukrainian Orthodox Church under the Moscow Patriarchate of the church clergy as a campaigning platform for Viktor Yanukovich. In Luhansk, Kirovohrad, Sarny, Zaporizhia, Kyiv, Chernihiv there were direct campaigning appeals, religious processions were organized in support of Viktor Yanukovich, priests distributed campaigning literature, etc. For example, in Odessa at the seventh kilometre (a large market) nuns distributed campaigning leaflets in support of the candidate from the State authorities, which claimed that Viktor Yanukovich had been sent by God while Viktor Yushchenko represented the Antichrist.

In response to these events, human rights organizations of Ukraine made several appeals and statements regarding violation of the right to freedom of religion and free elections in Ukraine. They mentioned in them that campaigning had been taking place both during religious services and in the interviews of some higher church figures. Such a practice of pressure on the consciousness of voters contradicted the provisions of the European convention for human rights and the Law of Ukraine «On the liberty of conscience and religious organizations». The encouragement by the State authorities of religious hostility and religious conflict contradicted the idea of a legal democratic state.

During the «Orange revolution» at a meeting in Chernihiv, «this position» of the Ukrainian Orthodox Church of the Moscow patriarchate was condemned by the priest of the Troyitse-Serhiyivsky cathedral Serhiy Ivanenko-Kalenda. This man whose priest's roots go back to the fourteenth century, protested against the compulsion imposed by the church in regards to its parish. He declared his opposition to the position of the church authorities and was prohibited from conducting religious services. Serhiy Ivanenko-Kalenda gave a press-conference in the UNIAN agency in Kyiv. Incidentally, it was only the Ukrainian Orthodox Church of the Moscow patriarchate who did not add its voice to the joint statement of different faiths and churches, appealing for a just and fair election.

The use of the church in the election was an attack by the State regime on the freedom of choice, religion and conscience and led to limitation of the right of choice of religious people and a drop in the authority of the Ukrainian Orthodox Church of the Moscow patriarchate within Ukrainian society.

10. HUMAN RIGHTS IN THE COURSE OF THE «ORANGE REVOLUTION

The rigging of the results of the second round of the presidential election was a powerful impulse for the outburst of revolutionary energy on the squares of Ukraine. Already by the morning of November 22 on Independence Square (Maidan Nezalezhnosti) in Kyiv a huge wave of people had appeared. It was

²⁷⁹ Halychyna is Western Ukraine, traditionally more nationalistic and less linked, either historically or ideologically with Russia (*translator's note*)

made up, moreover, not only of citizens of Kyiv. People began arriving from all over Ukraine to assert their own choice. The essence of the events can be explained as a movement to freedom, towards awareness of personal dignity, of the importance of personal choice. It was a victory over the conviction formed back in Soviet times that nothing depended on a single vote, that everything was decided by the «authorities». People had experienced freedom and were not now ready to surrender it. The camp of tents that appeared at that time on the square had a motto written on one of the tents: «The Ukrainian people are carrying out euro-repairs to the State. We apologize for any possible inconvenience»²⁸⁰. The purpose of this confrontation with the old government was to assert the interests of democracy, the individual's right to free expression of views, the right to peaceful assembly, and the right to a fair election.

This confrontation of the people and the State regime was very dangerous. A few times, the situation was «on the brink», especially on November 28. Yet the strength of the people and the support of the world community did not allow bloodshed. «Maidans» stood firm and peacefully throughout Ukraine. Only in one place, in Chernihiv on November 26 did events occur which led to the use of force and injuries.

That day a crowd of a few thousand people supporting Viktor Yushchenko, headed by the socialist State Deputy, Mykola Rudkovsky, tried to enter the building of the Chernihiv City Council to make the deputies adopt the decision about recognising Viktor Yushchenko as President. After some explosives left by unidentified individuals went off near a group of police officers who were guarding the building of the city council, and seriously injured two police officers, the law enforcement officers of the Ministry of internal affairs used rubber batons and noise grenades to prevent people from getting into the building. As a result, a few dozens people from both sides were injured.

Analyzing everything that happened on 26 November around the Chernihiv City Council, one can conclude that State Deputy Rudkovsky, in confrontation with the mayor of Chernihiv, Oleksandr Sokolov, proved himself to be a brilliant populist and organizer of riots, while ordinary citizens of Chernihiv were used as an element in a political game against the background of the complex political situation in the country.

However, in such a situation, actions that led to serious consequences for victims (according to our information, one of the police officers, a young man from Mena lost an eye) were inadmissible. The example of responsible action of politicians who did not permit violence and who forced the State authorities to respect the choice of the people is for us the Maidan in Kyiv where, despite the huge crowd of people, not one drop of blood was shed. This was possible thanks to the political wisdom of those who were an authority for Maidan. This was an example of the behaviour of truly responsible politicians who cared about the fate of each person who had placed their trust in them.

The single case involving the use of force against the people did not change the generally peaceful course of the Orange Revolution.

The main victory of these events was the fact that in Ukraine a civic society finally made its voice heard. The very fact that people understood that the elections had been falsified, came out on to the streets in order to assert their choice, doing this peacefully, tolerantly and together proves the European choice of Ukrainians that was warmly accepted in the world by all those who assert the ideals of freedom and democracy. For the first time in Ukraine, the hope has emerged that the human rights situation in the State will change for the better.

11. RECOMMENDATIONS FOR PREVENTING VIOLATIONS OF HUMAN RIGHTS CONNECTED WITH THE ELECTION PROCESS IN THE FUTURE

Keeping in mind the experiences of the elections of 2004, the new State authorities must listen to proposals from civic society which will facilitate an improvement in the situation with regard to human rights observation in Ukraine during elections at all levels.

We would like to make a few proposals that can help to prevent the violation of human rights and fundamental freedoms in future elections:

1) in order to prevent future problems with voter lists, a single register of voters should be compiled within the framework of the activity of an institution independent from the State, with a constantly updated database and control (including public) of the accuracy of the data in it;

²⁸⁰ «evroremont» or «euro-repairs» are normally what people carry out in their flat, i.e. renovations, involving more expensive, 'European', furniture, pipes, etc., and creating a lot of temporary disruption (*translator's note*)

2) civic organizations should be included in the list of participants in the election process and their representatives granted the right to be official observers during elections;

3) in order to ensure secrecy when casting one's vote, ballots papers should be put into special envelopes, so that one cannot see the markings on the ballot paper when it is put inside a transparent ballot box;

4) a prohibition should be introduced into legislation against any state officials playing any role (in particular, as freelance journalists) at polling stations and being there any longer than is needed to cast a vote;

5) in order to prosecute infringements and infringers of the law on elections in a timely and conscientious manner, we recommend that new unified chapters which concern only electoral infringements and which are clearly correlated with relevant legislation on elections are added to the Criminal Code, the Criminal Procedure Code and the Code on Administrative Offences;

6) legislative norms should be introduced making it compulsory for members of electoral commissions to receive training before they begin fulfilling their duties;

7) separate electoral districts in closed institutions (pre-trial detention centres, penal settlements, military units, etc.) should be abolished to allow for the establishment, in accordance with legislation, during voting at these electoral districts of special polling stations which would consist of two parts: one belonging to an open institution or populated area, where ordinary electors would vote, and another belonging to a special institution, while the vote count would all be carried out at one location with separate vote counts at each place and with a single protocol;

8) at every polling station a stand (or posters) should be placed with a list of rights of voters, instructions and sample copies of the following: complaints about the activities of officials, submission of a claim (complaint) to a court, a claim regarding a crime and other information on human rights;

9) legislative norms should be introduced stipulating the compulsory involvement on the day of elections of lawyers (solicitors) to provide free (State-funded) legal assistance to voters in courts;

10) any person who, while not being a state official, is a functionary of social security funds (pension, social insurance for the case of unemployment, etc.) should be banned from serving on electoral commissions;

11) to regulate the issues involved and introduce administrative responsibility where law enforcement officers of the Ministry of Internal Affairs, the Security Service of Ukraine and «civil brigade workers» are on the territory of polling stations without the decision of members of the commission as to the presence of unauthorized persons;

12) taking into account the problem of manipulation with voting from home and obligatory observation of the rights of people, who cannot, because of physical disabilities, visit a polling station on the day of election, to prepare a multilevel system (preliminary monitoring) of people wishing to vote using mobile ballot-boxes;

13) in order to regulate the problem of vote rigging using absentee ballots, to introduce a norm about marking the passport of a voter with a special mark (special stamp) indicating receipt of a ballot paper in the passport section «Special marks», to empower members of electoral commission to insert this mark;

14) as an additional measure, to ensure the obligation of territorial electoral commissions after the election to introduce information about all voters who voted with absentee ballots into a single data base and compare this at a nationwide level in order to detect electoral doubling, with information concerning infringements passed on to the law enforcement bodies;

15) to protect freedom of choice and ensure ballot-box secrecy of blind voters, to introduce into legislation guarantees and procedure for voting of these people;

16) taking into account that electoral commissions are state institutions, we suggest introducing into electoral legislation the obligation that territorial electoral commissions swear an oath and introduce liability where this obligation is not observed;

17) For the time of the election campaign, we recommend establishing bodies (with equal representation of members from different candidates) at Territorial Election Commissions that would:

– monitor cases when representatives of the State authorities give support to one of the candidates in any way with the right of imposing a fine or taking other measures;

– observe equal coverage in municipal mass media information of candidates and have the authority to impose fines.

These recommendations will prevent the possibility of the systematic human rights and fundamental freedoms violations which took place during the presidential election in Ukraine in 2004. At the same time, the election will be conducted in a transparent, equal, fair and democratic way.

XV. THE CATEGORISATION OF ECONOMIC AND SOCIAL RIGHTS²⁸¹

1. ECONOMIC AND SOCIAL RIGHTS

1.1. THE CONCEPT OF ECONOMIC AND SOCIAL RIGHTS

Economic, social and cultural rights form one of two universally recognized areas of human rights, these being: – 1) civil and political and 2) economic, social and cultural rights. This division of human rights into two distinct areas underpins various approaches to monitoring human rights and their violation.

The codification of human rights has, from the beginning of human rights discourse, generated disputes over the hierarchy of rights and how they can be prioritized. These arguments reflected the tension between different ideologies: liberal doctrines gave most weight to civil and political rights and freedoms; socialist doctrines argued that individual economic and social rights were the basis of securing and upholding political and civil rights²⁸².

The Universal Declaration of Human rights in 1948 included civil and political, and economic, social and cultural, rights. The Declaration was followed, in 1966, by two different covenants (The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) which envisaged differing mechanisms for the protection of human rights:

- The International Covenant on Civil and Political Rights envisaged the creation of a distinct organ, the Committee of Human Rights, that would be responsible for observing how states, which had signed the covenant, upheld the obligations that it placed upon them. The International Covenant on Economic, Social and Cultural Rights did not envisage the creation of such a distinct organ²⁸³. Responsibility for monitoring how states upheld their obligations under the covenant was accorded to an existing organ of the United Nations – the Economic and Social Council – (ESC). Not until 1985 was a Committee for Economic, Social and Cultural Rights created.

- The International Covenant on Civil and Political Rights also envisaged that the individual would have the right to report human rights issues to the appropriate authority. The Covenant on Economic, Social and Cultural rights did not envisage that individuals would have this right. This fact meant that monitoring how states upheld their obligations under the Covenant on Economic, Social and Cultural rights was based not on the right of the individual to report on rights issues, which would have placed the process beyond official control, but on a system of exception reports.

This official approach strengthened the conception that there were various generations/divisions of human rights and became the basis for arguments regarding the existence of a hierarchy of human rights and the supremacy of one category of rights over another.

A further issue that we should consider is the categorisation of economic, social and cultural rights as so called «positive» rights. Civil and political rights are regarded as negative rights, because they are based on freedom from state interference and their implementation, if not always cost free, is at least acceptably inexpensive. «Positive» economic, social and cultural rights require the concrete efforts of a given state to support their realisation and their implementation will certainly have financial implications.

²⁸¹ Written by Mariana Kulya, a Human Rights Expert based at the Ukrainian Helsinki Human Rights Union

²⁸² Macgregor Gaile, The International Covenant on Social Economic and Cultural Rights: will it get its day in court? (2002) 28 Manitoba Law Journal 3 pages 32 – 345

²⁸³ The Office of the United Nations High Commissioner for Human Rights is currently working on a project which would add a protocol to the Social, Economic and Cultural covenant which would stipulate that individuals had the right to petition authorities in respect of those rights covered by the Covenant. Details are available on the internet via the following link: <http://www.ohchr.org/english/issues/escr/group.htm>.

THE CATEGORISATION OF ECONOMIC AND SOCIAL RIGHTS

We need, also, to be aware of the principle that certain issues regarding violations of social and economic rights are not subject to judicial review (the so called concept of non justiciability). This conception has, after an initially troubled period, become axiomatic. The development of human rights has, therefore, led to the acceptance of the conclusion that social and economic conditions are not just intrinsic rights, the basic obligations of a state, but normative rights the renewal of which may be accomplished by judicial processes.

1.2. THE FULL LIST, AND THE CONTENTS OF, CURRENTLY RECOGNIZED ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The Covenant on Economic, Social and Cultural rights is one of the fundamental elements in the system of human rights defence. The covenant accords the economic and social rights proclaimed by the Universal Declaration of Human Rights in 1948 an obligatory character and identifies the following as economic and social rights:

- The equality of men and women (article 3);
- The right to work (article 6);
- The right to equitable working conditions (article 7);
- The right to create and belong to a trade union or a professional organisation (article 8);
- The right to social security (article 9);
- The right to defend one's family;
- The right to an adequate standard of living (including the right to food, clothes and shelter) (article 11);
- The right to health (article 12);
- The right to education (article 13);
- The right to culture (article 15).

The requirement to uphold the economic and social rights identified in the covenant places various obligations on a number of differing international and local bodies. A problem remains, however, with regard to the *diffuseness of the contents* of economic and social rights:

- The right to property, although it is recognized in the Universal Declaration of Human Rights (article 17) was not included in the Covenant on Economic, Social and Cultural rights.
- The Covenant on Economic, Social and Cultural rights (article 13) recognises the right to study, scientific research and creative work. The right to education and the right of parents to select a school for their children is, however, outlined in the Covenant on Civil and Political Rights (article 18)
- The European Social Charter defends most of the internationally recognized economic and social rights but does not include the right to education.

1.3. THE PRINCIPLE OF PROGRESSIVE REALISATION

A basic principle of the Covenant on Economic, Social and Cultural Rights is the obligation it places on states to achieve a full defence of those rights through a course of *progressive realisation* (article 2.1).

This fact means that monitoring economic and social and rights is not based simply on establishing if violations of rights have occurred but, above all, determining whether these rights have been achieved with regard to existing conditions. There are, however, certain difficulties in developing a system of criteria with which to evaluate and monitor these rights. If we take modern sociology as an example it is apparent that even if we have precise economic data, there is no system of evaluative criteria. The absence of these criteria makes it impossible to describe the quality of life of the population, the structure of the middle class, the phenomena of poverty or the participation of the inhabitants in the shadow economy. What criteria are necessary to establish, from a human rights standpoint, whether economic and social rights have been realized? How far, in reality, can we reveal and quantify the core processes affecting economic and social rights?

Searching for a mechanism to evaluate progress in realising economic and social rights has led to the conclusion that formulating indices of development is required²⁸⁴. A practice of monitoring changes in such indices, known as «descriptive» monitoring, has also been developed.²⁸⁵

²⁸⁴ This question is thoroughly studied in research produced by the sub commission of the UN for the prevention of discrimination against and the protection of, minorities.

²⁸⁵ European Foundation for the Improvement of Living and Working Conditions «Quality of Life in Europe: an illustrative report» p.1 which is available on the internet at: www.eurofund.eu.int

This «Descriptive» monitoring is based in the development of indices in spheres of activity relevant to the operation of human rights, and observing deteriorations or improvements across a given time period. The monitoring of a particular aspect of rights is not undertaken with a view to understanding the processes and factors that influence this or that indicator but aims to highlight various aspects of relevant activity. Such an approach allows to present a detailed picture of changes in rights indices, but does not provide an analysis that could be used to influence social policy.

Descriptive monitoring needs, therefore, to be considered in conjunction with «analytical» monitoring which aims to highlight the mutual influences and common factors operating within various spheres and the principles affecting fluctuations in human rights indices. It will be apparent that affecting qualitative changes in social policy will require the deployment of both «descriptive» and «analytical» monitoring.

1.4. MONITORING VIOLATIONS OF ECONOMIC AND SOCIAL RIGHTS

Specific economic and social rights have, whatever the conditions under consideration, their own influence on the activity of human rights organisations and how they monitor the defence of relevant human rights. There was an extensive period, however, when human rights organisations did not concern themselves the defence of economic and social rights. Only recently, in fact, did a number of international human rights organisations, including Human Rights Watch and Amnesty International, begin work in this area.

The main factor that gave rise to this neglect, and is specific to economic and social rights, is the difficulty of developing a customary method of measuring violations of these rights. A methodology for monitoring human rights can only be effective when it is possible to recognise, with a degree of precision, the fact of a violation of rights, the individual or body that committed the violation, and the means for the defence and the renewal of those rights. It is sufficiently apparent, of course, that violations of economic and social rights regularly occur. An assertion, however, such as «people are starving – this is a violation of the right to sustenance» or «people are not receiving the medical assistance they require – this is a violation of the right to good health» is far from a theoretical analysis. This kind of crude statement ignores questions such as who is responsible for the poverty of the citizens, or, if the Government is working to realise the rights concerned, the means that will be required to renew those rights which have been violated.

Some human rights experts believe that the most effective way of defending human rights is not popular protest, technical support or national strategy but developing a methodology for monitoring rights. They argue that this methodology should focus on researching and revealing the deficiencies of specific kinds of government activity.²⁸⁶ The establishment of this approach requires that attention is given to the work of various human rights organisations, and that an account is provided of particular aspects of state policy that may accidentally discriminate and or of other deficiencies in the state's economic and social life.

2. ECONOMIC AND SOCIAL RIGHTS: THE UKRAINIAN CONTEXT

2.1. UKRAINE'S OBLIGATIONS IN THE SPHERE OF ECONOMIC AND SOCIAL RIGHTS DEFENCE

Ukraine's obligations with regard to the defence of economic and social rights should be viewed not only with regard to the International Covenant on Economic, Social and Cultural Rights but, also, other relevant international treaties. Ukraine has, in fact, signed and ratified six treaties, from a total of seven legally binding United Nations agreements in the human rights sphere: the International Covenant on Civil and Political Rights; the International Covenant on Social Economic and Cultural Rights; the Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Rights of the Child; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. With the exception of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment all of these conventions cover the defence of economic and social rights. Ukraine is not a signatory to the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.²⁸⁷

We need also to consider various agreements developed by the International Labour Organisation (ILO) which guarantee the right to a place of work and to join a union. Ukraine has ratified nearly 50 of the various ILO agreements, some of which include the fundamental principles of rights in the sphere of paid employment, these being:

²⁸⁶ Roth, Kenneth «Defending, economic, social and cultural rights: practical issues faced by an international human rights organisation»

²⁸⁷ The UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families came into force in 2003. The text of the convention can be found on the internet at <http://www.ohchr.org/english/bodies/cmw/cmw.htm>

- Convention 29, Forced Labour Convention« 1930;
- Convention 87 « Freedom of Association and Protection of the Right to Organise 1948;
- Convention 98 « Right to organise and Collective Bargaining» 1949;
- Convention 100 « Equal Remuneration» 1951;
- Convention 105 «Abolition of Forced Labour» 1957;
- Convention 111 «Discrimination (Employment and Occupation) 1958;
- Convention 138 «Minimum Age Convention» 1973;
- Convention 182 «Worst Forms of Child Labour» 1999

There are, in addition to obligations of a legal character, a number of agreements between states which participate in global trade, so called non obligatory, political agreements. These include, for example, the obligations member states of the United Nations agreed they would achieve by 2015 in the millennium declaration. There are also obligations regarding economic and social rights which were declared during the World Summit on Social Development and the Fourth World Conference on the Rights of Women. Ukraine, it should be noted, has signed all the documents in the paragraph above.

2.2. THE RIGHT TO AN ADEQUATE STANDARD OF LIVING

Ukraine's move towards market economics has, when viewed from the standpoint of the international agreements to which it is a signatory and the framework of national law, had a negative effect on the country's ability to realise and maintain economic and social rights.

The worsening of the situation with regard to the defence of economic and social rights can be illuminated by observing the decline in a number of economic indicators. We should note that, for example, between 1990 and 1999, Ukraine's internal production of textiles reduced by 60%, while the volume of manufacturing output fell by 48%, and the output from rural agriculture fell by 51.5%. Real earnings also reduced by 3,8 and pensions by 4,0 times.²⁸⁸ The economic decline in Ukraine from 1990 to 1998, when compared with the effects of the great depression in the United States, was twice as harsh and lasted three times as long before it bottomed out and signs of renewed economic growth became apparent.²⁸⁹

From 2000 onwards Ukraine's macro economic indicators began to show signs of limited growth. There was, however, during the period between 2000 and 2004, no perceptible improvement in the standard of living. The increase in measurable poverty against a backdrop of economic growth was a clear sign of the state's ineffective use of revenue and a systemic inability to translate improved growth into higher levels of social security.

The ineffective use of revenue is illustrated by the fact that, contrary what is generally imagined to be the case, welfare costs in Ukraine are known to be on a level with countries showing current signs of growth. According to world bank statistics welfare costs in Ukraine during 2003 were 25.5% of the national product, a level which is comparable with that of highly developed countries while spending on education has risen to 5.7% of the national product. This can be compared with the indices of countries in the Organisation of Economic Cooperation and Development where the median level of expenditure on education is 5.2%. The median level of expenditure on health services for countries in the OECD is 3.7%. The median level of expenditure on welfare (pensions and various forms of welfare assistance) is 16% and, in countries at a comparable level of development to Ukraine, 11%²⁹⁰.

Every individual, of course, has their own view of what constitutes an acceptable standard of living. It is possible, however to develop a system of standards and certain categories to enable the monitoring of economic and social rights. Such standards, for example, have been incorporated into the millennial declaration of the UN where, amongst all the obligations which states must achieve by 2015, primacy is given to the defeat of the extremes of poverty and hunger.

2.2.1. The right to sustenance

«The right to sustenance is linked to personal self esteem and is essential to the realisation of other human rights « according to the Committee for Economic, Social and Cultural Rights²⁹¹.

²⁸⁸ Ukrainian Presidential Decree No 637/2001 from 15th August 2001 «Regarding the Strategy of Eradicating Poverty»

²⁸⁹ The United Nations Representation in Ukraine, the «Millennium Declaration» on the internet: <http://www.un.kiev.ua/ua/mdg1>

²⁹⁰ The United Nations Representation in Ukraine, the report of the Blue Ribbon Commission: <http://www.un.kiev.ua/brc/>

²⁹¹ The Committee for Economic, Social and Cultural Rights general commentary number 12 «the Right to Sustenance 1999

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By comparison with other countries, which are divide into four categories (better situation, upper middle, lower middle and worse situation) Ukraine is entering the group of countries whose indices show signs of a «better situation»²⁹².

Malnutrition 1998-2000 (y %)	Previous figure	Low Birth weight		Progress Re- gress	Malnutrition of children aged 0 to 5 years		
		Most recent figure			Previous figure	Most recent figure	Progress Regress
5	8,0 (1994)	6 (1999)		→		3 (2000)	

Explanatory note: here, and in the tables below, the following signs are used:

- ⇒ Known progress
- Unknown progress
- || Unchanged situation
- Deterioration
- ⇐ Known deterioration

2.2.2. Poverty

The general level of poverty in Ukraine was unknown until 1999, when work to monitor levels of poverty commenced. In 2000, a single criterion, developed in accord with international standards, and on the basis of complex observations of the domestic conditions experienced by many people, allowed several levels of the population to be defined as living in poverty. This criteria can be stated as the fixed level of income that gave the possibility to identify a group of people as having an insufficient standard of living in comparison with the standards of a given community. In 2001 the level of income at or below which people were agreed to be in poverty was set at 56.6% of the minimum necessary to sustain an acceptable standard of living²⁹³.

On the basis of this criteria during 2000 in Ukraine 26.7% of the population fell into the category of poverty while 14.7% were on the border of poverty²⁹⁴. According to ILO research during this period nearly 83% of the population of Ukraine considered themselves to be poor²⁹⁵.

The fundamental factors causing poverty in Ukraine are the low levels of earnings, low pensions, the inadequate system of social security, and unemployment. These factors will be examined in more detail below.

During 2001, in order to reduce the level of poverty, a phased strategy aimed at eradicating poverty was initiated by the Ukrainian government²⁹⁶. The first phase of this strategy (2001 – 2002) initiated a package of measures designed to stabilise the standard of living, and alleviate the worst effects of poverty. The implementation of this first phase was intended to slow down the fall in levels of employment across the economy and stabilise the duration of unemployment.

2004 saw the completion of the second phase (2003 – 2004) which was aimed at creating the necessary preconditions to stabilise growth in real income and secure optimal levels of employment.

The result of the third phase (2005 – 2009) should be a more robust orientation of economic activity towards satisfying people's basic economic necessities and a reduction in the level of poverty among the sections of the population who are worst affected. This phase should conclude by generating the preconditions necessary to move away from a strategy of eradicating, and to a strategy of preventing, poverty.

The strategy envisaged that during the period from 2000 to 2010 the prognosis for the indices of poverty would be as shown in the table below:

²⁹² Source: Children undernourished in total population: The State of Food Insecurity in The World 2002, FAO (www.fao.org) Estimated Low Birth Weight: World Development Indicators 2003, World Bank; UNICEF End Decade Website Database (www.childinfo.org) and the State of the World's Children 2004, UNICEF (www.unicef.org/sowc04). Malnutrition Prevalence: World Development Indicators 2003, World Bank and UNICEF End Decade Website Database.

²⁹³ From a decree of the Minister of Labour and Social Policy of Ukraine, the Finance Ministry of Ukraine, the Ukrainian Ministry of Economics and European Integration, the State Committee of Statistics of Ukraine and the National Academy of Sciences of Ukraine « With Regard to the Confirmation of a Methodology of Evaluating Poverty» N 171/238/100/149/2ND 5th April 2002

²⁹⁴ Ukrainian Presidential Decree N637/2001 15th August 2001 «Regarding the Strategy of Eradicating Poverty»

²⁹⁵ The UN's representation in Ukraine, the Millennium Declaration <http://www.un.kiev.ua/ua/mdg1/>

²⁹⁶ Ukrainian Presidential Decree No 637/2001 from 15th August 2001 «Regarding the Strategy of Eradicating Poverty»

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	2000	2001	2002	2003	2004	2010
Percentage of the population living in poverty	26,7	26,2	26	25,5	25	21,5
Percentage of the population living on the verge of poverty	14,7	13	12	10	8	3
Percentage of the population living in extreme poverty	22,9	22,5	21,5	20,5	19	18

The actual levels of these indices during this period did not, however demonstrate a reduction in the level of poverty: 2001 – 27.2%; 2002 – 27.2%, 2003 – 26.6%.²⁹⁷

2.3. THE RIGHT TO SOCIAL WELFARE

2.3.1. A general overview of the system of social welfare

The eradication of poverty is inextricably linked to the state's social security programmes. The soviet system of social security, which Ukraine inherited, included rent free accommodation, free education and medical services and a varied system of financial relief. It is worth recognising that at an international level the Soviet Union emphasized the priority of economic and social, over civil and political, rights.

Social security in Ukraine across the transitional period was also characterized by generous privileges, material relief from the effects of the Chernobyl incident, and subsidies and assistance for families.

These services were, during the transitional period, directed at preserving the entitlements granted by the soviet system. The state's obligations with regard to reimbursing expenditure incurred by industrial enterprises providing free or subsidized services to individuals were not, however, fulfilled throughout this period.

Social programmes, therefore, during this period, while concentrating on preserving the subsidies and entitlements of the soviet system, did not have a focus on reducing the level of poverty and eradicating its worst effects, which, unfortunately, persisted.

It was known officially that the social policies pursued by the state actually intensified the harshest effects of poverty. In the strategy for eradicating poverty it was recognized that the operation of the system of subsidies to individuals did not secure assistance for those excluded sectors of the population who were in poverty and led to an observable increase in support for the more affluent sectors of society and a growth in economic inequality. If a poor family appeared to receive a subsidy of 6.5 UH per month then proportionately a wealthier family would receive 13.1 UH. The percentage of income that derived from state subsidies rose, therefore, from 5.5% in the 10% of poorest families to 8.1% in the 10% most affluent families.²⁹⁸

A fundamental problem of social security in Ukraine lies in the termination of subsidies to people who ought not to receive them. According to World Bank statistics 88% of those in Ukraine who received financial support towards the costs of living in 2001 were not entitled to the support they received. The statistics produced by the bank support the assertion of the Ministry of Labour regarding the increased levels of financial subsidies rather than the planned reduction in poverty. The planned reduction in poverty had not therefore been entirely achieved.²⁹⁹

In order to eradicate the problem of providing assistance to people who were not eligible for support and the duplication of various forms of assistance proposals for an automated register of people who were eligible for assistance were initiated in 2003³⁰⁰. However, according to the press service of Ukrainian Government's Chamber of Accounting, the Ministry of Labour's planned creation of a single register of eligible persons in 2004 was not realized.³⁰¹

It is apparent that the problem lays not just in the costs of the welfare system but also in ensuring that the these funds are being used effectively. The monitoring programmes that are being undertaken by the Ministry of Labour and the State Committee of Statistics do not research the long term effects of welfare programmes on their recipients. According to the United Nations the non – governmental sector may be better placed to undertake such monitoring but does not, however, have sufficient financial resources to undertake the necessary research.

²⁹⁷ The disposition of the KMU dated 26th December 2003, no. 810- r. « Regarding the Confirmation of Methods for Realising, in 2004, the second phase of the Strategy for Eradicating Poverty

²⁹⁸ This was the position in 2000, see «The Strategy for Eradicating Poverty»

²⁹⁹ The United Nations Representation in Ukraine, the report of the Blue Ribbon Commission: <http://www.un.kiev.ua/brc/>

³⁰⁰ See the decision of the Ukrainian Cabinet «Regarding a Single Automated state Register of Persons that have the Right to Welfare Subsidies» 29th January 2003 no. 117

³⁰¹ From a report by the Press Service of the Ukrainian Accounting Chamber dated 18/02/2005: http://www2.ac-rada.gov.ua/achamber/control/uk/publish/article/main?art_id=287173&cat_id=502.

A known sector of the shadow economy has also led the government into difficulties around evaluating the income of welfare recipients. This concerns families, for example, whose income on paper is their sole source of income and families, whose income on paper is just a part of their actual income, being equally eligible for welfare support.

The UN has made a number of recommendations to improve the current situation regarding the provision of social security in Ukraine, including:

1) A reduction of in the quantity of types of assistance and providing assistance in monetary form. The Ministry of Labour is, for example, experimenting with providing people with support towards the costs of living in financial form, in accord with standard accounting practice,³⁰²

2) Taking into account the existing demographic situation assistance, with regard to children, should be increased and provided without regard to the level of income that the family is in receipt of;

3) The provision of misleading information with regard to a families income, in order to acquire benefits to which they are not entitled, is punished, at present, by a reduction in future benefits. This kind of activity, which is aimed at deceiving the authorities, should incur set fines.

4) A closer relationship between the welfare system and the reduction of poverty should be developed; if welfare were targeted at reducing poverty then families, which did not fall into the category of people in poverty, would not receive obligatory welfare benefits.

This last situation is illustrated by the conflict which has occurred over the last few years in Ukraine between, on the one hand, Parliament, which has sought to limit welfare benefits, compensation and guaranteed benefits and, on the other hand, a judgement of the Constitutional Court of Ukraine (CCU) regarding the unconstitutional nature of the Parliament's work in this area.

The judgements of the CC on the 6th July 1999 (no 8- rp/99) (regarding the right to subsidies), the 17th of March 2004 (no 7 – rp/2002) (regarding subsidies, compensation and guaranteed benefits), from the 17th March 2004 (no 7 rp/ 2004 (regarding the social welfare of individuals serving in the armed forces and personnel in the judicial services) and from the 1st December 2004 (no 20 rp/2004) (regarding suspending the limiting of welfare benefits, compensation and guaranteed benefits) state that the realisation of support directed at securing the social welfare of distinct categories of worker and their families does not depend on the size of their income nor the cost to the state budget. This support should, in the opinion of the Court, be unconditionally provided.

It should also be noted that the Chamber of Accounting has concluded, after an analysis of the consequences of suspension of State financing in 2004 for compensation and assistance for families with children affected by Chernobyl, that:

- the operation of the system for providing compensation and support to families with children and people affected by Chernobyl does not accord with the current Ukrainian law regarding «the status and social welfare of people affected by the consequences of the Chernobyl Catastrophe and
- does not secure for this segment of the population a timely and complete realisation of their constitutional right to social security.

The level of assistance and compensation for this category of the population, determined by the Ukrainian Cabinet in 1996 and 1997, and against the backdrop of a continuous rise in the cost of living, has never been reviewed. Other forms have assistance are also no longer fulfilling their intended purpose and are at a low level of between 1.6 and 2 UH per month.

There is an absence, in Ukraine, of a single integrated and complete system for providing support to this category of the population through the Ministry of Labour. This theoretical system would resolve the complicated questions of welfare provision for this group and would have the power to ensure that the payment of compensation and benefits was in accord with the legal framework.³⁰³

2.3.2. Perfecting the state's systems of obligatory social insurance

Legislative changes in the sphere of social security during 2004 included: the law «regarding state assistance to persons who are not entitled to a pension and invalids»³⁰⁴ the law «regarding state guarantees of social welfare to armed forces personnel who have been released from their positions as result of reforms

³⁰² During consideration by the government of the Ukrainian Cabinet's project «Regarding the Conduct of an Experiment in Providing People with Essential Subsidies in Monetary Form in Accordance with accounting Norms»

³⁰³ Look closely at the report by the Ukrainian Chamber of Accounting's Press service dated 18/02/2005

³⁰⁴ Law no. 1727 -IV 18th May 2004 « regarding state assistance to persons who are not entitled to a pension and invalids»

to the armed forces of Ukraine and their families»³⁰⁵. On 4th November 2004 the law «regarding changes to certain of the laws on the general system of state insurances in connection with the temporary loss of the ability to work and the stipulated costs of births and funerals».³⁰⁶

The changes to the law were intended to regulate unresolved questions around the provision of material security and social services to the individuals concerned and to provide a more effective control and utilisation of resources belonging to the general system of state insurances for providing support for people who are temporarily unable to work and specific financial support for the costs of births and funerals. A number of other legislative changes were adopted with a view to raising levels of social security and extending the segment of the population that was eligible for state subsidies.

2.4. THE RIGHT TO WORK

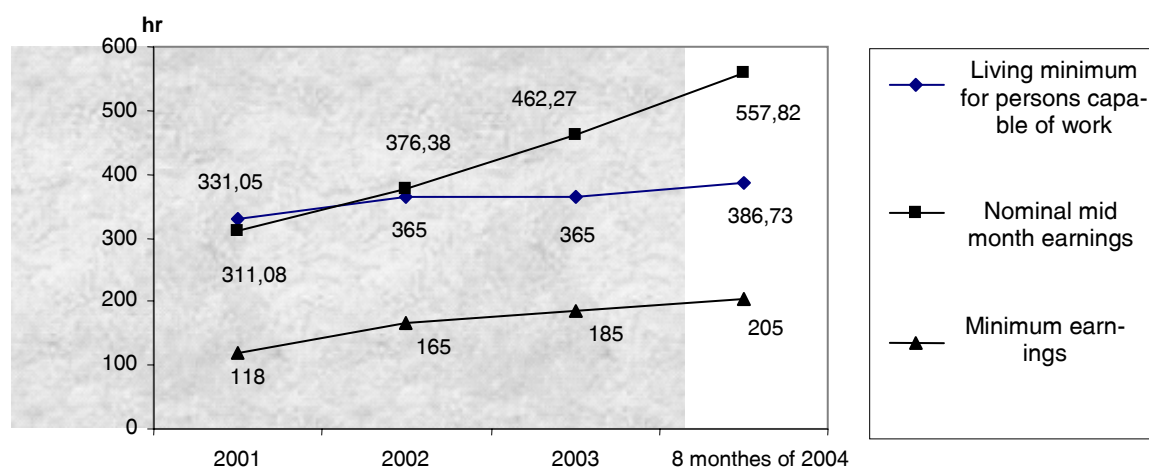
2.4.1. Wages and income

Ukraine is gradually providing a guaranteed minimum standard of living. The nominal income of the population during January and December 2004 had increased by 22.5% between by comparison with the same period during the preceding year. Disposable income that could be used for the purchase of consumer goods and services rose by 27.4% and real income, taking into account the rise in the cost of living by 16.8%.

The minimum level of earnings during 2004 was 205 UH or 56.2% of the living minimum for a person who was capable of work (April 2003 – 185 UH or 50.7%).

(For a comparison with previous years see the graph below «income and expenditure»). Mid month earned income for January to November 2004 rose by 27.4% and stood at 589.63 UH by comparison with the same period during 2003 and actual earned income rose by 23.8%.³⁰⁷

Income and expenditure



The proportion of people whose earnings did not exceed minimal earnings in June 2003 stood at 4889k (4.6% of the working population), in June 2004 317k (3.05% of the working population).

The Ukrainian Law «regarding the state budget of Ukraine during 2004» established different levels of a secure living minimum to provide assistance to sectors of the population that were receiving little support from the state. The living minimum for people capable of work was therefore raised to 80 UH, for persons unable to work (children and pensioners) 110 UH, for disabled people 115 UH (in 2003 this level of support was set at 80 UH for all categories).

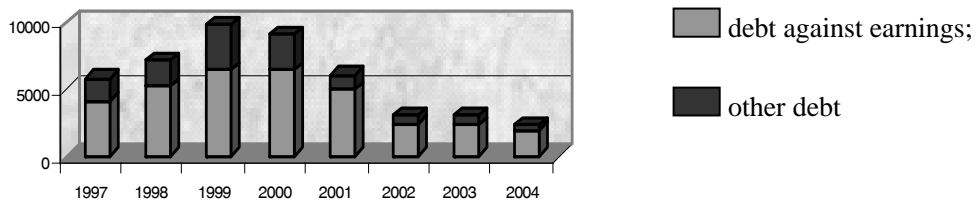
³⁰⁵ Law no. 1770- IV 15th June 2004 «regarding state guarantees of social welfare to armed forces personnel who have been released from their positions as result of reforms to the armed forces of Ukraine and their families»

³⁰⁶ Law no. 2154-IV 4th November 2004 «regarding changes to certain of the laws on the general system of state insurances in connection with the temporary loss of the ability to work and the stipulated costs of births and funerals».

³⁰⁷ The Ukrainian Ministry of Labour and Social Policy, letter no 898/0/14-05/024-8 10th February 2004 in answer to an enquiry of the UHSPL regarding monitoring the strategic direction of eradicating poverty.

2.4.2. Debt repayments against earned income and other debts³⁰⁸

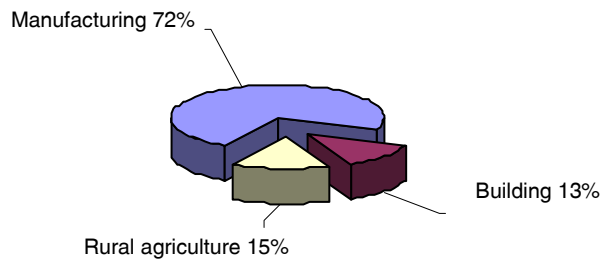
The fluctuation in levels of debt amongst the population, in millions UH



At the beginning of 2004 the reduction in the indebtedness of the population by comparison with 2000 was defined as 67772.5 m UH or 74.5%. Indebtedness in terms of payments from income stood at 84% of the general indebtedness of the population.

In 2000 debt repayments against the payment of pensions and all forms of financial assistance, and also financial assistance for the unemployed, were discontinued: during 2001 obligatory debt repayments from armed forces personnel and people living on financial grants were reduced.

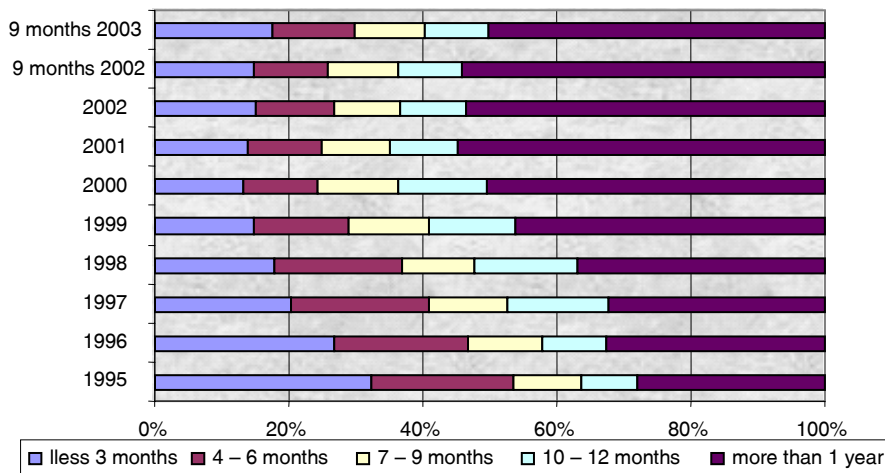
The structure of indebtedness against earnings in segments of the economy in March 2004



In March 2004 the proportion of the population that did not receive their wages stood at 5.6% of the total of state workers, or in absolute terms 638.7k individuals, each of which was due on average 1004 hr of unpaid wages, which represented 182% of average mid month earnings. The ratio of state to non state earnings stood at 1:1.57.

2.4.3. Employment and unemployment

Fluctuations in the duration of the length of time spent searching for work amongst unemployed people between 15 and 70 years of age



³⁰⁸ This information has been obtained from the State Statistics Committee, the Ministry of Labour and Social Policy and the National Academy of Sciences

The graph on the left illustrates unemployment and the duration of the period spent searching for work. It clearly illustrates that the duration of the period spent searching for work in 2003 (the last available figure) was longer than in 1995.

The securing of favourable working conditions and independent and newly created places of work

In January–March 2004 in dependent and newly created posts in state service provided employment for 213.4k previously unemployed people, or an increase of 16.2% than in the same period in 2003.

In 2004 a programme of monitoring discrimination against certain categories of worker in the social economic sphere was conducted in the Luhansk province. The programme highlighted the following systematic human rights violations: 1) workers who were made redundant following the closure of a given business did not receive the wages that they were owed; 2) the labour and socio economic rights of mine workers were violated during the restructuring of the industry; and also 3) the programme exposed the corruption of the official trade unions which operated in the interests of the government and actively repressed independent trade unions.

The authors of the programme reached the conclusion that the phenomena of «restraining» the power of organized labour, the practice of unpaid leave, the extensive penetration of regimes of partial employment are not just the consequences of an inadequate legal framework and ineffective management but the result of a mechanism of 21st Century feudal exploitation, operating beyond the realm of economics. They further concluded that this extreme exploitation of the workforce generated excessive profits for the enterprises concerned.³⁰⁹

2.4.4. Perfecting the normative-legal basis of socio-labour relations against the framework of labour law

On 10th November 2004 Ukraine ratified the International Labour Organisation Convention number 81 «regarding the inspection of labour». The UN Committee on economic, social and cultural rights recommended that Ukraine become a signatory to the convention after it had considered a report, in 2001, on Ukraine. Ukraine then ratified two further ILO conventions: convention 129 «regarding the inspection of rural agricultural labour» (1969) and convention 150 «regarding the administration of labour» (1978).

A draft law was produced and submitted to the Ukrainian Cabinet «regarding revisions to the Ukrainian law «on the payment of earnings» and the codex of Ukrainian labour laws». After the law had been considered on 24th March 2004 it was returned for further work in order to address concerns raised by the trade unions. The unions wanted the law to stipulate that minimal earnings should not be less than the minimal cost of living for a person who was capable of work but, taking into account the economic development of the state and the limited resources at all levels of the state budget, it is not currently possible to properly finance this proposed minimum wage. During work on this draft legislation by the trade unions and the employers' organisation an agreement was reached that the legislation should be considered simultaneously with the draft law on the phased increase in the minimum wage.

The Ukrainian law «regarding revising the Law of Ukraine in respect of 'collective bargaining and agreements' «was produced by a group, which included representatives of the three interested sectors, working under a programme of technical cooperation with the ILO «Ukraine: securing the realisation of fundamental principles and rights in the world of work». The law was then submitted to Ukrainian Parliamentary Committee on Social Politics and Labour and considered by one of its sub committees which was responsible for working on the codex of labour laws.³¹⁰

2.5. THE RIGHT TO CREATE AND BELONG TO A TRADE UNION

The right to create and belong to a trade union is guaranteed by the Covenant on Civil and Political Rights (article 22), and the Covenant on Economic Social and Cultural Rights (article 8). ILO Conventions 87 «regarding the freedom of association and the right to organise» 1948 and 98 «regarding the application of the principles of the right to organise and conduct collective bargaining» detail the minimum international standards that concern the creation and operation of trade unions. The European Convention on Human Rights also recognises the right of everyone to create and join trade unions in order to defend their interests (article 11). In most international agreements the consideration of the right to create trade

³⁰⁹ The Civil committee for the Defence of the Constitutional Rights and freedoms of Citizens «Monitoring Discrimination against Certain Categories of Workers/ Miners in Socio- Economic Practice in the Luhansk District» Luhansk 2004.

³¹⁰ The Ukrainian Ministry of Labour and Social Policy, letter no. 03-2/832-015-2 18th March 2004

unions within the category of the right to freely unite is intended to illustrate the contents of the latter, rather than to set parameters for its application.

At national level the Constitution of Ukraine proclaims the right of citizens «to participate in trade unions with the aim of defending labour and socio economic rights and interests» (article 36). The Ukrainian Law «regarding trade unions, their rights and guaranteeing their operation»³¹¹ recognises the personal, judicially regulated rights in respect of trade unions, guarantees their operation, and the principles allowing workers to create them.

Ukrainian labour law, even taking into account the material discussed above, still lacks some documentation. There are, for example, two important ILO conventions, 141 and 151, that have not been ratified by Ukraine which regulate the spheres of rural agricultural work and state service.

Despite the existence of these declared rights and freedoms Ukrainian trade unions still face continuing obstacles of various kinds. These range from difficulties in becoming legally registered to questions the leasing of their premises. The Ukrainian law, for example «regarding trade unions their rights and the guarantees of their operation» of 5th June 2003 did not simplify the legal procedure for registering trade unions but, on the contrary, made registration more difficult. Problematic questions also remain regarding unequal access to professional legal advice, which limit's the ability of trade unions to participate in formulating draft laws.³¹² Discrimination in the relationships between trade unions has also been reported. The Federation of Trade Unions of Ukraine, is the oldest of these organisations, commanding the largest proportion of resources and concerns, inherited from the soviet era. This fact operates as a source of contention between the FTUU and other unions and is also a violation of the constitutional norm which asserts the equal rights of all unions.³¹³

Most violations of the rights of trade unions during 2004 were connected to the beginning of campaigning in the presidential elections and the elections themselves.

During the pre-election campaign, on the basis of instruction from the government, some heads of town and district councils and police/ military services pressurized workers, blackmailing them and threatening them with unemployment if they did not vote for the pro government candidate V. Yanukovych. Teachers, transport workers and miners were the largest proportion of workers in this category.³¹⁴ Independent media trade unions, that were occupied with monitoring instances where the rights of journalists had been established identified that, in July 2004 alone there were 21 instances such incidents resulting in conflicts in the mass media.³¹⁵

In 2004 the FTUU continued to take an active part in pension reform. This work commenced in 2002 when the head of the VPU voiced his concern regarding the continued delay in the adoption of the law «regarding the security of non state pensions» and the indifference shown to most of the proposals for the draft law submitted by the FPU.

2.6. THE RIGHT TO HEALTH

The right to health is one of the central components in the defence of economic, social and cultural rights. The right to health and the defence of health are envisaged in the following international documents, in which Ukraine has participated: article 25 in the Universal Declaration of Human rights, article 5 of the Convention on the Elimination of All Forms of Racial Discrimination, article 12 of the Convention on Social Economic and Cultural Rights, articles 11 and 14 of the Convention on Eliminating Discrimination against Women, and Article 24 of the Convention on the Rights of the Child.

The Ukrainian Constitution (article 49) guarantees a free health service. Despite the visible inability of the present health system to provide access to some medical services, and the principles of corruption, there is still a strong expectation among Ukrainian citizens of free health care provision.

The strategy for eradicating poverty recognises the need to initiate a system of medical services, that will raise the quantity of service provided to the population and guarantee equitable access to cost free

³¹¹ Law no. 1045-XIV 15th October 2004 «regarding trade unions, their rights and guaranteeing their operation» .

³¹² Overview «Trade Unions in Ukraine: An evaluation and Assessment Report», Foundation for Responsive Democracy for the Eurasia Foundation, August 2004.

³¹³ *ibid.*

³¹⁴ Letter from the Confederation of Free Trade Unions of Ukraine on the current situation in Ukraine to the International Confederation of Free Trade Unions: <http://www.icftu.org/displaydocument.asp?Index=991220860&Language=EN>

³¹⁵ This monitoring took place within the framework of the project «the Defence of the Professional, Social and Labour Rights of Workers» with the support of the fund for the development of the mass media, press division, education and culture of the United States Embassy in Ukraine. Details on the internet at www.profspilka.org.ua

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medical support, from appropriately qualified personnel, in line with the recognized legal requirements. The adoption of a new legal framework for the health services has been a slow process. At the beginning of 2004 9 draft laws, five of which had been passed on to the government in 2004, regarding medical services were at various stages of discussion by the Ukrainian Parliament.³¹⁶

The tables below illustrate the reduction in infant mortality (infant mortality should have reduced by two thirds by 2015 (by comparison with the base level in 1990) the percentage of infant mortality among children aged 1 to 5 years, and the struggle to eradicate aids.

Incidence of tuberculosis per 100 thousand of the population			Percentage of the population between the ages of 15 and 49 who are hiv positive	Infant mortality (per 100 thousand new births)			Infant mortality (per 1000 children aged between 0 to 5)		
1994	2001	Progress Regress	2001	1990	2001	Progress Regress	1990	2002	Progress Regress
40	75	←	1.0	18	17		22	20	

By comparison with other countries in the four categories of country previously discussed (better situation, higher middle, lower middle, worse situation) Ukraine belongs to countries where statistics indicate that they are in the higher middle category.³¹⁷

The situation with regard to the immunisation of children, which is a key task in reducing infant mortality, is, in general, evaluated as a «better situation».³¹⁸

Diphtheria (children up to one year of age)			Poliomyelitis (children up to one year of age)			Measles (children up to one year of age)			Tuberculosis (children up to one year of age)		
1990-1994 (%)	2002 (%)	Progress Regress	1990-1994 (%)	2002 (%)	Progress Regress	1990-1994 (%)	2002 (%)	Progress Regress	1990-1994 (%)	2002 (%)	Progress Regress
79	99	⇒	91	99	→	89	99	→	89	98	→

It is also important to note the necessity of different approaches to monitoring the defence of health and the right to health. The monitoring of the right to health requires that attention be given to the separate categories of individuals affected, and that defined statistical indicators for categories such as gender, ethnic minorities and indigenous people be adopted.³¹⁹ The Peking Platform, for example, obliges states to «reduce the statistical difference between genders in terms of disease and mortality, and adopt a range of measures to reduce infant mortality».³²⁰

The Ukrainian State Statistics Committee prepares a biannual collection of statistics entitled «Children, Women and Families in Ukraine» which provides information on the position of children women and families cross sliced against demographic and economic indices, indices on levels of education, the defence of health, culture and crime. Unfortunately, apart from these reports, which are not published and may only be requested from the committee, no other statistical information on this subject is available in Ukraine.

Monitoring how far, in reality the state fulfils its obligation in the sphere of the right to health can also be achieved by monitoring government policies in the sphere of pricing medicines, access to free medication, approaches to pricing alcohol and tobacco products etc. In Ukraine, for example, where smoking is part of a way of life for nine million citizens and where each year 120 k people die from tobacco related illnesses, there are difficult questions around state policy in this area. It is worth noting that in the Summer of 2004 Ukraine became the 144th country to sign up to the Framework Convention for the Control of To-

³¹⁶ Draft law no.5655 16th June 2004 «regarding compulsory medical insurance», draft law no. 4620 14th January 2004 «regarding the foundations for the defence of health in Ukraine» draft law no. 3770-1 27th January 2004 «regarding general obligatory medical insurance», draft law no. 4505-1 6th February 2004 «regarding general compulsory state medical insurance», draft law no. 5771 9th July 2004 «regarding general compulsory state social and medical insurance».

³¹⁷ Sources: the state of the World's Children 1996 Unicef, for 1990/1994 data and the State of the World's Children 2004, UNICEF (www.unicef.org/sowc04), for 2002 data

³¹⁸ Malaria: Human Development Report 2000, UNDP for 1997 data and Communicable Disease Global Atlas Database, WHO (www.who.int/GlobalAtlas) Tuberculosis: Communicable Disease Global Atlas Database, WHO (www.who.int/GlobalAtlas) Aids the State of the World's Children 2004, UNICEF (www.unicef.org/sowc04) Infant Mortality World Development Indicators 2003 World Bank; Under 5 Mortality Aids the State of the World's Children 2004, UNICEF (www.unicef.org/sowc04).

³¹⁹ Asher, J The Right to Health (Commonwealth Medical Trust; AAAS Science and Human Rights Programme; HURIDOCs (2004) Page 79.

³²⁰ The World Convention on the Rights of Women 1195 Peking Platform of work paragraph 106

bacco Products, which envisaged the adoption of a number of approaches for controlling the «tobacco epidemic» and also the defence of non smokers rights.³²¹ This is the first international agreement in the sphere of community health prepared as a result of four years of discussion between 193 countries who are members of the World Health Organisation. Ukraine has not just to ratify the document but to initiate a legal framework in accordance with its requirements, and to develop a stringent mechanism of control through legislation in this area.

In spite of the broad array of questions, that concern the defence of the personal right to health, there is limited activity from civil organisations in this area. As described above the partial reporting of the existing situation and the realisation of the research and monitoring necessary are circumscribed by the financial resources available to non government organisations and their limited access to official statistics.

One of the first examples of the kind of monitoring required was a piece of sociological research «The accessibility of services and the rights of people living with aids in Ukraine» completed in 2004 by the International Alliance Against Aids in Ukraine and the All Ukrainian Network L Z B.³²² The research covered various aspects of the situation: the realisation of rights and subsidies, and the awareness of these, access to medical and social services and factual discrimination and iniquity. It is important to note that the project covered 14 Ukrainian counties.

The research showed that awareness of the Ukrainian law «regarding the spread of aids and the welfare of the population» amongst the people surveyed, who were living with aids, was very partial: 7.3% of respondents had a good knowledge of the contents of the law, 28.9% were partially aware of the contents of the law, 37.3% of had heard of the law but did not know its contents. In general 20.1% of those surveyed did not know about the law.³²³

The research also showed that violating the rights of people living with aids was common practice in Ukrainian society. 41.5% of those surveyed reported that their rights had been violated as a result of their status as people living with aids. One third of the instances of the violations of the rights of people living with aids are violations of the right to undertake work or study, more than two thirds of respondents (68.8%) complained that their right to medical assistance had been violated. Still more respondents – 69.9% – complained about the violation of their right to a confidential diagnosis. Taking into account the low level of awareness of rights, the information above regarding their violation may be an under representation of the extent to which these rights are violated.³²⁴

The low level of knowledge regarding rights means that judicial mechanisms for the defence of these particular human rights are almost never applied. The restitution of losses caused by the curtailment of rights that followed the distribution of information about their being contaminated with aids had been obtained by only four of those questioned.³²⁵

In 2004 a legal case that set an important precedent resulted in the satisfaction of representations from a HIV positive Ukrainian citizen, Oleksa Voloshyn, who had been unlawfully dismissed from work due to their his HIV positive status. The judge recognized that in the case under consideration real weight had to be attributed to the violation, by the Chief Editor of the Local Paper concerned, of the constitutional rights and freedoms of Oleksa Voloshyn, besides the right to work and the right to have one's pride and reputation respected.³²⁶

2.7. THE RIGHT TO EDUCATION

2.7.1. An overview of the current situation

Education is a priority in the socio – economic, spiritual and cultural development of the state. The development of the state cannot, indeed be secured without active state support for education and science.

The right to education was expressed in the following international documents: the Universal Declaration of Human rights – article 26; the Convention on the Elimination of All Forms of Racial Discrimination- article 5; the

³²¹ The International Framework Conference on the Control of Tobacco Products (World Health Organisation) came into force on 27th February 2005. The Russian text of the Convention can be accessed on the following internet address: http://www.who.int/tobacco/ftc/text/en/ftc_ru.pdf

³²² Access to Services for, and the Human Rights of, People living with HIV in Ukraine: the results of sociological research» International Alliance Against HIV/AIDS in Ukraine: the All Ukrainian Network LZV (2004).

³²³ *ibid* p. 9

³²⁴ *ibid* p. 11

³²⁵ *ibid* p. 14

³²⁶ HIV/ AIDS News, Politics and Advocacy, International Alliance Against HIV/AIDS in Ukraine, Issue 4, November 2004 pages 2-3

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Convention on the Elimination of All Forms of Discrimination against Women Covenant on Economic, Social and Cultural rights – articles 13 and 14; the Convention on the Elimination All Forms of Discrimination against Women; articles 5, 10 and 14; the Convention on the Rights of the Child; articles 28 and 29.

In the «Millennium Declaration» the second most important statement upholds the right of all children to elementary education; «in order to ensure that all children, including both boys and girls, have the possibility of completing a full course of elementary education and also that boys and girls have equal access to all levels of education». The question of the right to education and equitable access to education was also considered by the world summit on social development and the fourth world conference on the rights of women.

With regard to securing access to elementary education Ukraine belongs among those countries which have a «higher middle» situation.³²⁷

Illiteracy			the Coefficient of children of school age who are attending school		
1999 (%)	2001 (%)	Progress Regress	1990-1991 (%)	1998-1999 (%)	Progress Regress
0,2	0,1		80,2	71,7	≠

The situation regarding elementary and secondary education in Ukraine complex as illustrated by the following issues which have been identified by UN experts.³²⁸

1) The necessity of reforming the financing of education. A fundamental inadequacy, in the opinion of UN experts, is the ineffective use of financial resources; resources being used to uphold a static, inflexible system and not being directed towards individualized education; and also excessive administrative resources and a shortage of lecturers;

2) Excessive centralisation; a known problem lays in the concentration of governance in the ministry of education.

3) The low pay of teachers which, in turn, gives rise to corruption;

4) Insufficient control over the quality of education;

5) The modernisation of the programmes of study; programmes remain excessively factual, with a limited choice of options available, and the methods of tuition require improvement; there has been a reduction in the quantity of professional educational establishments.

6) Demographic tendencies; each year fewer children are entering education.

7) Equity of access; inadequate material and technical support for schools in rural locations.

Children and disabled children in rural locations personally encounter problems of inequitable access to education. In order to resolve these problems the state sponsored programme «school bus» was initiated to with the direct aim of securing cost free regular transport for pupils from rural locations, and educational staff, to places of study and return journeys home. According to information from the state budget and other sources 302 busses have been provided to enable the programme to be implemented.³²⁹ Doubts have arisen over the exact use of some of the busses that have been observed.³³⁰

The Ministry of Education and Science has also reported on development and improvements in education in the academic year 2003 – 2004 which were: an increase of 42% in earnings for educators and scientists; from the 1st of October 2004 earnings were further increased by 15.6%; student grants were raised to a higher level being in effect more than doubled; expenditure on the material needs of orphans was tripled; the programme of providing information technology in rural schools continued to be implemented; 56% of general educational institutions levels 1 to 3 (which can be read as 45% of rural schools) had the new generation of computer suites installed; the state programme for extending information and computer technology to technical colleges is assured for 2004- 2007; the number of children of pre school age receiving education has been increased. This last indicator of educational provision increased by 8% and represents 48% of the overall total of children within this age group.³³¹

³²⁷ Source: the Percentage of Children Reaching %th Grade: UNESCO Website Database (www.unesco.org) and World Development Indicators 2003, World Bank. Enrolment Ratio: UNESCO Website Database (www.unesco.org); Illiteracy (15-24 years) UNESCO Website Database (www.unesco.org) and World Development Indicators 2003, World Bank

³²⁸ Blue Ribbon Commission Report <http://www.un.kiev.ua/brc/>

³²⁹ From information provided on the web page of the Ukrainian Ministry of Education and Science.

³³⁰ Blue Ribbon Commission Report <http://www.un.kiev.ua/brc/>

³³¹ The Ukrainian Ministry of Education and Science directive N9/1-2 19th August 2004 « A Summary of Development in the Academic Year 2003 –2004 and Work Planned for the 2004/2005 Academic Year to Ensure Equal Access to Opportunities for High Quality Education»

The Chamber of Accounting concluded, based on the results of an audit of planning and use of resources from the budget of the Ukrainian Ministry of Education and Science on the extension of computer technology to general and rural educational institutions, that the programme lacked transparency, and was ineffective and uncontrolled.

The lack of proper oversight from the Finance Ministry of Ukraine and the difficulties around managing state resources in Ukraine, meant that the Ministry of Education and Science has wasted, during 2001-2004, 119.4 million UH from the state budget on the implementation of the National Programme of information Technology. Overall, during the period of the programme's operation (2001–2003) information and computer technology has been secured for 1335 rural schools, which constitute 59.1% of the total number of schools that the programme was intended to reach. In the period from 2001 to October 2004 either through legal violations or ineffective use affected for 68.6 million UH or 57.5% of the overall resources spent by the state on the programme. Of these: budgetary violations – 15.1 million, not entirely accounted for – 1.5 million UH, used ineffectively – 45.5 million UH – ineffective governance of costs affected 6.2 million UH and illegal expenditure – 0.3 million.³³²

2.7.2. Perfecting the legislative framework

In May 2004 a Parliamentary Session was conducted «regarding the current state and perspectives on the development of higher education in Ukraine», which analysed the state of affairs in Ukrainian Higher education. The recommendations of the session, which focussed both on strengthening the role of the state in the development of higher education and secure a proper legislative framework were affirmed by Parliament in June 2004.³³³

The Parliament of Ukraine accepted, on 14th December 2004, the Ukrainian Law «regarding the adaptation of changes to certain legislative acts of Ukraine (in the sphere of higher education)». It is an interesting fact that the President vetoed the law on two occasions at the behest of the government. The law, taking into account tendencies in the development of higher education, proposals from government organs and civil organisations, brought changes to an array of legislative acts. The law made the budgetary codex of Ukraine answerable to the configuration of the national educational doctrine and the requirements of the developmental strategy for higher education. The changes, to article 51 of the budgetary codex of Ukraine, supported the autonomy of higher educational institutes; the finance managers of these institutions acquired the right to approve and correct the usage of expenditure in accord with the stipulations of the state's budget. In other words the management of higher educational institutes were not obliged to agree separately all the changes to the expenditure of Universities. The changes to articles 89 and 90 of the budgetary codex allowed the financing of state and communal higher educational institutes to receive funding from a variety of sources; town councils became able to provide assistance to these institutes by providing technical assistance, social welfare support for students and educational professionals, and repairing accommodation.

The changes to article 84 of the Land Codex of Ukraine precluded acquiring plots of land owned by state and communal higher educational institutes.

The change to article 12 of the Ukrainian Law «regarding payment for land» ensured that campuses and student dormitories were freed from paying rent on the land they occupied.

The changes to the law «regarding the taxation of the profits of business enterprises» initiated tax subsidies for businesses which spent resources on higher education. Those costs that are directly spent on professional study could be offset against a rebate of up to 25% of the tax on the profits of a given business. These businesses would still incur expenditure on the additional labour required due to personnel being on study leave. This change, due to the repeated use of the veto, will not come into effect until 2006.

The law envisages changes directed at reducing expenditure on electricity leasing property.

The translation of the law «regarding the taxation of the profits of business enterprises» into a working norm gives possibilities for improving the financial and economic standing of higher education, by in-

³³² Regarding the results of an audit of planned and actual expenditure from the state budget of Ukraine for the Ministry of Education and Science on providing information technology for general education institutions and the computerisation of rural schools/ Prepared by the department for the control of expenditure in the social sphere and on science and upheld by a statement of the Chamber of Accounting n0. 27-3 7th December 2004- Kiev- the Chamber of Accounting of Ukraine- Issue 1

³³³ Parliamentary statement no 1755 4th June 2004 regarding the recommendations of the parliamentary session «Regarding the current state of, and developmental perspectives for higher education in Ukraine»

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cluding additional resources derived from business enterprises and allows education to be made more accessible.

2.7.3. Information, science and technology

The right to education also encompasses the right to information, scientific activity and access to new technology. The right to information, research and professional study is guaranteed by the following international documents: the Universal Declaration of Human rights (articles 19 and 27), the Convention on the Elimination of All Forms of Racial Discrimination (article 5), the covenant on Economic, Social and Cultural Rights (articles 13 and 15) the Convention on the Elimination of All Forms of Discrimination against Women (articles 10 and 14) the Convention on the Rights of the Child (articles 17 and 28).

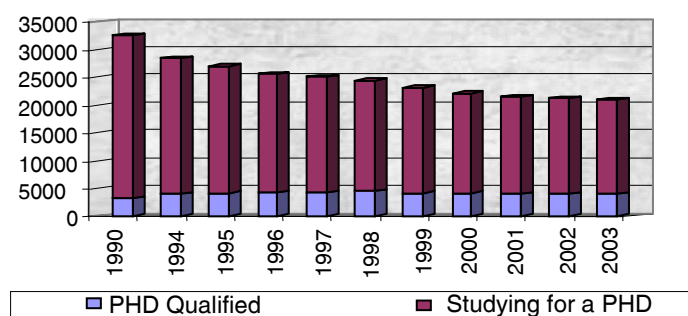
States who participated in the world summit on the information society recognized that «education, knowledge, information and communication are the basis of progress and welfare of humanity. The rapid development of these technologies opens up entirely new possibilities for realising higher levels of development».³³⁴

Ukraine belongs to the category of countries showing signs of a «worse middle» situation.³³⁵

Internet use per 100, 000 of the population			personal computers per 100, 000 of the population			static telephone lines per 100, 000 of the population			Collaborative workers in scientific research institutes per 1 million of the population		
1997	2001	Progress Regress	1990	2001	Progress Regress	1991	2001	Progress Regress	1995	2000	Progress Regress
196	1222	→	2	18		136	212	→	3169	2118	↔

Besides the general reduction in the quantity of collaborative workers in scientific research institutes follows the reduction in the number of workers with the rank of a candidate of science.

The quantity of workers in scientific organisations who are studying for or hold a PHD in scientific research



The departure of a proportion of mature academics due to the exceptional potential available in the field of science outside Ukraine has led to a large gap being created between young newly qualified PHDS and candidates of pre pension able and pension able age. This has caused the loss of the next generation of scientists: science has been thrown backwards by an entire generation and it will take many years to correct this situation.³³⁶

The Chamber of Accounting conducted an audit, in 2004, of the planned use and expenditure of resources, from the state budget for the Ukrainian Academy of Sciences, on fundamental and applied science.³³⁷ It was established that the economic, scientific and managerial activity of the apparatus of the Academy's presidium did not meet several statutory requirements of legislative acts affecting issues of the planned use and expenditure of state resources on fundamental and applied science. The licensing agree-

³³⁴ The World Summit on the Information Society 2003

³³⁵ World Development Indicators 2003, World Bank

³³⁶ Oshkaderov, S» Science has Lost an Entire Generation «// The Mirror of the Week no 3 (478) Saturday 24th – 30th January 2004

³³⁷ The Chamber of Accounting of Ukraine «Ukrainian Science: are budgetary resources working towards the end result» College of the RPU 20th April 2004. Available on the Internet at <http://www2.ac-rada.gov.ua>

ments used by the Academy in 2002–2003 protected the right of intellectual ownership to only 6% of the projects they covered. The principle causes of this situation are an absence of real clients for these projects, questions around the market for intellectual property, a recognized legal methodology for evaluating the worth of, and accounting for, intellectual property in budget arrangements, the inability to pay consumers etc. As a result the value of the intellectual property owned by the Ukrainian Academy of Sciences cannot, at present, be calculated.

In addition to the problems discussed in the paragraph above the Ukrainian Cabinet has, over the last four years, neglected the requirements of the Ukrainian Law «regarding scientific and technical scientific activity» and its own conditions for structuring the base finance of fundamental research and accounting for the costs of this research in the state budget. The Cabinet has not confirmed an overall account of the resources available for scientific institutions and institutes of higher education (in which the Ukrainian Academy of sciences would be included) that would allow the base financing of scientific research to be reckoned. As a consequence of this there is no recognisable strategy, at state level, and basic direction for fundamental research, taking into account national interests and global tendencies in the development of science.

The state of affairs, at present, in Ukrainian science, follows closely a tendency to reduce items in receipt of state finance for science and technical scientific work, and an increase in the finance available for scientific work in other countries.

3. RECOMMENDATIONS

3.1. UKRAINE JOINING INTERNATIONAL AGREEMENTS COVERING THE DEFENCE OF ECONOMIC, SOCIAL AND POLITICAL RIGHTS

Ukraine has to continue work directed towards joining the array of international agreements in the area of economic, social and political rights:

- The European Convention Regarding the Legal Status of Migrant Workers 1977 (signed on 2nd March 2004);
- The Twelfth Additional Protocol to the European Convention Regarding the Defence of Human Rights, Fundamental freedoms and Forbidding Discrimination (signed on 4th November 2000);
- The UN convention on the Rights of Migrant Workers (which needs to be signed and ratified).

The signing and ratification of the relevant agreements will promote an increase in the level of social protection afforded to the Ukrainian population, the adaptation of national legislation to European social norms and standards, and strengthen the authority of Ukraine in the international arena, bearing in mind the country's stated course of integrating with Europe.

Ukraine should also realise the obligations that it has already accepted, which are expressed in the UN covenant on Economic, Social and Cultural Rights, and the recommendations of the UN Committee for Economic, Social and Cultural rights. In the propositions, recommendations and key conclusions of the Committee Ukraine is recommended to « set out on the path of an open consultative process in respect of a national plan of activity, directed at realising the obligations which are required in answer to international documents regarding human rights, in particular, in answer to the International covenant on Economic, Social and Cultural Rights». ³³⁸ The Committee also requested that it be given a copy of the national plan of work and five periodic reports and that it be kept informed of progress and achievements in the realisation of this plan. The next due report from Ukraine, which will be the fifth, has to be provided to the Committee in June 2006. At the beginning of 2005, however, the national community knows nothing about the production, and even less about the realisation, of this plan. ³³⁹

The Committee also requested that the next reports from Ukraine include comparative statistics regarding the employment of men and women in various spheres of activity. ³⁴⁰ It is known that such statistical research is being conducted. As noted above, however, access to this information is unusually restricted.

³³⁸ Key conclusions of the Committee for Economic, Social and Cultural Rights: Ukraine 24th September 2001 E/c.12/1/Add.65, point 21.

³³⁹ An enquiry made by the UGSP, concerning this plan, to the Ministry of External Affairs, which is responsible for preparing reports to relevant UN Committees, remains unanswered at the time of writing.

³⁴⁰ Key conclusions of the Committee for Economic, Social and Cultural Rights: Ukraine 24th September 2001 E/c.12/1/Add.65, point 24.

3.2. THE ACTIVITY OF COMMUNITY AND OTHER NON- GOVERNMENT ORGANISATIONS

- The activity of Ukrainian non-governmental organisations with regard to monitoring the extent to which Economic, Social and Political Rights are upheld is extremely weak. The potential field for work in this area is immense: it could extend from sociological surveys to the preparation of fundamental research. NGOs, for example, in some countries prepare and publish their own «alternative» budgets.³⁴¹

- The fifth periodical report which is due from Ukraine in respect of the implementation of the covenant on Economic, Social and Cultural Rights has to be presented in June 2006. The process of reportage from Ukraine forms an important link between internal politics and the international system for the defence of human rights. In this connection the participation of NGOs and the civil community is extremely important. Unfortunately, however, the participation of Ukrainian NGOs in international endeavours is, in general, extremely limited, leaving aside those that concern economic, social and political rights. Most of the activity of Ukrainian community organisations concerning the defence of economic, social and political rights in 2005 leaves Ukrainian NGOs with the possibility, as yet untouched, of actively participating in a hypothetical forum to consider Ukraine's next report on the covenant.

3.3. THE WORK OF THE GOVERNMENT

The work of the Government has to be considered from more than just the standpoint of fulfilling relevant strategies and state programmes in the sphere of social policy, health education etc. It is worth beginning to evaluate the work of the Government within the context of defending human rights, and not just before the responsible organs of the state that are authorized to realise such control in accord with relevant international agreements. Attention should be paid to examples of good practice on the part of governments. The Republic of South Africa, for example, is required by its constitution to report annually with regard to the fulfilment of the obligations that the country has undertaken in respect of economic, social and political rights.

The development of the next phases of the strategy for eradicating poverty require that attention be given to the relevant directives from the office of the UN's High Commissioner for Human Rights.³⁴²

3.4. ORGANISATIONS WHICH DONATE FUNDS AND PROVIDE GRANTS

With regard to the formulation of long term projects, programmes and strategies for influencing the development of non-government organisations in Ukraine have to reckon with the need for more active involvement, from human rights organisations and professional bodies, in the defence of economic, social and political rights.

³⁴¹ In Canada the process of preparing an «alternative federal budget» began in 1994 with the participation of more than 150 Canadian economists and financial analysts. *Alternative Federal Budget 2004: Rebuilding the Foundations* Canadian Centre for Policy Alternatives, March 16th 2004 All Alternative Federal Budget Materials are available on the CCPA Website at: <http://www.policyalternatives.ca>

³⁴² Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies <http://www.unhcr.ch/development/povertyfinal.html>guid7

XVI. THE RIGHT TO A SAFE ENVIRONMENT³⁴³

The second half of the twentieth century heralded two fundamental changes, both in international law and in the legal system of almost every country. First human rights, and then a clean environment became universally recognized as fundamental social values. In both cases, the existing State and legal institutions had to change in order to guarantee these values. It was the crimes of the totalitarian regimes which brought about an understanding of the importance of the rights of each individual. The importance of a high quality of environment was understood as a result of the ever more frequent situations when the exhaustion of natural resources, or their pollution were seen to place insurmountable obstacles in the way of exercising virtually all human rights.

The UN Conference on the Human Environment held in Stockholm in 1972 was the first in international practice to assess the importance of the problem of the quality of environment. The preamble to the Stockholm Declaration states that both the natural and the man-made environment are essential to people's well-being and to the enjoyment of fundamental human rights, including the right to life itself. Principle 1 of the Stockholm Declaration declared the right of each individual «to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being».

In 1992, twenty years after the Stockholm Conference, a United Nations Conference on Environment and Development, also known as the «Planet Earth Summit» was held in Rio de Janeiro (Brazil). The Rio Declaration developed the provisions of the Stockholm Declaration and presented a new approach to the protection of the environment as a whole and of the environmental human rights, linking these to issues of sustainable development. Principle 1 of the Rio Declaration declares that «human beings are at the centre of concerns for sustainable development». In Principle 10 of the Rio Declaration, other environmental human rights are only declared – the right of access to environmental information, to participation in decision-making processes and judicial protection of these rights, etc.

The Rio Summit stressed the interdependence between the observance of fundamental human rights and the state of the environment. Violations of fundamental human rights can lead to damage to the environment. For example, non-observance of the right «to work» or to «protection against unemployment» (Universal Declaration of Human Rights (UDHR), Article 23, Paragraph 1) pushes people to plunder or destroy the natural environment. In turn, the degradation, destruction and pollution of the natural environment can lead to a worsening of sanitary conditions, pose a threat to people's health or cause damage to property. All of this is a violation of the human right to a «productive life in harmony with nature» (The Rio Declaration on environment and development, Principle 1) and the right to a standard of living «adequate for the health and well-being of himself and of his family» (UDHR, Article 25, Paragraph 1).

The Vienna Declaration (1993, Article 5) recognized the universal nature, integrity, interdependence and interrelation between human rights – civil, cultural, economic, political, social and environmental. The integrity of rights denotes the refusal to categorize rights as of higher or lesser priority. This provided wide scope for cooperation between «green» and other human rights movements. This provision is especially important for environmentalists (activists of the environmental movement), because it shows the complex nature of any violation of rights and therefore assumes the complex character of protection of these rights.

The principles set out in the Declarations of the UN Conferences in Stockholm and Rio de Janeiro had a profound impact on the legal systems of many countries, including that of Ukraine. However the right to healthy and safe environment has still not been directly articulated in the international system of human rights. This is connected with the enormous complexity of issues involving protection of the environment and sustainable development, as well as with certain specific features of these rights.

³⁴³ Prepared by Serhiy Fedorynchuk, from the Ukrainian Association «Green World».

1. SPECIFIC FEATURES OF ENVIRONMENTAL RIGHTS

Human rights are generally divided into «negative» and «positive». «Negative» rights are those which a person is born with – the right to freedom from torture, freedom of speech, of conscience, of movement, etc and the State is simply obliged to not deprive the individual of these rights or restrict them in any way. The second category, including the right to an adequate standard of living, to social protection, to healthcare, to employment, etc, require considerable effort and expense from the State to ensure their implementation. Since there is no limit as such to well-being, even in the most developed countries, it is difficult in the case of «positive» rights to ascertain whether or not they are being observed.

The right to a safe environment has several unique features:

1) It combines characteristics of both «negative» and «positive» rights. For people living in a natural environment which has suffered little environmental degradation, the right can be considered «negative» – the State must simply not permit any actions which could lead to a worsening in the state of the environment in that area. However for people who live in an environment with considerable man-made pressure on the environment, the right to a safe environment is «positive». The enforcement of this right in such cases requires long, complex and coordinated activity of all parts of the State machinery with the ensuing need to obtain and spend large amounts of money.

2) The large range of ways this right can be violated – ecological accidents, etc – are easily explained by the diversity of both the environment and human activities that adversely affect the environment. As a result, a large number of different legislative and normative acts imposing necessary restrictions are required to safeguard environmental rights.

3) Violations of this right can be on vastly different scales and have entirely different consequences – from a temporary deterioration of working conditions at a single work place to long-lasting transboundary pollution of entire regions on the planet.

4) Cause and effect chains which lead to violations of this right can be over a long period and begin from systems of social values. The road to an ecologically safe environment requires a transition to new ways of looking at the world.

5) As a result of the rising dependence of civilizations on technology, large-scale man-made environmental catastrophes with the potential to influence the health and quality of life of millions of people, can be caused by misjudged actions of small groups or even single individuals.

It is in view of these specific features that public participation in the protection of the environment, and most importantly, their access to environmental information, are of vital importance for national and international environmental law systems. In fact, all the most recent achievements of international law underline the importance of the public community. The principle of public participation is enshrined not only in the Rio Declaration and the Agenda of the XXI century, adopted at that UN Conference, but also in a series of international treaties signed after Rio. Some of these were developed and agreed within the framework of the Europe-wide process «Environment for Europe», the fifth general summit of which took place in Kyiv in 2003.

The special role of the public is most fully reflected in the Aarhus Convention: «Access to information, public participation in decision-making and access to justice in environmental matters». This Convention is of enormous importance for the environmental movement.

2. ENVIRONMENTAL RIGHTS IN UKRAINIAN LEGISLATION

Article 50 of the Constitution of Ukraine states that «Everyone has the right to an environment that is safe for life and health, and to compensation for damages inflicted through the violation of this right». In addition, the Constitution guarantees everyone «the right of free access to information about the environmental situation, the quality of food and consumer goods, and also the right to disseminate such information. No one shall make such information secret».

Thus, environmental rights are enshrined in the norms of the Constitution of Ukraine and form a qualitatively new, independent group of principles aimed at protecting individual environmental (and not political, material, spiritual and other) needs and interests.

Ukraine has become a party to more than 40 international environmental protection conventions of global as well as regional significance, among them being:

- Convention on the Wetlands of International Importance Especially as Wildlife Habitat (1971);
- Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention), Paris, 1972;
- Convention on the Conservation of the European Wildlife and Natural Habitats (1979);
- Convention on the Conservation of Migratory Species of Wild Animals (1979);
- Vienna Convention for the Protection of the Ozone Layer (1985);
- Convention for the Protection of the Marine Environment of the Baltic Sea Area (1992 Helsinki Convention), Helsinki 1992;
- Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Helsinki, 1992;
- Convention on Biological Diversity, Nairobi, 1992;
- Convention on Nuclear Safety, Vienna, 1994;
- The Aarhus Convention (1999).

International environmental conventions and treaties, upon their ratification by Parliament, become part of national legislation and impose on Ukraine additional obligations with regard to protection of the environment and safeguarding people's environmental rights.

In their analysis of documents of Ukrainian environmental legislation, international experts have more than once commented on its high quality, systematic nature and consistency. In particular, Article 3 of the base Law «On the protection of the environment» sets out a number of crucially important principles for environmental protection, among them: the priority of the demands of environmental safety; the preventive nature of environmental protection measures; the obligation to carry out environmental expert studies; openness and democracy in the taking of decisions, the implementation of which may have impact on the environment; the development of environmental awareness in the population, etc.

However the experience of adherence (or, more accurately, non-adherence) of this legislation is appalling. Most of the provisions of the Law remain on paper.

3. RATIFICATION OF THE KYOTO PROTOCOL

Of the Laws and Resolutions on environmental issues adopted by the Verkhovna Rada in 2004, most significant was undoubtedly the Law «On the ratification of the Kyoto Protocol to the United Nations Framework Convention on Climate Change».

Civic environmental organizations, in particular those participating in the Working Group of Ukrainian NGOs on Issues of Climate Change (hereafter the Working Group) welcomed Ukraine's ratification of this important international initiative and viewed it as a chance to implement energy-saving technologies in Ukraine through the so-called common projects in the framework of the Kyoto Protocol. Without this, it would be impossible to significantly reduce power consumption in Ukrainian production and increase its competitiveness on world markets. It is ultimately this very modernization which will make it possible to raise the standard of living of Ukrainian citizens and, through the environmental effects of modernization of technology, the quality of life.

However the benefits from the ratification of the Kyoto Protocol can only be gained given specific conditions which have yet to be created. This is, first and foremost, complete fulfilment of the obligations under the UN Framework Convention on Climate Change (hereafter FCCC), which Ukraine took upon itself from 11 August 1997. However, with the fulfilment of the FCCC, Ukraine has experienced a number of problems, and even failures:

1. Of the post-Soviet countries, Ukraine stands alone in still not having determined its National Focal Point for communication with the Secretariat of the FCCC in Bonn, although it pays its contributions to the Secretariat.

2. In spite of its obligations under Article 4 of the FCCC (paragraphs 1. b, 1. f, and 2. b), the Government of Ukraine has still not ensured that the National Strategy (which in fact has yet to be drawn up) and the Action Plan for diminishing the effects of climate change are discussed at public hearings and implemented.

In its social, economic and ecologic policy, the impact of climate change is not being taken into consideration (and is not mentioned in a single legislative normative document). Nor is detailed information provided on a periodic basis about policy and measures for preventing climate change.

3. In spite of its obligations under Article 4 (paragraph 1a) and Article 12 of the FCCC, Ukraine has not been regularly submitting anthropogenic emissions surveys, and the National statements on Climate Change to the Secretariat of the Convention. An inventory of emissions and absorption of greenhouse gases has only ever been prepared for the period of 1991-1998 and only one National statement on Climate Change has been issued.

4. NGO representatives are most concerned by Ukraine's failure to fulfil its obligations under Article 4 (Paragraph 1.i) and Article 6 of the FCCC, specifically that the Government of Ukraine has not organized systematic work on issues of climate change in the field of education, has failed to train experts in this field, to increase public awareness, to initiate public discussion and involve wide range of people in this process, including the NGOs. The public are not being involved in the taking of the relevant decisions. Even the package of Kyoto Protocol ratification documents were submitted to the Verkhovna Rada, entirely bypassing the public. This is also a violation of Ukraine's international obligations under the Aarhus Convention.

Upon ratification of the Kyoto Protocol, Ukraine needs to fulfil other, even more specific obligations, in addition to its obligations under the FCCC. Article 18 of the Kyoto Protocol envisages the implementation of effective mechanisms for identifying situations of non-compliance with obligations and for reaction to such situations.

Is the problem a lack of money or a lack of transparency? The claim is sometimes heard from those in the Government that there was not enough money to meet the obligations under the FCCC, in particular, the cooperation with the public, and development of a National Strategy and National Action Plan with regard to the National statements on Climate Change. One can often hear the government blaming lack of necessary funds for meeting the obligations under the FCCC in general, and for cooperation with the community, and developing of the National Strategy and National Action Plan in particular. In fact, Ukraine has received millions of dollars in foreign aid for these purposes. However these funds are spent without transparency or accountability to the public or parliament as to whether they are being spent efficiently. For example, in 2003 Ukraine received 1 million Canadian dollars under the Canadian-Ukrainian program for environmental cooperation for the implementation of the FCCC. In our view, this money was not used efficiently by the Minister, V. Shevchuk. Around measures of international assistance, a certain clique («the climate clan») has formed which has an interest in controlling the trade in quotas for greenhouse gases.

Risks of the international trade in quotas on emissions Even if Ukraine was to meet the eligibility criteria, the trade in quotas could impose artificial limits on the development of the Ukrainian economy and, on the whole, prove damaging. There is no guarantee that money obtained from the trade of quotes will not disappear through corrupt channels. It would be unwise to be so blinded by the promise of «free money», as to believe the naïve forecasts that supposedly in 2020 the level of emissions will not be higher than in Ukraine in 1990. Firstly, Ukrainian statistics do not reflect exhausts produced by the shadow economy; secondly, life will go on after 2020 as well. In the view of the Working Group, the focus in fulfilling the Kyoto Protocol should be not on the trade in quotas, but on common projects.

The administrative crisis over issues involving climate change. The problem of climate change has enormous international, political, economic and environmental significance. Yet in the Ukrainian Cabinet of Ministers there is no single official responsible for coordinating all work on climate change issues in Ukraine – that is, an official only dealing with these issues. The issue falls within many disciplines and branches, and does not fully come under the competence of any of the present ministries or departments, while Deputy Prime Ministers have dozens of such obligations. The responsibility and authorities as regards issues of climate change need to be balanced and personalized as much as possible, as with the Chief Designer or Human Rights Ombudsperson. The administrative crisis over issues of climate change can be overcome by the creation of an office of the Representative of the Cabinet of Ministers of Ukraine on issues on climate change, as the Working Group has on many occasions suggested to the Cabinet of Ministers, the Inter-departmental Commission on fulfilling the obligations under FCCC and the Ministry of the Environment.

The Inter-departmental Commission (IDC), created by Resolution of the Cabinet of Ministers of Ukraine from 14 April 1999 № 583, can be a regulatory or supervisory body for such a Representative and his or her Office. However the IDC is not in a position to carry out routine executive work. Its activity is

virtually paralyzed by the changes in leadership (frequent over the last 5 years) in the Government and the Ministry for Environmental Protection (MEP) which should act as the secretariat for the IDC. Over these five years, there have been five new Ministers of MEP, five new Deputy Prime Ministers (who chair the IDC), four new Heads of the State Committee on Energy Conservation, while the Minister of Energy has actually changed eleven times in ten years. Thus, there simply has not been anyone available to constantly deal with these issues. The Government is too absorbed in current matters to review its practice concerning the management of issues involving climate change. This practice has already led to the non-fulfilment by Ukraine of its obligations under the UN Framework Convention on Climate Change, and if it continues, failures and sanctions are inevitable.

4. SUPPLEMENTARY LEGISLATION FOR IMPLEMENTING THE AARHUS CONVENTION

Of all supplementary acts in the area of environmental protection adopted in 2004, the most noteworthy were «On approving provisions on the procedure of the Ministry for Environmental Protection of Ukraine for giving information concerning the environment» (order of the Ministry for Environmental Protection from 18 December 2003 № 169, registered in the Ministry of Justice 4 February 2004 № 156/8755) and «On approving Provisions on public participation in decision-making in the area of environmental protection» (order of the Ministry for Environmental Protection from 18 December 2003 № 168, registered in the Ministry of Justice 4 February 2004 № 156/8754). The Ministry for Environmental Protection considers these to be mechanisms for implementing the Aarhus Convention.

The very title of the first of these Provisions, «giving information concerning the environment» does not coincide with the «access to information concerning the environment» foreseen by the Aarhus Convention. Officials to the last wish to control the process of disseminating information, retaining at least some opportunity to give it out or not at their discretion. Giving information requires a clearly formulated request for information from the public (which is not always possible), whereas access envisages the possibility of looking through, and of working with catalogues and other forms of systematization.

It is not for nothing that the Aarhus Convention demands in Paragraph 2, Article 5: «*Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible inter alia.*

by:

....

(b) Establishing and maintaining practical arrangements, such as:

i) Publicly accessible lists, registers or files;

Paragraph 2.1 of the Provision states: «The organization of provision of environmental information is carried out by a specially empowered central executive body on issues of the environment and natural resources, and its local bodies, and by enterprises, institutions and organizations». The organization of provision of information is a job which requires effort and expenditure. From the text of the Provision, it is unclear how enterprises, institutions and organizations of all types of property perceive environmental information as their duty. It is even unclear with regard to state-owned enterprises, institutions and organizations. On this point, the Aarhus Convention states (Article 5, Paragraph 6): «*Each Party shall encourage operators whose activities have a significant impact on the environment to inform the public regularly of the environmental impact of their activities and products*». Yet no information about the forms nor means of encouragement are provided either in this Provision or in other Ukrainian normative documents.

The Ministry for Environmental Protection holds a very small part of the environmental information available in the State. The greater part is held in other ministries, departments, local executive bodies, at enterprises and institutions of different forms of ownership. The provision of information under the Aarhus Convention is the obligation of the State (represented by the Cabinet of Ministers) and not of the Ministry for Environmental Protection alone. The authority of the Cabinet of Ministers with regard to encouraging or obliging those in possession of such information is significantly greater than that of the Ministry for Environmental Protection, which is not able to compel them to do this.

The Ministry for Environmental Protection did understand this – in the Draft national report of Ukraine on its implementation of the Aarhus Convention, it states: «in order to create real mechanisms for implementing the Aarhus Convention, the Ministry for Environmental Protection of Ukraine had pre-

pared Drafts of two resolutions of the Cabinet of Ministers of Ukraine on the approval of these two provisions which would contribute towards meeting the demands of the Aarhus Convention by all interested executive bodies. However, on the recommendation of the Cabinet of Ministers of Ukraine, the Ministry for Environmental Protection instead drew up two orders from 18 December 2003 № 168 and № 169 «On approving Provisions on public participation in decision-making in the area of environmental protection» and «On approving provisions on the procedure of the Ministry for Environmental Protection of Ukraine for giving information concerning the environment», and registered them in the Ministry of Justice on 4 February 2004 № 155/8754 and 156/8755».

It was thus the Cabinet of Ministers which unwarrantedly avoided meeting its international obligations by artificially narrowing the possibilities for public access to environmental information to that within the framework of the Ministry for Environmental Protection, and as far as other Ministries, departments and local executive bodies were concerned, left them to their own devices. If they happen to be in a good mood, they may just provide environmental information; if not, they can say: «the order of the Ministry for Environmental Protection doesn't concern us, and we don't have any instructions from the Cabinet of Ministers on environmental information».

Paragraph 2.2 of the Provision states that those in possession of environmental information «ensure, within the framework of their competence, the creation and constant updating of electronic databases of environmental information and ensure the public free access to this database via the Internet. Such information should include:

2.2.1) *National and regional reports on the state of the environment highlighting the dynamics of any change;*

2.2.2) *a list, texts and drafts of normative-legislative acts which are in force in the area of environmental protection and reports on adherence to environmental legislation;*

2.2.3) *documents on policy issues in the area of environmental protection, plans for environmental protection, programs and projects;*

2.2.4) *international agreements in the sphere of environmental protection and the level of their fulfilment;*

2.2.5) *Other information about the state of specific environmental objects if, according to sociological research, these prove to be of concern to the public.*

The very Ministry for Environmental Protection does not carry out these noble declarations. For example, on their website³⁴⁴ as of 28 February 2004, the last National report on the state of the environment was for 2001, there were no regional reports, the list of legislative acts was extremely limited, there were no reports at all on adherence to environmental protection legislation, as well as no documents on policy issues in the area of environmental protection, plans for environmental protection, programs and projects. Since the Ministry website was set up, there has always been a place for information about financed measures of environmental protection however it has also always been left blank. In spite of the fact that Paragraph 3-b of Article 2 of the Aarhus Convention deems environmental information to include: «*cost-benefit and other economical analyses and assumptions used in environmental decision-making*». As we know, transparency in this area helps to prevent corruption, however this, perhaps, is not a paramount aim for the heads of the Ministry.

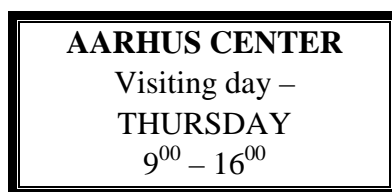
On the website there is not even any general information «*about the type and scope of environmental information which is held by the relevant public authorities, the basic terms and conditions under which such information is made available and accessible, and the process by which it can be obtained*», directly stipulated in Paragraph 2 of Article 5 of the Aarhus Convention.

Later in Paragraph 2.3 of the Provision we read: «*In order to create the conditions for widely disseminating environmental information, a specially empowered central executive body on environmental issues and natural resources and its local bodies create centres of environmental information in the capital of Ukraine, the Autonomous Republic of the Crimea and in regional centres. Centres of environmental information are elements of infrastructure of a network of a national environmental automated information-analysis system for ensuring access to environmental information*».

What this mythical automated information – analysis system is remains a mystery for the public, given that no document about it can be found on the website of the Ministry. Its possibilities can be guessed from the example of one of its «elements of infrastructure». According to information from the organization

³⁴⁴ See www.menr.gov.ua.

«Ekho-Pravo-Kharkiv», at the Kharkiv regional administration of the Ministry of Environmental Protection, one more sign appeared:



So, on Thursdays the public has the chance to get to the centre in order to ask for information. It may be available, or then again, it may not. It may be given, or then again, it may not. That's called «access»!

In Paragraph 2.4 of the Provision, it is stated that those in possession of information «ensure that information is made public through means of mass media» on:

2.4.1 *The state of the environment, the dynamics of its change, sources of pollution, waste disposal;*

2.4.2 *Environmental emergencies and measures for their liquidation and sources of pollution;*

2.4.3 *The preparation and adoption of environmental programs, action plans, and also documents on environmental policy issues;*

2.4.4 *Environmental problems of a field or region and possible ways of resolving them with the aim of enlisting public participation in decision-making on environmental issues;*

2.4.5 *Plans for locating objects of increased environmental danger which require assessment of the influence on the environment;*

2.4.6 *Plans for issuing the appropriate documents for using natural resources of local significance, and for pollution of the environment, which are issued within its authority;*

2.4.7 *Identified modified live organisms in accordance with international agreements which can be imported into the country;*

2.4.8 *experience of cooperation with the public in the field of environmental protection, rational use of natural resources and ensuring ecological safety;*

2.4.9 *Other environmental aspects or factors which are of concern to the public when carrying out public environmental expert study, and when exercising other environmental rights.*

Given that there is no indication of frequency, nor procedure for implementing this paragraph, nor responsibility for its non-fulfilment, these declarations remain on paper. The Ministry's website also contains no statistical information about the provision of environmental information to the press which would make it possible to assess what on the list is implemented fully, what only partially, and what is not implemented at all.

In Paragraph 6 of the Provision the following absurdity has been formulated: «A request for environmental information may be turned down if the information constitutes a State secret». This directly contravenes Article 50 of the Constitution: «Everyone is guaranteed the right of free access to information about the environmental situation, the quality of food and consumer goods, and also the right to disseminate such information. **No one shall make such information secret**» (our highlighting).

An analysis of the «On approving Provisions on public participation in decision-making in the area of environmental protection» demonstrates an even greater divergence from the Aarhus Convention and norms of Ukraine environmental protection legislation.

In Paragraph 1.2 of the Provision, there is the following definition: «The public concerned is the public affected by the implementation of decisions on issues which have or could have an adverse effect on the state of the environment». This is part of the definition in the Aarhus Convention (Paragraph 5 of Article 2): «*The public concerned*» means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest».

The wording in the Provision thus deprives civic environmental organizations which do not directly suffer from the adverse affect of the status of «the public concerned». This means that if a village which is threatened by such adverse affects does not have its own civic environmental organization, then environmentalists from outside may not be allowed to participate in the decision-making process – as being «not concerned»!

Among the kinds of decisions on issues which have or could have an adverse effect on the state of the environment where public participation is invited, in Paragraph 1.4.5 we find «expenditure connected with

the implementation of measures for environmental protection paid from funds [of the Ministry] for the protection of the environment». This is an artificial limitation: why should public concern only be focused on expenditure on measures paid for by funds of the Ministry for environmental protection, and not on those from State or local budgets, sponsorship or international grants?

In Paragraph 1.5 of the Provision, the list of forms of public participation does not, for some reason, include such extremely important forms, foreseen in Article 21 of the base Law «On the protection of the environment» as the following:

Participation in the carrying out by specially empowered State bodies of administration in the area of environmental protection of checks as to whether enterprises, institutions and organizations are implementing their plans and measures for environmental protection;

Proposals to hold referendums at republic or local level on issues connected with environmental protection, the use of natural resources or the safeguarding of environmental safety.

And although these fall under Paragraph 1.5.8 of this Provision «*other forms stipulated by the legislation of Ukraine*», it is curious that the authors of the Provision left them out when they are clearly more powerful tools than «*the preparation of appeals to State executive bodies*» (Paragraph 1.5.6).

Yet having mentioned many forms of participation, in what follows the Provision only reveals procedure for the holding of public discussions. This does not comply with either the title of the Provision itself, or the essence of the Aarhus Convention. Not to mention that there are big problems as regards «discussions». The formulation «public discussions» in Paragraphs 1.2 and 1.5.3 of the Provision lend themselves to very different interpretations. For example, in Paragraph 1.5.3 «public (civic) discussions *on draft decisions of central executive bodies or their local bodies, which have or could have an adverse effect on the state of the environment, during parliamentary hearings, conferences, seminars, round tables, discussions about the results of sociological research, gatherings of people in their homes, etc.*».

In other words, any discussion during any meeting or gathering with any purpose can be considered «public», if draft decisions of central executive bodies or their local bodies are discussed. There is no mention at all of procedural limitations! Somebody said two positive things about a draft plan during some event and behold, we can say that a public discussion on the draft took place.

One cannot have a discussion if the draft is prepared by, for example, the Verkhovna Rada, a city or district council, which of course are not local bodies of central executive power, and their decisions do not fall within the framework of the Provision.

On the other hand, in point 1.2, we are given the definition: «Public discussions (public hearings or open meetings) are procedure for ascertaining public opinion in order to take this into account when State executive bodies are making decisions on issues which have or could have an adverse effect on the state of the environment...»

This now is not just any meeting, but an open one! However it is not clear how to understand «open» or «public hearings» which have not been defined as concepts at all. And meetings not with just any purpose, but in order to take public opinion into account! Here also, as in Paragraph 1.5.3, exclusively in the decision-making of State executive bodies. Draft projects for decisions of Parliament, or bodies of local government once again are left out. There is no mention of obligation to adhere to established procedure in the definition, instead hearings or meetings are called «procedure».

As for the procedure for holding public discussions, there are also discrepancies. Paragraph 1.6 states that it «can be initiated by participants in the public discussion». Precisely how the discussions are initiated is not mentioned in the Provision. In Paragraph 2.4 we read: «At the suggestion of the public or of the person who ordered the draft decision, the person who is taking the decision shall choose the form of public discussion». This means, he or she may not choose a form at all saying, for example, «You didn't initiate this correctly». There is nothing in the Provision about procedure for appealing a refusal which the public disagree with.

In Paragraph 2.7, the list of information for information about the holding of public discussion does not include what is demanded by the Aarhus Convention (Paragraph 2-vi of Article 6): «*An indication of what environmental information relevant to the proposed activity is available; and the fact that the activity is subject to a national or transboundary environmental impact assessment procedure*».

In Paragraph 2.8, the demands for reporting on draft decisions, despite the requirements of the Aarhus Convention (Article 6, Paragraphs 6-e and 6-f), do not mention: «*an outline of the main alternatives studied by the applicant*» and «*in accordance with national legislation, the main reports and advice issued to the public authority*»

In Paragraph 2.9, the Provision reads: «During the public discussions, the public are provided with the opportunity to freely express, in a verbal or written form, their opinions, comments, proposals or recommendations on the issues under consideration». Certainly, for the purposes of objectivity, «the opportunity to freely express their opinion» should also be given to those individuals who have presented the draft project. And since the overall time is limited, it should be spent economically, so at the discussion, there is a chairperson, a secretary and an agenda. Who proposes the latter and how the decisions are taken is also not explained in the Proposal. Such circumstances in the majority of cases guarantee the domination of representatives of the State authorities and «a football match with only one goalpost».

The Provision does not stipulate how exactly the results of the public discussion are to be taken into consideration. All that is said in Paragraph 11 is that «the results should be taken as much as possible into consideration when preparing a draft decision». Nothing is mentioned about responsibility for not taking comments and results of the discussion into consideration, there is no procedure for answering comments or for giving a substantiated refusal to consider such comments.

Although at the end of the Provision, in Paragraph 2.17, we are told: «Decisions taken with infringements to the norms of this Provision may be appealed by concerned individuals in accordance with the legally prescribed procedure».

The overall quality of these norms is such that even without infringing them, one can make any kind of anti-environmental and anti-social decisions, which it would be impossible to appeal, referring to this Provision.

Back when the Draft Laws «The Provision on procedure for giving environmental information in the possession of the Ministry for Environmental Protection» and «The Provision on public participation in decision-making on environmental issues» were first proposed, a lawyer from «Ekho-pravo-Kharkiv», Vitaly Zhev, assessed them as *«reducing the ranges of options for exercising citizens' constitutional rights to receive environmental information, participate in decision-making on issues which concern the environment and significantly worsening the position of the public and diminishing its role in the process of safeguarding and exercising the right to a safe environment»*.

Despite significant reworking, the general quality of these Provisions in their final form was little improved. Neither complies with the content of the Aarhus Convention, the mechanisms for implementation of which it was supposed to provide. It is paradoxical that the Danish aid program for Ukraine, whose money was used to finance this falsification, was intended to facilitate the implementation of the Aarhus Convention. An active role in the drawing up of these Provisions was played, on a paid basis, by the NGO «Ekho-Pravo-Kyiv», which even held «public discussions» of the draft projects in the spirit of the Provisions themselves. Unfortunately, it paid more heed to the wishes of its clients from the Ministry for Environmental Protection than to the opinions of other civic organizations.

5. THE SITUATION WITH THE DANUBE BIOSPHERE RESERVE (DBR)

Virtually all large-scale technical projects of recent years have had the trademarks of reckless environmental, economic or legal schemes. Building was carried out without positive conclusions from environmental expert analyses, technical and economic justification, or without any design and cost estimates at all. Then when scandals broke out, dubious documentation was prepared. This was the case with the completion of the Tashlytsky waterworks facility, the reactors of the Khmelnytsky Atomic power station-2 and Rivne Atomic power station-4, the construction of the Odessa motorway, etc.

The most heated of all environmental controversies in Ukraine during 2004 was the conflict around the construction of a deep-water Danube – Black Sea canal. This places in jeopardy the existence of the Danube biosphere reserve (hereafter – «DBR») and it has damaged Ukraine's international image. This reserve is a part of a transboundary Ukrainian-Rumanian reserve «The Danube Delta». The reserve is on the list of the UNESCO World network of biosphere reserves, and is considered to be the «ecological heart of Europe» – it has 325 kinds of birds and 75 types of fish, of which 38 are listed in the Red Book.

Construction of the canal violates Ukraine's international obligations, which it undertook by ratifying the following:

- 1) Convention on the Conservation of Migratory Species of Wild Animals, Bonn;
- 2) The Agreement of the Conservation of African-Eurasian Migratory Waterfowl;
- 3) The Convention on Cooperation in the Protection and Stable Use of the Danube (Danube);
- 3) Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, 1991;

4) Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention);

5) The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).

At the same time, during the opening ceremony of the canal, President Kuchma hypocritically stated that Ukraine had observed all environmental requirements and norms of legislation, including international norms in the construction of the canal.

The process of design and construction of a deep-water Danube – Black Sea canal through the Bystroye estuary on the territory of the Danube biosphere reserve stands out as an example of cynical mockery of democracy and lawfulness. The Ministry of Transport of Ukraine, by means of manipulation, misuse, violations of legislation, administrative pressure, disinformation and disregard of public opinion, managed to begin construction. The reckless plans of the Ministry, H.Kyrpa, were supported by President Kuchma and the Minister of Environmental Protection of Ukraine.

The national Academy of Sciences (DBR being under its authority) spoke out against building the channel through the mouth Bystroye, as did hundreds of public organizations of Ukraine and other countries, well-known international organizations, the governments of USA, Rumania, the European Commission, international experts and citizens. A particular role in the defence of DBR was played by the scientific staff of the reserve, the coalition of Ukrainian environmental NGOs «For wild nature», which carried out an information campaign among the wider public, and also the charity foundation «EkhoPravo-Lviv», which has defended DBR, nature and environmental rights of Ukrainians in the courts. This text uses material which has been provided by these organizations.

There were a large number of obstacles, in particular, legislative, for the construction of the canal according to the version chosen by the Ministry of Transport – through the Bystroye Estuary:

1) At the time of planning the construction, the Bystroye Estuary was within the reserve zone of the Danube biosphere reserve where any kind of economic activity was prohibited (Articles 16, 18 of the Law of Ukraine «On the Nature-Reserve Fund of Ukraine»). The Ministry of Transport initiated the adopted of the Decree of the President from 2 February 2004 «On the expansion of the territory of the Danube biosphere reserve», by which the zoning of the reserve was changed, with around one thousand hectares of reserve zone territory (including the Bystroye Estuary) being moved into a zone of anthropogenic landscapes where economic activity is permitted. The re-zoning of the DBZ was carried out on the arbitrary instructions «from above», not on the basis of any scientific plans, more over, against the judgment of scientific staff at the DBR.

2) At the time the construction of the canal was planned, the DBR held a State act for the right to permanent use of the land, including the Bystroye Estuary. The Ministry of Transport of Ukraine, assisted by the Vylka City Council began a court process to have the DBR State act to the land declared invalid, and by exerting pressure on the judges of all levels, managed to obtain a result in its favour, justifying this as being in defense of the interests of the local population. The Ministry of Transport also prepared and organized the signing by the President of Resolution № 502/2003 from 10 June, 2003 which introduced so-called «editorial» corrections and excluded from the territory of DBR canals and internal reservoirs, including the Bystroye Estuary, which put in question the whole reason for the existence of DBR as a wetland of international significance.

3) While State environmental expert examinations of TEO³⁴⁵ and the working plans for the Danube – Black Sea canal were being carried out, the Ministry for Environmental Protection knowingly infringed current legislation and the principles of conducting State environmental expert examinations: openness, scientific justification, objectivity, legality and consideration of public opinion. With disregard for its duties, the Ministry approved this construction, thus placing in jeopardy the natural habitat of a number of plants and animals listing in the Red Book.

4) During the decision-making on the construction of the canal, public opinion was not considered, with obstacles being placed in the way of public participation in the decision-making process, factual information was constantly concealed, and the public were not provided with the opportunity to express their point of view and were denied access to documents relating to the construction.

5) The inadmissibility of implementing economic projects at the expense of territory of the nature-reserve fund had been stressed during parliamentary hearings on the adherence to the requirements of environmental legislation of Ukraine in February 2003.

³⁴⁵ TEO – Technical Economic Justification – all construction work etc needs a TEO certificate (*translator's note*)

After 20 checks on their activity which found no violations, a criminal case involving non-observance of the demands of the Criminal Procedure Code was launched against the Administration of DBR. The Director of the reserve, Oleksandr Voloshkevych, a man committed to his task of protecting the reserve was threatened by unidentified individuals, and rumours about his death were circulated. The International Union for Environmental Protection at its congress in Bangkok in November 2004 passed a special resolution in which it called on the government of Ukraine to put an end to the persecution of Mr Voloshkevych and the Administration of the reserve.

In October 2003 a joint mission of experts from the Ramsar Convention and the Bureau of MAB UNESCO visited Ukraine in order to seek the most environmentally acceptable solution to this problem and suggested alternative variants which would ensure the conservation of this natural territory of international significance. The experts came to the conclusion that the option of building through the Bystroye Estuary is the worst from an environmental (damage to the environment) and economic point of view. On 7 May 2004, the secretariat of the Ramsar Convention approached President Kuchma again, expressing concern at the construction of a canal through the reserve, and called on Ukraine to adhere to international agreements it has ratified, in particular, the Ramsar Convention.

The European Commission, disturbed that Ukraine was not complying with international obligations, on Ukraine's invitation, sent a mission to the Danube Delta from 6-8 to check the information presented by the Ukrainian government in response to an official request from the Commissar on Environmental Protection, Margot Volstrom, as well as at various meetings and forums where the issue of the construction of the canal was raised. In the opinion of the Coalition of Ukrainian environmental NGOs «For wild nature», the Ukrainian State authorities have waged a campaign of disinformation of the international community as to the situation with DBR, pushing at any cost their option for the Bystroye.

The mission, headed by the Director General of the Commission on Environmental Protection, Soledad Blanco, included representatives from the European Commission, the International Union for Environmental Protection, UNESCO and secretariats of the Danube, Ramsar, Espoo and Aarhus Conventions. The joint report of the European Commission and secretariats of international conventions noted, among other things, the non-observance of democratic procedure in involving the public in the decision-making process, and the causing of irreversible damage to nature as a result of the construction of the canal.

The charity foundation «EkhoPravo-Lviv» lodged a complaint with the Committee on Observance of the Aarhus Convention about the disregard for public opinion and violation of their right to participate in the decision-making process on the environmental expert examination of the project. The complaint was heard on 17 December 2004. The Government of Ukraine did not answer the questions put by the Secretariat of the Convention and did not, despite the invitation of the UN European Environmental Committee send a representative to the Committee session. The Committee is currently preparing its decision with regard to the non-fulfilment of Article 6 of the Convention which will be made public at the next Conference of the Parties on 25-27 May 2005 in Alma-Ati.

6. «RECONSTRUCTION AND IMPROVEMENT» IN FEOFANIYA³⁴⁶

The park monument of the garden-park art «Feofaniya» belongs to the State Reserve Economy of the National Academy of Sciences of Ukraine. It is situated in the southern outskirts of Kyiv and is a part of once integral oak-hornbeam Holosiyiv forest. There are still huge oaks which are several hundreds years. Since ancient times this place has been perceived as sacred.

Despite the fact that «Feofaniya» is a forest, it has the questionable and, for land of wild nature, dangerous status of being a park monument of garden-park art (albeit of national significance). The Law of Ukraine «On the Nature-Reserve Fund of Ukraine» states that the most renowned and valuable models of park creation are designated park monuments of garden-park art. However on the territory of «Feofaniya» there are no artificial plantations nor creations of landscape park architecture at all. This territory is most certainly deserves higher protected status. However, neither the Ministry for Environmental Protection nor the State Reserve Economy «Feofaniya» have shown any interest in conservation of this unique natural object. This is because its inappropriate status makes it possible to carry out «reconstruction and improvement», screened by which dachas can be built.

³⁴⁶ Materials sent by Kateryna Borysenko were used, the Youth Department of the National Ecological Centre of Ukraine.

How is it possible to organize building in a reserve? It turns out, in two stages: first one needs to transfer land from the nature-reserve fund to the forest fund. Then, as land which has lost its value and suffered degradation, transfer it to land designated for housing. And the city administration for environmental protection will not be able to object. The possibility of transferring land from the forest fund to other categories of land through the loss of its valuable qualities provokes deliberate acts aimed at destroying or damaging forests by individuals who have an interest in changing the category of the land.

How does this land 'lose' its value? The technology is not particularly subtle: the trees on the land required which will hamper the planned construction work, are cut down as part of 'sanitary' felling, then waste (for example, construction waste) is brought on to the land. The degradation process of the forest can be «assisted» by pouring acid or salt brine around tree roots so that they dry up. Then, using the justification that the land has suffered degradation (has become thinned out through felling or is cluttered up with waste) and has lost its value, it is transferred to the fund of land designated for housing.

It is these methods which have been used in Feofaniya. Since March 2004 when the «reconstruction and improvement» of Feofaniya began, persistent rumors have been circulating that Viktor Yanukovich was going to build a dacha there, that it was specifically for this that the «reconstruction» had been started. Official organization of this began with an approach on 27 September 2003 to the Prime Minister of Ukraine, V. Yanukovich from a group of State Deputies – Dobkin, Pikhota, Pavliuk and others:

«there is a pressing need for immediate intervention by the government to use urgent measures to ensure not only the preservation of the reserve, but also its development, the implementation of the requirements of existing normative regulations... We would ask you to instruct that a plan be drawn up on order from the State Reserve Economy «Feofaniya» of the Academy of Sciences of Ukraine for the reconstruction of the reserve, and that the Kyiv City Council and the City State Administration also assist in implementing such measures (organizing this with appropriate directives): erection of a fence, building of roads, pavements, outside lighting, sewage, water supply, gas supply, installation of telephones. At the same time, vehicle transport should be limited on the territory of the reserve by installing the appropriate signs and barriers».

And on November 2003 the Kyiv City State Administration issued a Directive № 2212 «On the reconstruction and improvement of the park monument of the garden-park art of national significance «Feofaniya» and adjacent territories».

A second approach from a group of State Deputies (slightly different: Rybak, Bondarenko, Konovaliuk and others) to V. Yanukovich, reads: «Having determined the boundaries of the State reserve economy «Feofaniya» of the National Academy of Sciences of Ukraine, the Kyiv city council should create the conditions for a comprehensive solution to issues as to its reconstruction and conservation».

Despite the fact that «Feofaniya» is of national significance, the boundaries of the park-monument were illegally changed by the Kyiv Council in their Decision № 636/796 from 10 July, 2003. The State Reserve Economy «Feofaniya» was previously bagel-shaped, since inside there was housing, economic buildings and a garden. The Kyiv Council, without any scientific grounds, but simply as fact, announces the transfer to the State Reserve Economy «Feofaniya» of that «hole in the bagel», with an area of 30.36 hectares. The same Decisions removes 30.36 hectares of reserve forest from the State Reserve Economy «Feofaniya» which is transferred to land of the forest fund. Thus, the amount of territory of «Feofaniya» has not changed, remaining 152.2 hectares, however there has been an unequal swap in parts of this land. And the land removed has been reclassified as land of the forest fund.

In 2003 from lands of the forest fund, namely of the Holosiyiv forestry of forest-park economy «Konch-Zaspa», 5 lands of 0.1 hectares for individual construction were passed to the fund of land for housing. In May-June of 2004, a Decision was adopted by the Kyiv Council according to which from the forest-park economy «Konch-Zaspa» on the lands, removed from the State Reserve Economy «Feofaniya», 22 more plots of land were allotted 0.1 hectares each for housing construction on Feofanivsky Lane which starts «advancing» on the park from the side of the village of Khotiv.

The removal of forest land with a special regime for forest use (forest-parks, city forests) for purposes not connected with conducting forest economy is allowed only as an exception by a decision of the Verkhovna Rada. In the decisions of the Kyiv Council, where with the stroke of the pen, forest fund land is allotted for construction, in every point some «letters of agreement» are mentioned, but with no indication of whose letters.

On 22 February 2004, State Deputies Rybak, Hurov, Petrov, Vashchuk and others again approach V. Yanukovich: «We would ask you to instruct the Kyiv City State Administration to finish the planning documentation for the reconstruction and improvement of the reserve «Feofaniya» and the adjacent terri-

tory by ensuring the erection of a fence, the building of roads, pavements, wells, internal illumination, sewerage, water-supply, gas-supply, installation of telephones».

And on February 22, 2004 deputies Rybak, appeal V. Yanukovych: «we ask you to give a direction to the Kyiv city state administration to finish the project documentation on reconstruction and accomplishment of the reserve presupposing erecting a fence, roads, sidewalks, wells, internal illumination, sewerage, water-supply, gas-supply, installation of telephones».

Copies of the above-mentioned letters between Yanukovych, Omelchenko and a group of deputies were sent to the President of the National Academy of Sciences of Ukraine, B. Paton and the Minister for Environmental Protection, S. Poliakov. Thus, it would appear that this happened with their tacit consent.

Local residents attempted to find out why a reserve should need sewage, telephones and so forth. However they received no comprehensible answer. The state functionaries could only come out with utterances like: «Have you seen how much rubbish there is? It's all blocked up, no civilized person has set foot there!» According to the project of «reconstruction», the eviction of residents from buildings located on the territory of the reserve is envisaged – to keep the territory only for those «civilized» people who do not ask such questions.

The project of «reconstruction» of the park-monument has nothing to do with protection of nature and, in accordance with the insistent wishes of State Deputies, envisages first of all the laying of roads, pavements, sewage, gas and water supplies, and installation of telephones. «Reconstruction» has been invented to provide the future private cottages of those in power (or their relatives) on territory stolen as described above with facilities at taxpayers' expense. 17 million UH were allocated for «reconstruction» from the State budget in 2004 alone, and the completion is planned for September 2005. The client ordering the works is the the State Reserve Economy «Feofaniya», and for the adjacent territory removed from it – «Kyivzelenbud», which was allocated 7 million UH for work in 2004.

The project of «reconstruction» was submitted for environmental expert examination only on 22 June, 2004. Yet, without a comprehensive State expert examination, particularly, environmental, it was implemented at full speed. The speed and scale of the «reconstruction» are staggering. Virtually all the territory within the new boundaries has been sectioned off by a 3-meter fence. «Sanitary» felling had already commenced at the end of February 2004. «Reconstruction» workers selectively felled in the whole park not less than a thousand old, in particular some three hundred-year old, oaks – one of the main treasures of «Feofaniya». It was not so much old and deadwood trees which were cut down, but predominantly healthy trees (one cubic meter of oak presently costs about 400 US dollars).

In the place of some overgrown lakes where forest had appeared on waterlogged land, several hectares of forest was totally cleared, supposed for the restoration of the cascade of the lakes. It is not clear how the lakes, quickly dug out, were to be filled with water, since the available springs will not provide such amount of water. Probably water will be supplied from the newly constructed water pipe. According to rumours, it is specifically here, near the lakes that Yanukovych's «dacha» was to be erected – so that the Svyato-Panteleymonivsky Cathedral would be seen from the window.

The «sanitary» felling out was carried out according to criteria acceptable for city's squares, but not for objects of the nature-reserve fund. The attitude of the Head of the Department for Environmental Protection of Kyiv, M. Movchan is staggering: «in order to set up and provide elements of park art in the park, selective and total sanitary felling has been carried out». Total felling is in no way sanitary!

During the «sanitary» felling from early Spring (the period when ephemeral plants blossom) till the period when birds set out their nests, the undergrowth was totally destroyed by the felled logs being hauled away. At the same time, there were dozens of pieces of technology creating a massive din. Simultaneously dozens of technique units were working making much noise. After such «improvement» the tract begins to be overgrown with weeds, many birds abandoned their dwelling places. As a result of the laying of cables of communication networks, roads and foot-paths through the tract, as well as the «sanitary» felling, more trees were cut down which has led to the fragmentation of the forest. A few grounds have been cleared – obviously for construction, roads with lighting have been laid directly through the forest, a lot of walk-paths have been paved (pavement slabs were brought in). There are guards wandering around, armed with rubber truncheons, and those whom they take a disliking to are told to get lost.

The destruction of a unique natural ecological system for the gratification of those who wield power, the «privatization» of objects of the nature-reserve fund do considerable damage to public morals. And Feofaniya is just the most flagrant example of a range of such cases throughout Ukraine.

On 20 June, 2004 on Metrolohichna street, not far from the State Reserve Economy «Feofaniya», a meeting was held against «the reconstruction» of the reserve tract «Feofaniya» organized by the public en-

vironmental organization «Union to Save Holosiyiv». Over 150 people came to support the protest action, mainly residents of Metrolohichna street. It was clearly stated at the meeting: «... in Feofaniya we can see the pillaging by Yanukovych, Omelchenko and a group of deputies. Cottages built illegally must be demolished, the devastated land returned to the forest and nature-reserve funds, the degraded territories restored at the expense of those whose actions led to the losses».

7. RECOMMENDATIONS FOR IMPROVING THE SITUATION

The majority of public environmental organizations in Ukraine usually keep away from any political parties, concentrating on protection of nature and development of environmental awareness among the population. However, realizing that the main reason for the worsening in the environmental situation was the total lack of importance placed on environmental policy by the neo-feudal regime of Kuchma, and his protégé Yanukovych, during the presidential campaign of 2004 60 public environmental organizations appealed to citizens of Ukraine – «Ukraine should follow a different road!»³⁴⁷.

After Viktor Yushchenko was elected President, 123 public environmental organizations and experts signed the appeal «Society needs an effective environmental policy»³⁴⁸. Having congratulated V. Yushchenko on his victory, they expressed their hope that he would put to an end to the disregard of environmental policy typical of the Kuchma period.

Since the text of the appeal was long discussed and coordinated by many organizations, one can assume that it reflects consensus in wide circles of the environmental community. The following is an excerpt for the appeal:

«...against a background of poverty for millions of people, a corrupt government and crises in almost all spheres of public life, the majority of Ukrainian politicians mistakenly think that it is not the time for environmental problems, and that it is necessary to «develop» the economy and level of well-being.

The result of such thinking is «development» in the most dirty and power-consuming fields. Ukrainian export is 90% made up of raw materials or semi-refined products, resource efficiency of production is 5-6 times more than in Europe. Ukraine may end up with sanctions for non-fulfilment of commitments under the Kyoto Protocol, have losses instead of advantages. The state has still not determined its development strategy for future trends.

The poverty of Ukraine's environmental policy is manifested in the incompleteness and low quality of State environmental information for citizens; in its total and everyday non-observance of environmental legislation; in the non-transparent, inefficient, corrupt use money designated for environmental protection, including international aid; in the endless disordered convulsions of rearranging the structure and staff of the Ministry for Environmental Protection.

In Ukraine it was not only the elections that were falsified – the mechanism for general democracy, but also the mechanism for environmental democracy – the implementation of the Aarhus Convention «On access to information, public participation in decision-making and access to justice on environmental matters». Public opinion is ignored when implementing virtually all large and small construction projects. Not one State body reacted to the systematic work – «The public evaluation of the environmental policy in Ukraine», recognized as a unique precedent at the 5th European Conference of Ministers «Environment for Europe» (Kyiv-2003)».

The suggestions of environmentalist on ways of improving the situation, which were prepared with the participation of many representatives of the environmental movement are as follows:

1) To declare environmental policy one of the main seven priorities of activity of all branches of power, and the criterion for governing quality – the increase in the index of human development that reflects balance of economic, environmental and social components of the social quality of life.

2. To acknowledge the particular importance of Ukraine's observance of the Aarhus Convention, both for its own sake, and as a mechanism for involving the wider public in democratic processes; to not take any decision which may have an effect on the state of the environment with procedurally regulation public participation (public and parliamentary hearings, referendums, public environmental expert examinations, etc). Citizens should be informed at the earliest stages of decision-making; to resume the public discussions on the activity of the government, begun in 2000.

³⁴⁷ The complete text of the appeal can be found on the website: <http://greenkit.net/Members/smf/zvernennia>.

³⁴⁸ The complete text of the appeal see on the website: <http://greenkit.net/Members/smf/EkoJusch>.

3) To recognize as a root cause of environmental problems the low level of environmental education, training and awareness. Ukrainian top managers at all levels must be required to implement unconditionally the demands of Article 7 of the profile Law «On the protection of the environment»: «Environmental knowledge is a compulsory qualifying requirement for all State officials whose activity is connected with the use of natural resources and has an impact on the state of the environment»

4) To change State information policy, stimulating public demand for environmental information and promoting a healthy way of life.

5) To reform the system of bodies of administration, regulation and control in the sphere of environmental protection, use of nature and sustainable development; to liquidate resource State committee-patrimonies, ensuring separation of management and economic functions, independence of regulation, management, expert examination and control. In accordance with clause 20 of the profile Law, the Ministry for Environmental Protection should really become the main working body for drawing up and implementing State environmental policy, especially, coordination with all other state bodies.

6) To widely, with maximum involvement of the community, discuss the activity (or rather inaction) of the State Environmental Inspection and the Prosecutor on environmental protection. To reform these bodies, liquidate duplication and uncontrolled zones in the activity of any State bodies, including the Cabinet of Ministers. Real measures should be taken, rather than sanctions which remain on paper. A positive example to be followed would be that of the Accounting Chamber.

7) To ensure transparency and justification in human resources policy in environmental protection bodies and adjacent departments. In first place must be the following: management professionalism, education, experience in environmental protection, reputation unmarred by any anti-environmental or corrupt activities, the ability to advocate environmental principles and to constructively cooperate with the community. To appoint the Minister, his or her deputies, heads of the environmental protection departments on a competitive basis with mandatory consideration of public opinion.

8) To oblige State administration bodies with non-governmental organization involvement to carry out reviews of so-called «programs» (national, state, governmental, field, regional, etc.), particularly in the environmental sphere. To annul those of them which are propagandist, but not management documents. To prepare National Action Plans, particularly, for the fulfilment of Ukraine's obligations under international conventions. To introduce task-based methods of management and posts of managers with strictly identified personal responsibility for efficient and transparent management, with results which can be specified, and keeping to deadlines. First and foremost, to introduce the post of Commissioner of the Cabinet of ministers of Ukraine on issues of climate change.

9) To support setting aside in the state budget a special environmental section with the balance between income for nature utilization and environmental expenses. Taxes, as well as payments for nature utilization, should be paid first of all to local budgets where these enterprises work and make harm. Not less than 5% of the costs of nature utilization should be spent on measures promoting environmental education, awareness raising and information, and non-governmental organizations should be involved in tenders for these measures.

XVII. RIGHTS OF WOMEN³⁴⁹

1. INTRODUCTION

Ukraine is a member of the United Nations and has committed itself to adhere to internationally recognized human rights standards, in particular the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) ratified by Decree of the Presidium of the Supreme Council of the Ukrainian Soviet Socialist Republic in 1981.

Under the terms of the 1991 *Act on the Effect of International Agreements on Ukrainian Territory*, all international treaties that have been ratified by Ukraine automatically become part of domestic law. This is reiterated in article 9 of the 1996 Constitution of Ukraine. However, in its concluding observations on the Fifth Periodic Report on Ukraine, the Human Rights Committee expressed its concern that the provisions of international treaties did not occupy a high enough position in the legal hierarchy of Ukraine and noted that the standards contained in these treaties were not necessarily given primacy over frequently contradictory national laws.³⁵⁰

Having ratified CEDAW, Ukraine undertook obligations provided in article 2 of CEDAW, that is, to eliminate discrimination in all its forms and by all available means. It is obvious that the first and foremost means of overcoming discrimination are legislative mechanisms or incorporation of the principles of gender equality into the Constitution of Ukraine and into the Laws and supplementary legislation of Ukraine.

Article 24 of the Constitution affirms the entitlement of women and men to equal rights and contains a detailed list of measures that the State should take to ensure that these rights are enjoyed.

In affirmation of this position and guided by the Universal Declaration of Human Rights, CEDAW, and other international agreements on human rights, the final documents of the Fourth World Women's Conference *Actions for Equity, Development and Peace* (Beijing, 1995), and the Decree of the Parliament of Ukraine *On Recommendations of Participants of Parliament Hearings On Implementation of CEDAW in Ukraine*. from 12 July 1995, the Verkhovna Rada on 5 March 1999 (Decree № 475-XIV) adopted the Declaration on Fundamental Principles of National Policies on Family and Women. According to the Declaration, the State guarantees equal rights and opportunities for women and men in respect of all principal human rights and freedoms in all realms of the society. The Decree of the Cabinet of Ministers of Ukraine № 479 of May 6, 2001 *On the National Action Plan for the Improvement of Women's Status and Facilitation of Introduction of Gender Equity in Society for the Years 2001-2005* contains a list of specific steps to be taken in order to efficiently implement the aforementioned Declaration.

Although Ukraine has made these commitments at the national, regional and international levels, violations of human rights such as the right to freedom from discrimination, torture and ill treatment continue to occur. Women in Ukraine currently face many obstacles to the enjoyment of their human rights including negative social stereotypes concerning the status of women in society, high rates of violence against women in the family and in the community and a lack of access to real and legal employment opportunities.

Moreover, mechanisms for overcoming discrimination against women cannot be limited to legislative means only; they need to expand much further into the realms of legal applications and law enforcement. This encompasses all areas of activity of governmental bodies and their officials within the limits of their competence in creating and applying legislation, promoting and enforcing the declared principles. Here,

³⁴⁹ Written by Olerksandra Rudneva, Hanna Krystova, Olena Kachemirovskaya, Kharkiv Centre for Women's Studies. The information proposed is based on data of the Alternative report on CEDAW Implementation in Ukraine which is the first document of this kind to be ever produced in this country.

³⁵⁰ Human Rights Committee, Concluding Observations: Ukraine, UN Doc. CCPR/CO/73/UKR, November 5, 2001, Paragraph. 8.

the practice of law enforcement bodies and judges play a vital role. Here the provisions of article 4 of CEDAW, specifically, legitimization of «adoption of temporary measures... that do not qualify as discriminative by the participant countries» should not be confined only to passing normative legislation, but to ensuring their full implementation.

Special social, economic, cultural and educational measures are all needed to combat discrimination against women. A list of such mechanisms and measures is provided in article 2 and other articles of CEDAW. Unfortunately, these measures have not been implemented which means that Ukraine is still far from fulfilling its obligations in full. Ukraine has not yet ratified the CEDAW Optional Protocol, which provides the CEDAW Committee with the power to receive and act upon individual communications as well as to undertake investigations in cases where serious or systematic violations of the Convention have allegedly taken place.

2. AREAS OF STUDY

2.1. DOMESTIC VIOLENCE

CEDAW does not directly address violence against women. However, General Recommendation 19 considers it to be a form of gender-based discrimination and a direct violation of universal human rights. Domestic violence is one of the most typical and widespread kinds of violence against women.

The CEDAW Committee made recommendations to the government of Ukraine including the call to pay more attention to this issue in the next official CEDAW implementation report. Adherence to this recommendation naturally requires special steps to be taken including keeping official records on incidents and spread of this phenomenon. However, no official statistics on this subject have ever been widely publicized. Nevertheless, some Ukrainian NGOs have carried out several complex studies of this problem, and so far, their conclusions are the only publicly available sources of such data. The results obtained indicate the seriousness and prevalence of this problem and provide descriptions of behavioural patterns of women victims and of children from violent households.

In 2000, the Kharkiv Committee for Women's Studies (hereafter KCWS) delivered one such study: *Impact of Domestic Violence on Behavioural Stereotypes of Women and Children in Ukraine*. A general assessment of family relations showed that these relations are characterized by hostility and insults in 19% of families, and by physical abuse in 10% of families. The latter figure requires some comment. Answers to special control questions suggested that, in reality, physical abuse is present in about 18-20% of families, with the target usually being a woman. Physical abuse of women was noted in 80% of families where, according to children, alcohol was consumed on a daily basis.

29% of the children respondents said that during household conflicts they wanted to protect the mother (sometimes the father), 36% wanted to leave home «just so as not to see all this», 10% did «not want to live any more», 17% tried to get the parents to make up, 15% preferred «not to notice» it (or not to care), 2% said that in such a situation they were ready «to kill the father». It is significant that those types of behaviour can vary a lot depending on the frequency and forms of violence, and in general on the type of the family. As a rule, the more violent the family is, the fewer are those, who try to «protect» or «make up», and more and more children prefer «to leave», «not to notice», etc.

Criminological studies complement the aforementioned data: according to them, teenagers who have run away from violent homes commit 30% to 70% of juvenile offences. Physical violence negatively affects children's interest in learning and education (29% of children in violent families are interested in studying, while the figure for 'normal' families is 34%). Thus it is reasonable to assume that many girls and young women's educational and subsequent economic opportunities are severely impaired by the environment of abuse they grow up in. Another problem is that children from such households eventually learn to perceive violent relations as a norm and later carry this pattern into their own families, thus perpetuating a vicious cycle.

It has been estimated that 30 to 40 percent of all calls to police stations in Ukraine are related to domestic violence involving physical assault. The number of people reported to police for committing persistent domestic offences is constantly increasing. Their number grew by 16% in the past five years and reached more than 67 thousand by January 1, 2001.

One third to one half of women treated for injuries in injury units are reportedly the victims of domestic battering, and these women most frequently seek medical attention for concussion, abdominal injuries and broken limbs. It is estimated that every year in Ukraine, domestic battering causes 100,000 days of hospitalization, 30,000 trips to injury units, and 40,000 doctor call-outs.³⁵¹ As for forensic expertise, which is essential in case of official criminal charges, each such doctor sees about 1,200 victims of domestic violence per year. Some clients come as often as once a month, and it is not unusual for forensic doctors to personally call the police inspectors requesting them to intervene in the most worrying cases.³⁵²

Incidents of domestic violence are generally treated under articles 121-128 of the new Criminal Code, which deal with assault and intentional infliction of bodily harm. Most cases of domestic battering presently fall under article 125 of the Criminal Code, which deals with «intentional light bodily harm». Articles 121 and 122 of the Code both cover cases of assault that cause either severe bodily harm, or long-term health disorders. Provisions of article 296 of the Criminal Code on «hooliganism» are also often used as the grounds for bringing claims of domestic battering. Certain provisions of the Administrative Code have also been applied in cases of domestic violence not deemed to have reached the threshold of seriousness required for prosecution under the Criminal Code.

At the same time, women wishing to press charges of domestic violence frequently come under pressure from lawyers and the police to become reconciled with their husbands or partners. Some prosecutors have refused to take up cases of domestic violence even in situations where women have suffered serious injuries. A survey undertaken among judges and lawyers in the Kharkiv region in 2000 found that many law enforcement bodies in Ukraine perceive domestic violence as constituting a private matter rather than a criminal offence.³⁵³ Even in cases where women have been willing to report instances of domestic battering, law enforcement officers have often refused to intervene referring to article 32 of the Constitution of Ukraine, which prohibits interference in personal or family life.

In order to combat this phenomenon, an action group of youth and women's NGOs led by KCWS began preparing a Draft Law of Ukraine *On Prevention of Domestic Violence*. A special working group of leading experts of the National Law Academy of Ukraine coordinated by Dr. O. Rudneva was formed to develop such a draft. The action group approached the Vice Speaker of the Parliament of Ukraine, Stepan Havrysh, who agreed to table the Draft law in the Verkhovna Rada. This Law was eventually adopted by the Verkhovna Rada on 15 November 2001.

The Law has been hailed as a landmark for women in Ukraine as its provisions are far more comprehensive than legislation currently in force in any part of the Commonwealth of Independent States (CIS) and Eastern European countries. Article 1 of the Law defines prohibited forms of violence including physical, sexual, psychological or economic (deprivation of financial support) violence. The Law provides for the creation of a network of crisis centres as well as facilities for medical and social rehabilitation of victims of domestic violence. Article 14 specifies conditions under which temporary protection orders will be issued, and Article 16 provides that perpetrators of domestic violence are required to attend training sessions on non-violent behaviour patterns.

This Law came into full force three months after its official publication on 19 March 2002. Its mechanisms for application require development and the introduction of a number of pieces of subordinate legislation. The government has already taken the first steps on that way. The Ministry of Internal Affairs issued Order № 329 of April 9, 2002, *On Approval of Instruction on the Procedure for Placing Household Members Guilty of Committing Acts of Domestic Violence on Preventive Record and on Keeping Records of Such Persons*.

However, the State authorities must go much further in order to develop an efficient system for preventing domestic violence. There are still only a few crisis centres and these are run by women's NGOs. Centres *Women for Women* operate in several major cities of Ukraine (Chernivtsy, Dnipropetrovs'k, Donetsk, Kherson, Lviv, Rivne and Zhytomyr) and serve as domestic violence crisis centres. Nevertheless, their number and capacity are entirely insufficient to provide adequate assistance to victims of domestic abuse, and the active support of local authorities and the government is absolutely essential for substantial improvement of the situation.

³⁵¹ Donetsk Regional League of Business and Professional Women (DRLBPW), Campaign *16 Days Against Violence*, 2000.

³⁵² Minnesota Advocates Group, *Domestic Violence in Ukraine*, December 2000, p.31

³⁵³ Olexandra Rudneva, Chapter on Ukraine in *The First CEDAW Impact Study*, International Women's Rights Project, New York, June 2000, p. 224.

The effectiveness of the Law will largely depend upon the extent to which law enforcement officials and members of the judiciary implement it.

2.2. WOMEN IN POLITICS

Article 7 of CEDAW requires its member states to ensure equal political rights for all their citizens regardless of gender. It specifically indicates the need to promote the equal participation of women in policy and decision-making at all tiers of power including carrying out governmental functions.

Formal equality of all citizens of Ukraine is reflected in Constitution (articles 24, 36, 38 et al.). In particular, article 24 guarantees its citizens equal rights and freedoms without any discrimination on the grounds of gender. Other relevant pieces of national legislation that declare all citizens' right to participate in all forms of political life without discrimination are the Laws of Ukraine *On Presidential Elections in Ukraine* (Article 2), *On the Elections to the Verkhovna Rada* (Article 1), *On Local Self-Government in Ukraine* (Article 3), *On Civil Service* (Article 4), *On Public Organizations*, etc.

During the Soviet period in Ukraine, largely as a result of the gender quota introduced in the 1980s, women comprised more than 33 percent of the deputies in the Verkhovna Rada. While women actively participated in the political process leading to Ukrainian independence in the early 1990s, these days women are generally under-represented in policy and decision-making positions in the Verkhovna Rada and in the upper echelons of State executive bodies. In 1994, there were 19 women members in the Verkhovna Rada, while between 1998 and 2002 women made up only 7.6 percent (37 female members of the Parliament) and filled only 6.7 percent of senior executive positions in State structures. As of May 13, 2002, the Central Election Commission of Ukraine registered 446 members of the Verkhovna Rada, among whom there were 424 men and only 23 women (comprising a mere 5% while the world's average rate of women in parliaments is 10%³⁵⁴).

By February 2002, 33 political parties and electoral blocs gained the right to run for the Parliament. Only one of them was an association of women's groups. Overall, women made only 29% of the total number of candidates for the Parliament in all presented lists. It should also be noted that the majority of women candidates were placed in «bottom» portions of lists that left them a very slim chance to ever get to the Parliament.³⁵⁵

The League of Professional Consultants (Kyiv, Ukraine) analyzed the preliminary results of the last elections and the overall women's representation in all structures of power in Ukraine from the gender standpoint. Disclosed numbers indicate the presence of a wide gender gap in Ukrainian society and absence of balance between women and men in politics. Women are left outside the realm of political and governmental decision-making. Only one woman is a member of the government of Ukraine. Of 15 state committees of Ukraine a woman heads only one. There are no women among the management of the Presidential Administration, nor there are any women governors.

Nevertheless, if the rate of representation of women in the Parliament is low, it is much higher in councils at local and regional levels. Statistical data prove that the lower the levels of governmental bodies, the more accessible they are to women.

According to a preliminary analysis of the results of 2002 elections (official results are to be released in July), women make up 32% of members of councils at all tiers. Women hold only 5% of senior positions of executive power bodies and in governmental bodies. Such imbalance prevents women from being able to really influence decision-making processes and to take an active part in their implementation. Yet, it is an active social position along with real opportunities to participate in the social and political life that together can implement the legal guarantees to enjoy rights and opportunities provided by law for women of Ukraine.

The lack of parity has a direct impact on the stability and efficiency of the political system of the nation, on decision-making in principal areas of the nation's development and leads to a situation where women's social concerns are left out. It is crucial to ensure adequate representation of women in Parliamentary committees, in the Presidential Administration, in the Cabinet of Ministers, and in other central and local bodies of executive power.

³⁵⁴ The official website of the Central Election Commission of Ukraine, www.cvk.ukrpack.net

³⁵⁵ *Ibid.*

The Human Rights Committee recently expressed its concern at the low level of female representation in the Verkhovna Rada and in senior positions both in the public and in the private sectors and recommended that the government consider adopting positive measures, including educational measures, to improve the status of women in society.³⁵⁶

In particular, it seems expedient to introduce the following provision to the Law of Ukraine *On Elections of Members of the Parliament*: the number of members of the same sex in the candidates' lists must not exceed 70% of their total number. The same provision must apply to top ten candidates on the list³⁵⁷. It would be desirable also to consider introduction of the quota system in filling decision-making governmental positions, formation of competition and assessment commissions on parity grounds (with equal number of members of each sex), introduction of requirements of mandatory representation of certain percentages of members of both sexes in structural divisions of governmental bodies. All these would be very temporary special measures that could facilitate overcoming of negative stereotypes regarding Ukrainian women's participation in political processes.

2.3. WOMEN'S STATUS IN THE FIELD OF EMPLOYMENT AND EDUCATION

Article 11 which deals with elimination of discrimination against women in the field of employment is one of the most extensive clauses in CEDAW. It lists in detail women's fundamental labour rights and steps that need to be taken in order to achieve equity in this realm. This is not surprising given that it is employment leading to economic independence that is the cornerstone of women's real equity in the society.

Democracy is often associated with personal independence including economic freedoms and opportunities. Nevertheless, the transition to democratic institutions and market economy in Ukraine led to women becoming under-represented in decision-making positions, to huge rates of unemployment and a re-emergence of traditional stereotypes concerning gender roles in society. It has been noted that «conversion to the market economy has become a masculine project of restructuring. The women's perspective is excluded from policy-making, and women do not participate in the process of power or resource distribution».³⁵⁸

At a formal level, laws and other normative acts of Ukraine contain a great number of provisions that regulate women's status in the labour market and are designed to ensure their equity with men. More than 119 normative acts on labour and employment have been passed. The Labour Code itself contains the principles for relations between employees and employers and protects legal interests of both parties.

As directed by article 11 of CEDAW, Ukraine introduced a considerable number of legislative remedies aimed at elimination of discrimination against women in the employment realm that correspond to article 4 of CEDAW. The Labour Code of Ukraine includes a special chapter on protection of women's employment rights which incorporates articles on labour safety (a list of jobs that are prohibited for women because of danger to life or health (article 174), limitations to women's work on night shifts (article 175), benefits for pregnant women and women with children under 18 (articles 176 to 186). A special legal standard provides a shortened workday for certain categories of women (pregnant women, women with children under 14 or with disabled children under 16, including the situation where a woman is their legal guardian, and for women taking care of sick family members – article 56 of the Labour Code) at their request, etc. A number of provisions of the Law of Ukraine *On Employment*, the Law of Ukraine *On Remuneration of Work*, the Law of Ukraine *On Labour Protection* and others are directed at elimination of discrimination against women.

The Law of Ukraine *On Employment* foresees the provision of additional employment guarantees to those able to work but needing social protection and unable to compete on the work market on an equal footing, including:

- a) women with children under 6;
- b) Single mothers with children under 14 or disabled children.

However, legal standards gain maximum efficiency only with introduction of specific mechanisms for their implementation and, first of all, with the imposition of sanctions for violation of specific legal provisions. Nev-

³⁵⁶ Human Rights Committee, Concluding Observations: Ukraine, UN Doc. CCPR/CO/73/UKR, 5 November 2001, para. 9.

³⁵⁷ *Women in Politics*, a monthly bulletin of KCWS, Issue 11, 1997, p. 15

³⁵⁸ Anastasia Posadskaya, «Gender Dynamics of Economics and Political Change: Efficiency, Equality and Women» in *Democratic Reform and the Position of Women in Transitional Economies*, p. 18.

ertheless, Ukrainian labour legislation lacks such specific measures³⁵⁹. Instead, its norms contain only general provisions that complicate solutions of specific disputes, e. g., «Persons guilty of violation of labour legislation bear responsibility in accordance with effective legislation» (article 265 of the Labour Code), «...officials guilty of violation of laws of Ukraine on employment are held accountable as specified by law» (article 35 of the Law of Ukraine *On Employment*), etc. It would be expedient for the lawmakers to provide corresponding sanctions for violation of additional benefits to certain groups along with introduction of such benefits. In particular, in case of violation of the principle of equal opportunities for women and men, there should be specific kinds of disciplinary or administrative action taken against, or specific fines imposed upon owners or empowered boards, enterprise/institution/organization officials, parties of collective agreements, etc., or other negative consequences that apply in cases of infringement of rights of the same kind.

Despite all legislative measures mentioned above in terms of access to employment, women in Ukraine are often discriminated against on the basis of gender and age. Women are particularly affected by downsizing, discrimination in hiring practices, sexual harassment, unequal rates of remuneration (while there is a system of fixed pay rates for each job in the state sector of economy, it is much more difficult for women to obtain better-paid positions as such)³⁶⁰, high levels of non-contractual work and unstable working environment as well as by illegal dismissals during maternity leaves.³⁶¹ Severe employment discrimination against women in Ukraine is a result of social stereotypes that women belong to the private sphere of the family while it is men who are the breadwinners³⁶². Reports put forward that not only women with small children are refused employment solely because of their motherhood³⁶³, but also the whole general practice of paying women less than men for equivalent work is based on the notion that women are not the main family income-earners.³⁶⁴ On average, women earn 27,6 percent less than men for equal work.³⁶⁵ Women usually have greater problems both at receiving and losing employment (their share of those laid off in 2001 reaches 62.6%), i. e., it is more difficult for them to receive termination pay and other benefits provided by law in the latter case.

Article 10 of CEDAW calls for free and unobstructed access to education for women, and this is the right that women in Ukraine truly enjoy. They form the majority of secondary school (56.6 percent), college and university (51.9 percent) graduates. Female students also form the overwhelming majority in medical, cultural, arts and commercial schools (60-70 percent of the total student body), and large numbers of women undertake post-graduate studies (46.2 percent).³⁶⁶

Despite the fact that women make up 60 percent of all professionals with secondary and higher education, as discussed below, this high level of educational attainment is not translated into competitiveness on the labour market. On the whole, women are assigned to less prestigious and lower paid positions. According to information received from the International Helsinki Federation, 80 percent of registered unemployed women had completed some form of higher education, while 72 percent of unemployed women were graduates of vocational and technical schools.³⁶⁷

The majority of job ads and employers' applications to employment centres and recruitment agencies in Ukraine directly specify preferred gender of future employees. In most cases when this requirement is not stated directly, employers are still most likely to give the preference to men. A 1998-1999 KCWS study of women's status in the labour market disclosed that in cases when the prospective employee's sex was specified from the very beginning, the share of vacancies for women made up approximately 1/5 of the real quantity of women's employment needs. Another fixed social stereotype subdivides jobs into so-called «male» and «female». The

³⁵⁹ I.Lavrynyuk, *Principles of Equal Opportunities in Legal Standards and in Practice*. Viche, Issue 9, 2000, p.49-51.

³⁶⁰ *Women in the Labor Market of Ukraine under Transition*, a legal and sociological study, KCWS, Kharkiv, Ukraine, 1999, pp.23-25

³⁶¹ International Helsinki Federation for Human Rights, Ukraine chapter in *Women 2000*, International Helsinki Federation for Human Rights, 2000, p. 475 (here, the report refers to the KCWS's 1998-1999 study of women's status in the labour market in Ukraine; however, the research organization is mistakenly listed as Kharkiv Centre for Women's Rights)

³⁶² *Women in the Labour Market of Ukraine under Transition*, a legal and sociological study, KCWS, Kharkiv, Ukraine, 1999, p.23

³⁶³ *Ibid.*, pp.34, 77

³⁶⁴ Olexandra Rudneva, Chapter on Ukraine in *The First CEDAW Impact Study*, International Women's Rights Project, New York, June 2000, p. 223.

³⁶⁵ Minnesota Advocates for Human Rights, *Domestic Violence in Ukraine*, December 2000, p. 10.

³⁶⁶ *Violence against Women in Ukraine: Mainstreaming the Human Rights of Women* (report prepared by The World Organization Against Torture (OMCT) for the Committee Against Torture at its 27th session, 12-23 November 2001)

³⁶⁷ International Helsinki Federation for Human Rights, Ukraine chapter in *Women 2000*, International Helsinki Federation for Human Rights, 2000, p. 475.

latter include secretarial, accountancy, retail sales of consumer goods and groceries, teaching, lower to medium level medical staff, etc., which are usually lower-paid.

At the same time, article 22 of the Labour Code prohibits baseless refusal of employment. Any direct or indirect limitation of rights or setting of direct or indirect preferences at entering, amendment and termination of employment agreements based upon the employee's sex is not allowed.

55% of all employers ask their prospective female employees additional questions about their family responsibilities or other similar matters though such questions directly violate article 25 of the Labour Code, which prohibits demanding information of prospective employees that is not specified by law.³⁶⁸

The Committee on Economic, Social and Cultural Rights and the Human Rights Committee have both recently expressed their concern at the high levels of unemployment among women in Ukraine (up to 80 percent of unemployed persons are women) as well as the concentration of women in low-paying jobs in the informal sector³⁶⁹

This situation can be partially explained with the «boomerang effect» of the aforementioned special provisions that weigh employers down with a long list of benefits and additional obligations regarding women employees. In fact, these provisions impair women's competitiveness in the labour market. Not only 53% of employers, but women themselves and even 40% of judges and lawyers that specialize in relevant issues believe that «special rights» contradict the very principles of market economy and are women's disadvantage as compared to men.³⁷⁰ The ARG KCWS deems it necessary to draw public attention to the «boomerang effect» of special remedies aimed at facilitation of factual equity of men and women.

Another factor that negatively influences women's status in the labour market is the low degree of awareness of their rights and ways to protect them. Only 22% of women respondents (of them 6% were either lawyers or members of women's NGOs) consider that they are aware of their rights to a certain extent; however, the majority of them indicate their familiarity with pieces of legislation that regulate employment relations without any special gender considerations. 78% of women do not know anything about the mere existence of legal regulations of specifically women's rights.³⁷¹ It should be noted that the respondents were speaking only about effective Ukrainian legislation, that is, even women who are familiar with it often do not know anything about international legal standards that provide equal opportunities for women and men in the labour market. As for employers and senior managers, quite a number of them are aware of legal norms that directly regulate the nature of women's labour, define works prohibited for women, provide certain benefits, etc., but overall, they do not know about pieces of legislation that protect women's status in the labour market, either. Thus, it can be stated that there is legal unawareness on both sides that results in considerable limitations of employment and career opportunities for women.

The elimination of discrimination against women in the field of employment is closely connected with the problem of elimination of sexual harassment of women in the workplace

Sociological studies have shown that 50 percent of women in Ukraine have been victims of sexual harassment at work, and 8 percent of women reported having been subjected to repeated sexual harassment³⁷². Article 119 of the former Criminal Code made it a crime to force a woman to have sexual relations with a person on whom she was economically or officially dependent. Article 154 of the new Criminal Code replaced article 119 of the earlier Criminal Code of Ukraine and introduces additional criminal charges in case of violence against victims of sexual harassment.

However, in 1997, legal actions were taken only in three incidents, and two persons were charged on the grounds of article 119 of the Criminal Code. In 1996, six cases of sexual harassment were registered, and two persons were convicted for the offence.³⁷³

According to a poll carried out by a sociological company «Naval», cases of sexual harassment are 1.5 times more frequent in private companies than at state-owned enterprises.³⁷⁴ It is generally agreed that sex-

³⁶⁸ *Women in the Labor Market of Ukraine under Transition*, a legal and sociological study, KCWS, Kharkiv, Ukraine, 1999, p.96

³⁶⁹ Committee on Economic, Social and Cultural Rights, Concluding Observations: Ukraine, U.N. Doc. E/C.12/1/Add.65, 24 September 2001, para. 10; United Nations Press Release, «Human Rights Committee Concludes Review of Report of Ukraine», 73rd Session, 16 October 2001.

³⁷⁰ *Women in the Labor Market of Ukraine under Transition*, a legal and sociological study, KCWS, Kharkiv, Ukraine, 1999, p.97

³⁷¹ *Ibid.*, p.98

³⁷² *Violence against Women in Ukraine: Mainstreaming the Human Rights of Women* (report prepared by The World Organization Against Torture (OMCT) for the Committee Against Torture at its 27th session, 12-23 November 2001)

³⁷³ International Helsinki Federation for Human Rights, Ukraine chapter in *Women 2000*, International Helsinki Federation for Human Rights, 2000, p. 489.

³⁷⁴ *Ibid.*

ual harassment of women in the workplace is a widely tolerated social practice in Ukraine, and, given the precarious nature of the current job market, is one, which women are often forced to put up with.

At present, a special coordination group of leading experts in labour law of the National Law Academy was formed with the purpose to create the draft of the new amended Labour Code of Ukraine. Item 3 of article 22 of the Constitution of Ukraine prohibits narrowing of effective rights and freedoms in the process of introduction of legal amendments. Thus, it is expected that the new Labour Code will widen women's employment rights.

3. CONCLUSIONS AND RECOMMENDATIONS

The facts provided in this document indicate that existing legal regulations in Ukraine fail to ensure complete factual equity of women and men that calls for special attention on the part of global community.

Women in Ukraine face many obstacles to enjoyment of their human rights, and although the government has taken some steps to integrate gender concerns into its policy-making, much work remains to be done in order to ensure that women no longer experience discrimination. For this reason, the Working Group of KCWS recommends that the government develops a comprehensive strategy for prevention and elimination of all forms of discrimination against women, and that this strategy includes training for governmental officials, law enforcement staff and members of the judiciary at all levels in dealing with complaints of infringement of women's rights as well as a general public education campaign aimed at changing social attitudes concerning the status of women.

In relation to specific instruments for protection of women's human rights, the Working Group of KCWS demands ratification of the CEDAW Optional Protocol by Ukraine. This will enable Ukrainian women to lodge individual complaints concerning violations of their rights, which are guaranteed under the Convention.

The Working Group of KCWS calls upon the government of Ukraine to recommend that the Supreme Court of Ukraine summarizes all court cases where facts of discrimination against women were present and to develop an official interpretation on the definition of discrimination and ways to apply CEDAW in judiciary practice.

Trafficking in women and girls for the purposes of sexual exploitation, forced marriage and domestic servitude is a serious and growing problem in Ukraine. While the government has taken certain legislative and policy measures to address the issue of trafficking, it appears that there is little political commitment to tackle the problem. The ARG KCWS recommends that the government amend Article 149 of the Criminal Code, which deals with trafficking in order to make trafficking that takes place within the borders of Ukraine a crime. It also recommends that interpretative commentaries for judges and other officials as well as comprehensive procedural guidelines for police and immigration officers on prevention and prosecution of trafficking offences be developed.

The Working Group of KCWS is particularly concerned with the reported involvement of business entities and organized criminal groupings in the trafficking of women in Ukraine. The failure of the government to effectively investigate, prosecute and punish businesses and organized criminal groupings responsible for the trafficking is a serious problem. KCWS demands that the Government of Ukraine ensure that in the future it takes all measures to prevent and punish trafficking in women by legal entities and organized criminal groupings.

Domestic violence is a serious problem in Ukraine, and KCWS is very concerned that the government has yet to devote significant resources to prevention of domestic violence and to protection of women who are its victims. The adoption and entry into force of the Law *On Prevention of Domestic Violence* is the first step on the way of efficient addressing of this problem and leads to greater protection against family-based violence for women in Ukraine. KCWS calls upon the government of Ukraine to ensure that all secondary pieces of relevant legislation necessary for application of this Law in daily practice are duly developed.

KCWS proposes to create a special working group that includes NGO members, law and criminology experts, practicing lawyers with the purpose of efficient implementation of the Law of Ukraine *On Prevention of Domestic Violence*. Such group will bring primary and secondary legislation of Ukraine into line with the adopted Law, develop relevant departmental regulations on the creation and operation of new in-

stitutions as specified by the Law as well as on implementing measures and making decisions as provided by the Law. In particular, this group shall:

- propose amendments to the Administrative Code of Ukraine that introduce administrative responsibility for violation of requirements set in temporary protective orders;
- develop proposals on designation of a special empowered executive body that is responsible for prevention of domestic violence and draft Regulations that determine its powers and procedures;
- take part in development of the draft Decree of the Cabinet of Ministers of Ukraine on definition of procedures of lodging and reviewing complaints of domestic violence or clear and present danger of its commitment;
- take part in development of draft Regulations On Crisis Centres for Victims of Domestic Violence and Potential Victims of Domestic Violence as well as draft Regulations on Centres for Medical and Social Rehabilitation;
- initiate a wide-scope informational campaign on raising public awareness of the new Law, its provisions and mechanisms of its implementation as well as on raising general legal awareness. This campaign should be delivered with the support of mass media, human rights protection and women's and youth NGOs and legal experts.

In addition, greater attention must be paid to factors that currently prevent women and girls in Ukraine from lodging complaints in relation to domestic violence. These factors include social stereotypes concerning the subordinate status of women in family relationships as well as the lack of specialized training among law enforcement personnel and members of the judiciary who frequently mirror prevailing social stereotypes concerning domestic violence and, as a result, often actively discourage women and girls from pressing official charges against perpetrators of violence. The ARG KCWS recommends that comprehensive training on responding to complaints of domestic violence is provided to all law enforcement staff currently in service as well as to future police officers and judges in the context of their basic training.

The Working Group of KCWS recommends that the government introduce such temporary special measures as legally guaranteed quotas for same-sex representation in the Parliament and higher governmental bodies. The same provision must apply to the top ten candidates on political election lists.

KCWS also suggests considering the formation of competition and assessment commissions on parity grounds and introduction of requirements of mandatory representation of certain percentages of members of both sexes in structural divisions of governmental bodies. These steps will facilitate overcoming of negative stereotypes regarding Ukrainian women's participation in political processes.

KCWS calls on the government to introduce additional guarantees to women in the employment realm as well as to provide sanctions for their violations, particularly, for violation of the principle of equal opportunities. There should be specific kinds of disciplinary or administrative actions taken against, or specific fines imposed upon owners or empowered boards, enterprise/institution/ organization officials, parties of collective agreements, etc., or other negative consequences that apply in cases of infringement of rights of the same kind.

KCWS recommends that the government ensure adequate conditions and guarantees of women's labour in the new Labour Code. These new standards must reflect international legal norms (ILO documents, European social charts, etc.) so that the new benefits correspond with the criteria of necessity and adequacy and do not produce the «boomerang effect», that is, do not complicate women's position in the labour market. KCWS calls upon the State to work upon the draft of the Labour Code in close collaboration with all those concerned.

KCWS understands that according to provisions of article 22 of the Universal Declaration of Human Rights each person as a member of the society has the right to social security through national efforts and international cooperation in accordance with structure and resources of each state. However, if the existing amounts of social aid allocations to certain categories of women and mothers remain unchanged, the overcoming of de facto discriminated status of women during pregnancy and childbirth as well as full-time childcare will be impossible. The Working Group of KCWS insists that the government activate all resources in order to bring the size of social allocations in line with at least, the official minimum living standard.

One of the main reasons for an unequal position of women in Ukrainian society is the low level of public legal awareness, awareness of women's rights as a special category of human rights that is placed

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under special protection on the part of the international community as well as of mechanisms of its protection and implementation. KCWS is convinced that raising legal awareness among women is a prerequisite for the elimination of inequity of women and men. Thus the Working Group of KCWS recommends that the government organize systematic short-term training courses on women's human rights with the help of regional and district departments of the Ministry of Justice of Ukraine and with the assistance of members of NGOs and students of law schools.

The Working Group of KCWS believes that efficient implementation of the said recommendations will substantially improve the status of women in Ukraine, thus bringing the development of democracy in Ukrainian society to a qualitatively new level as introduction of gender positive policies ensures active participation of all citizens in the progress of the nation.

XVIII. THE RIGHTS OF PRISONERS³⁷⁵

1. GENERAL COMMENTS

In this section we consider certain aspects concerning the observance of the rights of individuals deprived of their liberty who are held in the custody of the police before a decision is taken with regard to preventive measures – in temporary detention facilities (hereafter TDF), during pre-trial investigation – in pre-trial detention centres (hereafter – PTDC), after the passing of a sentence by the court which stipulates such forms of punishment as custodial arrest³⁷⁶, restriction of liberty, custody in a disciplinary brigade for military servicemen, deprivation of liberty for a certain period or life imprisonment in penal institutions and corrective penal settlements of the State Department of Ukraine on Penal Issues (hereafter Department) and the Ministry of Defence (guardhouses, disciplinary brigades).

The penal system includes 181 institutions, of which 33 are pre-trial detention centres, 135 – penal institutions of various levels of security, 11 – corrective penal settlements (for minors: 10 for males, one for females), 2 corrective labour and treatment centres. Some detention facilities for those sentenced to custodial arrest were supposed to be built, but due to lack of financing, none was built. In 31 PTDC, therefore, special units were created to hold those sentenced to custodial arrest.

As of 1 January 2005, there were 188,465 prisoners in penal institutions of the Department, this being 1.7% less than at the same time in 2004 (on 1 January 2004, there were 191,677 prisoners, on 1 January 2003 – 197 641 prisoners, for 1.01 2002 – 192 293 prisoners, for 1.01 2001 – 222 254 prisoners, for 1.01 2000 – 218 083 prisoners, for 1 January 1999 – 206 191 prisoners)³⁷⁷. At the beginning of 2005 there were 149,267 prisoners in penal institutions and corrective penal settlements (at the same time in 2004 – 150,934, 2003 – 150,239, 2002 – 147,549). In pre-trial detention centres, there were 38,768 detainees, as compared with 40,743 at the beginning of 2004, 43,223 in 2003 and 41,087 in 2002.

The number of prisoners per 100,000 of the population, at 398, is one of the highest in Europe.

These figures are convincing evidence that one of the main problems of the penal system remains the high percentage of sentences involving deprivation of liberty, as well as the large number of charges where the courts choose as preventive measure remand in custody (pre-trial detention). This leads to overcrowding in pre-trial detention centres and some penal institutions, as a result of which both Ukrainian and international experts have described conditions of detention as being cruel and inhuman, or even possible to classify as torture.

The problem of overcrowding is directly connected to the sharp rise in crime from 1991–1999 and the corresponding increase in the number of prisoners.

According to statistics from the Ministry of Internal Affairs (MIA), received in the middle of 1994, as of 30 January 1994, there were 38,900 detainees in 30 pre-trial detention centres with capacity to hold 11,300, that is, 3.44 times more detainees than places, while at that time in the whole country there were 161,000 prisoners. The then First Deputy of the Head of the Central Penal Administration of the MIA, Oleksandr Ptashynsky stated that as of 1 February 1997, 43,700 detainees were being held in 32 pre-trial detention centres, and indicated that during the previous five years, 3 PTDC had been opened with 1800 new places³⁷⁸.

³⁷⁵ Prepared by Yevhen Zakharov, Co-Chairperson of the Kharkiv Human Rights Group and Head of the Ukrainian Helsinki Human Rights Union. Material used is from the expert research of Doctor of Law, A. Stepanyuk «Positive criminal responsibility as subject of regulation of the Criminal Code of Ukraine.

³⁷⁶ [Custodial] arrest is a form of punishment for administrative and criminal offences. «Punishment in the form of arrest involves custodial detention in conditions of isolation and is imposed for periods from one to six months». (Article 60 of the Criminal Code). (*translator's note*)

³⁷⁷ Oleksandr Bukalov «The Ukrainian Penal System in 2004. //Aspect, №3, 2004. – p.4. All data for 2004 has been taken from this source.

³⁷⁸ «Den'» («Day»), 26 March 1997

Data as of 1 January 2001, provided by the then Head of the State Penal Department, Ivan Shtanko, showed the following: In 180 Department institutions there were 222.3 thousand people, 171 thousand being held in 128 penal institutions, 3,3 thousand adolescents – in penal settlements for minors, 46,2 thousand – in 32 PTDC, as well as 1,8 thousand people in 8 corrective labour and treatment centres³⁷⁹. Due to the fact that between 1991-1997 the numbers of those deprived of their liberty rose annually by 11%, from 1993 – 1999, 35 institutions with capacity to hold 25.5 thousand people were opened. From 1997, the number of those convicted of a crime fell slightly, with the number of those deprived of liberty also decreasing: in 1997 the number of convictions constituted 257 790, with those deprived of liberty being 85,396 or 33,13%; in 1998 the respective figures were 232,598, with 86,347 or 37,16% deprived of liberty; in 1999 there were 222 239 convictions, with 83,399 or 37.5% deprived of liberty; in 2000 – 230,903, with 82,869 or 35,89% deprived of liberty.

Nonetheless, the annual figures for those punished who end up in penal institutions still far exceed the number released from custody, and not even the annual amnesties, which free on average 35 thousand people, help. Although the new Criminal Code envisages forms of punishment which are not connected with deprivation of liberty, this has not eased the burden on the penal system as was expected.

At the same time, the repressive nature of criminal – legal policy has on the whole remained unchanged. It is no accident that the number of acquittals through all these years stood consistently at between 0,33-0,35%, and, just as previously, the percentage of those held in penal institutions with sentences up to 3 years is around 30% of all those serving out punishment. As before, the number of those accused who are held in pre-trial detention centres remains obviously excessive. In 2004, 14,186 detainees were released from PTDC, this being 19.3% of the overall number who had been held in a PTDC during the year. Of this figure, 8,392 were released in connection with the use by the courts of forms of punishment not involving deprivation of liberty, 3,606 due to the end of the term of remand in custody, 2,103 as a result of change in preventive measure. Thus, the necessity for having held these people in custody is extremely questionable.

Comparing data for various years on the number of places in PTDC and the number of people actually held there, the conclusions one may draw are shocking. One has the impression that from 1993-1999 the annual registered number of places in PTDC formally increased by 10-15% while the actual number of places remained unchanged. This may, on the other hand, be explained by the fact that the administrations of the PTDC need to take the detainees regardless of the number of places available, and they are financed in accordance with the number of places. Since the number of people, held in custody in PTDC steadily rose, the administration was simply forced to increase the registered number of places, otherwise the financing they received even for food for the detainees would have been even more woefully inadequate. All the more so because the ever insufficient financing of penal institutions and pre-trial detention centres was not provided in full. This is, in our opinion, one of the main reasons for the harsh conditions of detention.

According to data received from the State Penal Department, the following amounts were allocated in the budget for financing the penal system: 227,5 million UH for 1998, 216,6 million UH – for 1999, 204,2 million UH – for 2000, 156,3 million UH – for the first six months of 2001 p. The figures actually received were 180.6 million UH, 203,3 million UH, 204,2 million UH and 154,7 million UH, respectively.

This means that the average cost of holding one prisoner was approximately 70 UH per month in 1998, 78 UH per month in 1999, 77 UH per month in 2000, and 115 UH per month in 2001. If one considers that the number of staff of penal institutions and pre-trial detention centres must not, by law, be less than a third of the number of inmates, it becomes clear that financing of the penal system is catastrophically insufficient. Violations of the rights of both staff and inmates are implicit in a budget which provides for around 35% of that required, and only 12% of the necessary amount for food. It has led to a situation where between 1998 – 2000 the real figures allocated for food were 8-12 kopecks, and on medical services 4 – 7 kopecks. The prisoners can not earn a living themselves, since finding them work is one of the biggest problems for the administration. For example, in 1998 67 thousand prisoners, on average, did not have monthly work, this constituting 51,5% of the overall number of prisoners supposed to work. The average salary of prisoners more-over came to 1.01 UH a day.

Such pitiful financing can explain the high levels of illness and the high mortality rate in penal institutions and pre-trial detention centres. According to figures from the Department, in 1998 there were 2,108 deaths among prisoners and those awaiting trial (approximately 10 deaths per thousand inmates), in 1999 – 3,015 deaths (approximately 13.5 per thousand inmates), in 2000 – 2,222 deaths (around 10 per thousand inmates),

³⁷⁹ «Aspect», №1, 2000

in the first six months of 2001 – 865 deaths (around 7,8 per thousand inmates), including deaths from tuberculosis, the numbers of deaths constituting 725, 1133, 715 and 300 respectively. The mortality rate for the country as a whole during these years stood at 14 deaths per thousand people. The mortality figures in penal institutions and pre-trial detention centres are therefore very high given that inmates are predominantly young and able-bodied, with more than half of all inmates being under the age of 30.

Since 2001 the financing of penal institutions has been gradually increasing: in 2001, 355 million UH was allocated from the budget (with 339.4 million actually provided), in 2002 – million UH (with 373 actually received.), in 2003 the full amount planned was paid, this being 453.2 million UH. It seems clear that the increase in financing has had a direct impact on the mortality rate which has decreased: in 2001 in Department penal institutions, there were 1,381 deaths, in 2003 – 824, in 2004 – 808. Spending on food has increased from 70.4 million to 81.4 million UH, expenditure on medical supplies – from 4.9 million to 5.2 million. We believe, nevertheless, that financing remains inadequate. In the view of the Department, it needs to be increased 2.5 times.

These statistics demonstrate clearly that many problems of the penal system in Ukraine would be solved if forms of punishment not involving deprivation of liberty were applied more widely and if proper levels of financing were maintained. For the moment, the State Penal Department remains the hostage of the current repressive criminal – legal policy.

2. DETENTION IN POLICE CUSTODY AND PRE-TRIAL DETENTION CENTRES

A serious problem is presented by the conditions of detention in custody in temporary detention facilities (TDF) and other places of preliminary custody during police detention, and in pre-trial detention centres (PTDK). The Committee against Torture has concluded that these conditions do not comply with their standards.

The premises in which detainees are held are not designed to hold people for any length of time. In accordance with the law, detention may not last more than three hours. In these premises, accordingly, there are no places for sleeping, and expenses for food are not provided. In addition, the detention time limits for people detained in police units are infringed – instead of the three hours stipulated by the law, they may be held more than a day, or even up to three days. For example, according to results of monitoring of district police units by the Human Rights Ombudsperson, Nina Karpachova, during 2000 in Kyiv District Police Stations 25,089 people were detained for more than 24 hours, including 15,729, detained for administrative offences, 7126 – on suspicion of having committed a crime, and 2,225 arrested.

Moreover, in almost all cases, those held in temporary detention facilities do not receive meals three times a day from State funds, as envisaged in Resolution № 336 from 1992 of the Cabinet of Ministers and the Order of the MIA № 485 from the same year. At the demand of Nina Karpachova, expenditure for board was stipulated in the budget however in many regions, as checks showed, the money is not used as intended³⁸⁰. Unfortunately the situation has still not changed: our experience defending activists of youth movements detained during the election campaign in Autumn 2004 indicates that there is no funding for providing detainees with food in district police stations.

Police temporary detention facilities have become breeding grounds for tuberculosis. Individuals taken into custody on suspicion of having committed a crime, according to Article 155 of the Criminal Procedure Code (CPC) may not be held in TDF for more than 3 days, or in districts where there is no pre-trial detention centre, for longer than 10 days, after which they must be transferred to a PTDC. However, in contravention of requirements of Article 4 of the Law of Ukraine «On preliminary detention» and the above-mentioned Article 155 of the CPC, the management of the Department issued several departmental normative documents as a result of which a number of restrictions appeared with regard to taking in special categories of detainees.

In particular, a joint Order of the Department and the Ministry of Health of Ukraine № 3/6 from 18 January 2000, an Order of the Department № 192-2000 and Directive № 24/44 from 3 January 2003 prohibit the admission to pre-trial detention centres of those suffering from alcohol-induced psychoses, as well as individuals suffering from serious somatic or infectious illnesses. Clearly the latter include people with tuberculosis. For example, in 2003 793 detainees were denied admission to PTDC for this reason³⁸¹.

³⁸⁰ Ibid, p. 239.

³⁸¹ «Pravda Ukrainy», 24.06.2004.

At the current time, therefore, more than 200 detainees suffering from tuberculosis are held in temporary detention facilities which are in absolutely no way fit to house people suffering from dangerous illnesses

These individuals, from the moment of detention to when their sentence comes into force are usually kept in temporary detention facilities in the custody of the police, or in exceptional cases under police guard in «civil» hospitals which have no facilities for this. Therefore the staff of law enforcement bodies are forced to allocate extra forces, leading to flagrant infringements of infectious disease containment procedures and the spread of the «criminal» infection among police officers. For example, last year as a result of this situation, more than 20 police guards contracted tuberculosis. It goes without saying that in the cells of TDF dozens, even hundreds, of healthy people are constantly infected and traumatized. This problem requires urgent attention.

As mentioned, the time limits for detention during the period of preliminary investigation have not been reduced as recommended by the UN Committee against Torture (Paragraph 22 of the document «Conclusions and Recommendations of the Committee against Torture. Ukraine», CAT/C/XVIII/CRP.1/Add.4). If the investigation cannot be concluded within two months, and there are no grounds for cancelling or changing the preventive measures, the time limit may be extended: up to 4 months with the consent of the Prosecutor and the judge who took the initial decision with regard to the choice of preventive measure; up to 9 months – if the application is agreed by the Deputy of the General Prosecutor of Ukraine, the Prosecutor of the Autonomous Republic of the Crimea, of the region, of the cities of Kyiv and Sevastopol, or by Prosecutors of the same rank, or with the same Prosecutor on serious or particularly serious crimes, or by a judge of an appeal court; up to 18 months – if the application is agreed by the General Prosecutor of Ukraine or his Deputy, or the same Prosecutor on especially important cases involving serious or particularly serious crimes, or by a Judge of the Supreme Court of Ukraine. «In each case when it is impossible to terminate the investigation of a case in full within the stipulated remand period, with the consent of the Prosecutor, the case is remitted to the court in that part which relates to accusations which could be proved. In relation to the incomplete investigation, the case is to be divided into separate proceedings and terminated in accordance with the general rules. In this, the time for the accused and his or her defendant needed to familiarise themselves with the materials in the case upon completion of the investigation is not taken into consideration when calculating the overall term of remand in custody» (Article 156 of the CPC).

As before, there are no limitations on the total time limit for remand in custody during pre-trial investigation, familiarization with the case and the court. If one bears in mind the widespread practice of the courts in sending cases back for additional investigation (approximately one tenth of criminal cases are returned for supplementary investigation), it becomes clear that these norms in their entirety create the possibility for extremely long periods of remand in custody. The conditions in pre-trial detention centres are in themselves cruel and inhuman. Cases are not rare where people accused of a crime are held for years in PTDC, although innocent, since a verdict has not been given in their case, and the judge does not dare to either acquit the person or at least change the preventive measure. The result is overcrowding of PTDC.

According to Article 11 of the Law of Ukraine «On preliminary detention», the space standard for cells per detainee must not be less than 2.5 m². At the same time, the average figure in pre-trial detention centres in Ukraine is only 1.8 m², and in some PTDC it is even less: in Simferopol, Luhansk, Kharkiv PTDC it is 1.5 m², in Kherson – 1.3 m², in Kryvy Rig – 1.2 m², in Donetsk PTDC – 1 m².

Even the General Prosecutor of Ukraine decided to publicly acknowledge the harsh conditions in pre-trial detention centres. A press release of the General Prosecutor states that legal requirements as far as providing for the everyday material, medical and sanitary needs of inmates are being infringed. This situation is explained by the overcrowded conditions in PTDC, and thus, in contravention of Article 11 of the Law of Ukraine «On preliminary detention», a considerable percentage of detainees are not even provided with places to sleep.

The Press Release adds: «People are effectively forced to rest in turns». According to checks made by the Prosecutor's office, from 400 to 1300 individuals are being held in excess of norms in PTDC in the Autonomous Republic of the Crimea, the Dnipropetrovsk, Luhansk, Odessa, Poltava, Kharkiv and Kheron regions.

According to the Prosecutor, there are even more individuals who have been sentenced to life imprisonment and whose sentences have come into force. This is in contravention of requirements of the Penal Code and the Law of Ukraine «On preliminary detention». As a result of such infringements, there was recently an attempted escape by a prisoner sentenced to life imprisonment from a Kyiv PTDC.

As stated in the conclusions of the Prosecutor, heads of institutions of the penitentiary system and executive bodies do not use the necessary measures for improving the financial position of such institutions, as well as for increasing the financing of anti-epidemic measures. The General Prosecutor considers that the situation in pre-trial detention centres and inadequate financing of penitentiary institutions may lead to unforeseeably grave consequences³⁸².

The harshness of conditions of remand in custody is set out also at normative level. For example, in the Law «On preliminary detention», there are significant shortcomings, and a number of its provisions do not conform to international standards in the sphere of human rights.

a) The Law not only never mentions the presumption of innocence, but often does not have it in mind, since there is no distinction made between individuals accused of a crime, and those convicted. For example, Article 9 on the rights of individuals held in custody shows that the regime limitations on those only charged with a crime (that is, not yet convicted by a court) scarcely differ from the limitations on those whose sentence is already in force. In our opinion, limitations on amounts of money to the size of one minimum wage is unjustified, yet these limitations are the same for adults, minors and women with children;

б) Article 8, although it requires that minors be kept in separate custody from adults, allows, with the permission of the Prosecutor, for the detention in one cell with minors of two adults who, it is true, must be facing charges for the first time and for less serious crimes, this being a direct violation of children's rights;

в) in Article 15, which establishes punishment for individuals taken into custody, nothing is mentioned about mechanisms for appealing punishments, instead the immediate implementation of the punishment is envisaged. This consolidates the full and absolute dependence of a person who has not yet been declared guilty on the investigative bodies and on the staff of places of custodial detention. This Article allows for being locked up in isolation cells as a form of punishment for persistent violations of the regime, which in itself is dubious in relation to individuals who have not been convicted of a crime.

3. CUSTODIAL DETENTION OF THOSE CONVICTED OF A CRIME. AN ANALYSIS OF THE PENAL CODE

3.1. POSITIVE CHANGES

The new Penal Code came into force on 1 January 2004. If one compares it with the Corrective Labour Code (CLC) which it replaced and other normative acts, certain positive moves can be identified. For example, the Penal Code foresees the regulation through one law of the procedure and conditions of implementation of all forms of punishment without exception. The right of those convicted of a crime to social security is proclaimed. Of benefit for the health of prisoners will be the fact that, in contrast to Article 101 of the Corrective Labour Code of Ukraine, in Article 51 of the Penal Code, individuals serving their sentence have no prohibition imposed on buying food products and other basic items, and may receive money orders.

Unlike Article 49 of the CLC of Ukraine, where only the obligation of convicted prisoners to work was established, Part 1 of Article 107 of the Penal Code indicates that those deprived of their liberty have the right to work. This means that the new version in the Penal Code is closer to Article 43 of the Constitution of Ukraine which affirms the right of citizens to labour.

In comparison with Article 39-1 of the CLC, Article 111 of the Penal Code is more humane, given that it now allows for the possibility of short-term trips outside corrective-educational penal settlements and corrective-labour penal settlements of low and medium security which, in terms of regime restrictions, are somewhere between penal settlements of heightened and strict regimes which existed up to the end of 2003, from which short-term trips in case of exceptional personal circumstances were simply not possible.

The aim of observing the labour rights of convicted prisoners can also be seen in Article 119 of the Penal Code which stipulates that the working week of individuals deprived of liberty must not exceed the norm for the working week set down in Ukrainian labour legislation, this being in contrast to the CLC where the working week in places of deprivation of liberty was 48 hours.

Evidence that penal legislation is being implemented in accordance with legislation on pension provisions is found in the regulation of Part 3 Article 122 of the Penal Code, according to which the time spent

³⁸² «Postup» ["Progress"], Lviv, 16 April, 2004.

working by those sentenced to deprivation of liberty is counted towards their employment record in determining the State work-related pension.

One would assume that Part 2 of Article 120 of the Penal Code which increases to 15% (as opposed to 10% under the CLC) the guaranteed minimum received by the individual from the monthly wage will serve to improve the well-being of those serving sentences.

The fact that under Part 3 of Article 129 of the Penal Code stipulates that those deprived of liberty are entitled to not less than two hours free time a day will give those deprived of their liberty the chance to at least double their leisure time, which should improve their psychological state and broaden their range of activities.

One notes that under Article 143 of the Penal Code permitted limits on means of improving the conditions of those in corrective-educational penal settlements are considerably broadened, with it now not only being possible to spend a sum of money equivalent to 60% of the minimum monthly wage (as foreseen in Part 2 of Article 38 of the CLC), but to also receive short visits, which at the decision of the Head of the corrective-educational colony may take place beyond the territory of the colony, and also receive three parcels and four postal deliveries with printed materials a year.

Part 1 of Article 144 of the Penal Code is aimed at increasing the contact of individuals deprived of liberty with the outside world, as recommended by international standards of treatment of prisoners. According to this Article, inmates have the right to visit cultural performances and sports events outside the corrective-educational penal settlement accompanied by members of staff, and the right to go outside the territory of the settlement in the company of their parents or other close relatives.

One should note that the Penal Code goes considerably further than Articles 81 and 82 of the Criminal Code of Ukraine, where the corresponding possibility for an early conditional release from serving one's sentence and change in the not yet served part of the sentence to a lighter form of punishment are set out. Thus, Part 3 of Article 154 of the Penal Code sets out the duty of the administrations of the penal bodies and institutions within a month after the period of sentence stipulated by the Criminal Code elapses, to review the possibility of early conditional release or of a lighter form of punishment for the remainder of the sentence. The establishment in this way via a norm in the Penal Code of the need for the outlined actions creates, in accordance with the theory of legal relations, a legal requirement for administrations which cannot be avoided since it is unambiguous in content, directive, unarguable and safeguarded by judicial mechanisms. This feature of the legal obligation of administrations, stipulated in Article 154 of the Penal Code, to review questions regarding the possibility of early conditional release or a change to a lighter form of punishment implies the right of convicted prisoners to demand the fulfilment by the administration of this obligation and to lodge a complaint if the administration does not review this question. This means that the lawful interest of convicted individuals, foreseen by Articles 81 and 82 of the Criminal Code of Ukraine, which the legal obligation of the administration does not correspond to, under Part 3 of Article 154 of the Penal Code turns into the subjective right of the convicted person to the guaranteed possibility of seeking early conditional release or a change to a less severe form of punishment. One should add here that in the list of rights of those sentenced to deprivation of liberty, formulated in Article 107 of the Penal Code, this right is not mentioned.

3.2. SHORTCOMINGS OF THE PENAL CODE. GENERAL PART

While acknowledging the significant improvements in the Penal Code as compared with the CLC of Ukraine, one must, nonetheless, point out its many shortcomings and contradictions, explained by the discrepancies between particular provisions with those in the Criminal Code of Ukraine, with general legal theory and the theory behind implementation of punishments.

One should, first of all, note that the Penal Code defines the purpose of punishment much more widely than the Criminal Code of Ukraine. For example, according to Article 50 of the Criminal Code of Ukraine, the aims of a penal system are to punish, rehabilitate those convicted, and also to prevent new crimes being committed, either by those convicted or by others. Part 1 of Article 1 of the Penal Code, however, asserts, that penal legislation of Ukraine is a means of achieving «the aim of protecting the interests of the individual, society and the State via the creation of conditions for the reform and resocialization of those convicted, and of preventing new crimes being committed, either by those convicted or by others». It is clear that «protecting the interests of the individual, society and the State» and «resocialization», for all their attractiveness, are secondary among the aims given in Article 50 of the Criminal Code. Ukrainian legislators, defining the aim «of protecting the interests of the individual, society and the State» as the single goal of penal legislation, are by this means once again attempting to introduce into national legislation the concept of «social defence», which was the basis for the Corrective Labour Code of the RSFSR (1924) and the CLC of the Ukrainian SSR (1925). The re-

placement of the purpose of penal measures formulated in Article 50 of the Criminal Code of Ukraine by the aim «of protecting the interests of the individual, society and the State» can only be described as an attempt to reject the concept of penal measures developed by Ukrainian criminal justice, to blur the clear boundaries of real criminal responsibility, to discard basic provisions in the theory of the penal system, which could ultimately lead to the activity of penal bodies and institutions losing a clear legal framework.

It would thus seem that Part 1 of Article 1 of the Penal Code would be better expressed as follows: «Penal legislation regulates activities related to the enforcement of penal measures by penal bodies and institutions, as well as the procedure and conditions for the enforcement and serving of criminal sentences with the purpose of punishing and creating conditions for convicts' reform, and for preventing new crimes being committed either by those convicted, or by others.

It is difficult to accept the principles of differentiation and individualization of penal measures, named in Article 5 of the Penal Code as being among the principles of penal legislation, together with the merging of punishment and corrective influence, public participation in the activity of penal bodies and institutions. These can mainly be applied in the case of punishment by deprivation of liberty. How can one, for example, have public participation in paying a fine? The absence in Article 5 of the principle of respect for human rights is extraordinary. It would seem that those who drew up the Penal Code, proclaiming that the Ukrainian Penal Code had been prepared taking into consideration international standards for the treatment of prisoners and international agreements on the protection of human rights and freedoms, effectively ignored the Fundamental principles of treatment of prisoners, where the following is found: «All prisoners shall be treated with the respect due to their inherent dignity and value as human beings». «Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto... «(Resolution 2200 A (XXI) of the General Assembly. Addendum).

The sheer possibility of regulating by legislative norms the process of positive change in a personality, that is, the reform of those convicted (Part 1 of Article 6 of the Penal Code) is also questionable. The question arises, whether the term «readiness» can be considered a legal term, and by what criteria such «readiness» can be defined. The Penal Code provides no answers to these questions. Moreover, the definition of «reform» through the use of indefinite forms of the verb like «happen», «create», make the process of reform rather vague, and give grounds for thinking that reform is a process which within the framework of implementation and serving of sentences is still far from being complete. With such an approach, reform cannot be considered to be a judicial fact, since judicial facts cannot be abstract concepts, opinions, or changes in the inner spiritual life of a person.

As is known, the legal position of convicted individuals is a system of normatively established subjective rights, lawful interests and duties of those convicted. Therefore, the inclusion in the outline of the foundations of the legal position of convicted individuals (Part 1 of Article 7 of the Penal Code) of words according to which the State should ensure the necessary conditions for the reform and resocialization of convicted prisoners is clearly redundant in the definition of the foundations of the legal status of convicted individuals, since in the given context mention for some reason of reform and resocialization carries no substantive weight, and has no relation to the definition of legal status. This example provides ample proof yet again that the language of the Penal Code lacks the clarity, succinctness, definiteness and accuracy of presentation required by judicial practice.

Unfortunately, in Articles 7 and 8 of the Penal Code there is no provision stipulating that a convicted person must be recognized as a person before the law in the sphere of implementation of punishments. It would seem expedient to do this on the basis of Article 6 of the Universal Declaration of Human Rights which declares that «everyone has the right to recognition everywhere as a person before the law».

The terms «resocialization», «social adaptation», «reintegration», «social rehabilitation», «diagnostics», «measures of a psychotherapeutic, psycho-corrective nature», «local residence» and so on, which abound in the Penal Code have never before been used in national legislation of the criminal cycle. In our view, the use of such terminology in no way promotes distinctness and clarity of legal regulation of the penal process, and of the application of State compulsion aimed at limiting the rights and freedoms of convicted individuals where any misunderstandings must be precluded.

The wish to replace penal institutions of general, heightened, severe and special regimes with penal settlements of low, medium and maximum levels of security (Article 4 of Article 11 of the Penal Code), which is not mentioned in the Criminal Code, is not entirely clear or justified. It would have been more consistent to intro-

duce together with the legislatively established penal institutions of an open type (Article 61 of the Criminal Code of Ukraine), penal institutions of semi-open and closed types. As regards the envisaged levels of security, the question arises: security for whom? If the issue is one of creating safe conditions for people sentenced to deprivation of liberty, as is stated in Part 1 of Article 7 of the Penal Code, then another question seems called for: why in this case should the maximum level of security be for those who have committed the gravest crimes?³⁸³

Yet another question arises after a comparative analysis of the differences to the penal institutions which were in existence until the end of 2003, in terms of their regime and corrective labour penal settlements in terms of their level of security. If the penal institutions of different types of regime differed among themselves according to the categories of people serving their sentences in them, and in aspects of the regime (the amount of money which inmates could spend on buying food and on basic essentials, the number of parcels), penal settlements of different levels of security differ in almost the same aspects. What then is the sense of introducing three levels of security instead of the customary four regimes? If this was a desire to yet again declare Ukraine's «European choice», 'regime' is in fact a commonly used term according to international standards. «Traditionally the custody regime refers to the fact that institutions are divided into categories in accordance with type of regime». «The custody regime is not simply security within the territory of the external boundaries of an institution, but also the level of freedom of movement of prisoners»³⁸⁴.

It is thus unclear what considerations the Ukrainian legislators were guided by in proposing to replace «regime» by «level of security» if there is no difference in content between them. Moreover, the Ukrainian legislators entirely avoided mentioned such institutions as prison, suggesting as places of deprivation of liberty only penal settlements which are to be distinguished in terms of «level of security». However a penal settlement and level of security it would seem are incompatible, after all, as O.I. Boytsov noted, it is natural for a settlement hostel to have a number of legitimate, but implicit limitations on rights which are not present in prison cell custody. In particular, it does not ensure to an adequate degree the right of those convicted to security of person and protection from any threats from other inmates on his or her life and health, honour and dignity, rights and legitimate interests, it limits the right of those convicted to freely decide how to spend leisure time, to receive information of interest from channels of mass information³⁸⁵. In connection with this it would seem that only prison custody would be able to ensure their personal safety.

There is a dubious provision formulated in Article 16 of the Penal Code, according to which individuals convicted of crimes of medium severity should serve their sentence in corrective penal settlements. This is questionable given that penal institutions of the open type (as stated in Article 61 of the Criminal Code of Ukraine) are intended for individuals sentenced to periods of **restriction of liberty** from one to five years. Crimes of medium severity are crimes for which **deprivation of liberty** for a period of no more than five years is foreseen. The Ukrainian legislators have thus not differentiated between restriction and deprivation of liberty. However an analysis of Part 2 of Article 12 and Part 2 of Article 61 of the Criminal Code of Ukraine allows one to conclude that penal institutions of the open type (or in corrective centres as they are called in the Penal Code) are intended for individuals whose punishment is specifically that of restriction of liberty, that is, a punishment which is milder than that of deprivation of liberty.

A comparative analysis of the Corrective Labour Code of Ukraine, the Instruction on the classification, assignment and transfer to penal institutions of individuals sentenced to deprivation of liberty, approved by an Order of the State Department of Ukraine on Penal Matters from 16 December 2003, and the Penal Code clearly indicates that it would have been more sensible and consistent (than is foreseen in Article 16 of the Penal Code) to hold those convicted of minor crimes in penal institutions of an open type; those convicted of crimes of medium severity in penal settlements (with the degree of security stipulated in the Penal Code) of a minimum level of security, as well as women sentenced to deprivation of liberty for a certain period; men sentenced to deprivation of liberty for a certain period for serious crimes, as well as males who have already served a sentence involving deprivation of liberty, and women sentenced to life imprisonment, in penal settlements of medium security; males sentenced to deprivation of liberty for a certain period for especially serious crimes, or males sentenced to life imprisonment – in penal settlements of maximum security.

³⁸³ The argument here is less clear in the English given the existence of two words – safety and security, whereas in Ukrainian both meanings are denoted in the word «безпека» (*translator's note*)

³⁸⁴ Cf.: Як змусити стандарти працювати. Практичний посібник по ефективному застосуванню міжнародних тюремних правил. (How to make standards work. A practical guide to the effective application of international prison regulations. – Donetsk. Eastern Publishing House, 2001. – p. 135.

³⁸⁵ Уголовное право на современном этапе: Проблемы преступления и наказания / Criminal Law at the contemporary stage. Problems of crime and punishment. N.A. Belyaev, V.K. Glistin, V.V. Oryekhov et al. /– St. Petersburg: Published by St. Petersburg University, 1992 – p. 538.

3.3. SHORTCOMINGS OF THE PENAL CODE. SPECIAL PART

If one takes Part 2 of Article 51 of the Penal Code, where we read that those sentenced to custodial arrest are subject to the limitations of rights established by penal legislation for individuals serving a sentence in the form of deprivation of liberty, then custodial arrest can indisputably be considered a type of deprivation of liberty. This does not comply with Article 51 of the Criminal Code of Ukraine, according to which arrest comes between confiscation of property and restriction of liberty, and is thus a more severe punishment than confiscation, yet milder than restriction of liberty. Together with this, Article 51 of the Penal Code, which establishes for those sentenced to arrest additional prohibitions (in comparison with those for deprivation of liberty) with regard to visits and parcels, creates in this way stricter conditions for serving punishment than those envisaged for inmates of penal settlements of maximum security.

Another far from perfect part of the Penal Code is Article 53 which stipulates that «everyday material provisions and medical services of those sentenced to arrest are provided in accordance with norms established for those individuals serving a sentence in the form of deprivation of liberty. This still further confirms that even at the level of micro-social conditions, a sentence of custodial arrest is equated by the Penal Code to deprivation of liberty. At the same time the Penal Code does not indicate under which norms, envisaged for different categories of those deprived of liberty, those sentenced to arrest should be provided with food. This should perhaps be the food norms for those held in pre-trial detention centres, since there remain no buildings for arrested individuals, and those sentenced to arrest serve their sentence in pre-trial detention centres. Yet maybe it should be the norm stipulated for those held in prison, after all the present conditions for serving out arrest are stricter than those in a prison? It seems that Article 53 of the Penal Code should have defined more precisely which category of deprivation of liberty those sentenced to custodial arrest fall in with regard to everyday material provisions».

It is unclear what the legislators were guided by when, in Part 1 of Article 59 of the Penal Code they gave those sentenced to limitation of liberty the right to have money with them, but in Part 4 of the very same Article prohibited those sentenced to limitation of liberty from keeping money and stipulated that if the latter was found on those whose liberty had been limited, it would be passed, by court order, to the State. So can those whose liberty has been limited have money on them or not?

A scrutiny of the text of the Penal Code also raises doubts as to whether those who drew it up really did, as they claim, try to take as their basis the priority of universal human rights and freedoms, the establishment of a system of social and legal guarantees, safeguarding the legal status of those convicted, and the bringing of the procedure and conditions for serving penal sentences into compliance with generally accepted international norms. Similar doubts arise due to the fact that, in comparison with the Corrective Labour Code, some articles of the Penal Code envisage harsher conditions for serving one's punishment for certain categories of those convicted. This particularly applies to Article 69 of the Penal Code, which has no mention of the possibility for those sentenced to limitation of liberty to go outside the confines of the corrective centres for periods of annual leave, as had been allowed for by Article 107-10 of the Corrective Labour Code of Ukraine. The conditions for serving their sentence have also become stricter for men convicted of serious crimes who were already serving their sentence at the end of 2003 in penal institutions of heightened regime. According to Article 18 of the Penal Code, these categories of individuals sentenced to deprivation of liberty must serve their sentence in penal settlements of medium security, where the conditions are more severe than in the former penal institutions of heightened regime.

Although the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950 p.) indicates that deprivation of life to prevent the escape of a person lawfully detained is not a violation of the right to everyone to life, in our opinion, the Ukrainian legislators should have taken into account the fact that in Ukraine, after it signed Protocol № 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 28 April 1983, on joining the Council of Europe, in connection with the abolition of the death penalty, people may not be deprived of life for more serious crimes than attempting to escape from a place of deprivation of liberty. How justified, therefore, is the use of arms to deprive people of life during an attempt to escape? Considering that «Everyone has the right to life, liberty and security of person», as proclaimed in Article 3 of the Universal Declaration of Human Rights, depriving a person of life for the desire to be free is a contradiction of the principle of respect for human rights which were supposed to have been the principle of penal legislation of Ukraine and which the Ukrainian legislators proved incapable of formulating. While the will of a person deprived of liberty to escape is illegal, the will itself to be free remains a natural human right. All individuals deprived of their liberty enjoy the human rights and fundamental freedoms

proclaimed in the Universal Declaration of Human Rights, as set down in the Basic Principles for the Treatment of Prisoners. In connection with this, it would seem that Ukraine's authority would only be enhanced if, as a member of the Council of Europe, it came forward with the proposal that member states of the Council of Europe sign a Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms on the example of Protocol № 6, which prohibited the taking of life when preventing escape from places of deprivation of liberty.

In our opinion, Parts 5 and 6 of Article 108 of the Penal Code need to specify the period of time during which prisoners may buy their own food products and basic necessities for the amounts of money defined.

The content of Article 111 of the Penal Code demonstrates the will to also free the institutions of the State Department of Ukraine on Penal Issues from Prosecutor supervision, and not only from judicial control, as had been achieved on 30 August 2001 with the provision of functions related to the justice system to the Commission on classifying and assigning individuals sentenced to deprivation of liberty from pre-trial detention centres (prisons) to corrective labour institutions. This conclusion is also justified given that under Part 3 of Article 39-1 of the Corrective Labour Code, permission for short trips which was given by the head of the corrective labour institution had to be agreed with the Prosecutor's office. According to Part 2 of Article 111 of the Penal Code, the head of a penal settlement no longer needs to agree permission for short trips with the Prosecutor's office which, in our opinion, will reduce the guarantees that the principle of legality will be observed.

Ukrainian legislators would appear to have demonstrated certain inconsistency in allowing in some cases for individuals in penal institutions to have their correspondence checked, and in others not. For example, the correspondence of individuals sentenced to restriction of liberty, as well as military servicemen in disciplinary battalions (these being a place of deprivation of liberty) may not be checked which, incidentally, is in accordance with Article 31 of the Constitution of Ukraine which guarantees everyone privacy of mail. In contrast to this, Part 3 of Article 113 of the Criminal Code indicates that the correspondence of individuals deprived of their liberty may be checked, which is nothing else than a covert form of censorship which, according to Article 15 of the Constitution of Ukraine is prohibited.

Those who drew up the Penal Code declared its compliance with international standards for treatment of prisoners. However, the fact that Article 115 of the Criminal Code states that the space standard per inmate in corrective penal settlements cannot be less than three metres squared, provided that the inmates are in dormitory style accommodation, in no way complies with the recommendations of Article 9 of the Standard Minimum Rules for the Treatment of Prisoners, which states that «each prisoner shall occupy by night a cell or room by himself»³⁸⁶. Moreover the European Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has indicated that living space of less than 7 m² per prisoner turns the conditions of custody into torture³⁸⁷. What kind of compliance with international standards can be spoken about in this case?

In Article 118 of the Penal Code, the additional obligation to work is imposed upon individuals deprived of liberty, although in Article 107 «Rights and duties of those sentenced to deprivation of liberty» this obligation is not prescribed. One should mention that the Constitution of Ukraine also does not stipulate the obligation to work, since Article 43 only affirms «the right to labour». Furthermore, from Article 118 in the Penal Code it follows that together with the obligation of those deprived of liberty to work, the administration has the corresponding obligation to engage inmates in work which does not entirely comply with the theory of legal relations in accordance with which a obligation may be placed in opposition to a right, and vice versa. The establishment in Article 118 of the Penal Code of an obligation to work makes the right «to take part in work activities» (Article 107 of the Penal Code) meaningless since, as O.I. Yekimov wrote, if a right becomes an obligation, it ceases to be a right. To have the right means to have the possibility of choice. A person who has the obligation imposed, no longer has such choice³⁸⁸. Further, the establishing of the obligation of individuals deprived of their liberty to work in the legal norms of the Penal Code which is a procedural normative act imposes the element of compulsion on the work of convicted individuals, whereas according to Article 43 of the Constitution of Ukraine, which entirely prohibits forced labour, this is not «work ... carried out by a person in compliance with a verdict or other court decision». Since court rulings which oblige individuals to work in places of deprivation of liberty are not passed, work which is defined as an obligation by the Penal Code takes on the features of forced labour. The general obligation to work in the activity of corrective penal settlements is

³⁸⁶ Revised European version of the Standard Minimum Rules for the Treatment of Prisoners, 1987, Strasbourg.

³⁸⁷ Rulings of the European Court on Human Rights. Case-study: «Kalashnikov vs. Russia, 2002

³⁸⁸ A. I. Yekimov: . Справедливость и социалистическое право. / Justice and socialist law / – Leningrad: Publishing House of Leningrad University, 1980. – p.. 84.

non-economic and not legally based compulsion to work which is incompatible with the principle of equal rights. This circumstance was noted by V.S. Nersesyants, who came to the conclusion that a person who, not of his own will, is obliged to work, and is provided with work under compulsion (in this case regardless of whether as a convicted person or not), can obviously not be considered as either a person with the right to equivalent payment for his forced labour, or as a person before the law at all³⁸⁹. In connection with this, in our opinion, it would be better to change Part 1 of Article 118 of the penal Code, removing the person part of the sentence, replacing it with the provision which would in general comply with Paragraph 8 of the Basic Principles for the Treatment of Prisoners, specifically: «Conditions should be created enabling **prisoners** to undertake meaningful remunerated employment which will facilitate their reintegration into the country's labour market and permit them to contribute to their own financial support and to that of their families and relatives».

The fact the Articles 107 and 119 of the Penal Code do not stipulate the right to vacation for those deprived of liberty is nothing more than disregard not only of Article 45 of the Constitution of Ukraine which guarantees the right of everyone who is employed to paid annual vacation, but also shows that Ukrainian legislators did not pay attention to the recommendations contained in Article 70.2 of the European Prison Rules, in accordance with which «Treatment programmes should include provision for prison leave which should also be granted to the greatest extent possible on medical, educational, occupational, family and other social grounds»³⁹⁰

The wording of Part 4 of Article 122 of the Penal Code according to which convicted individuals who are no longer able to work are entitled to a pension and compensation for damages only after being released from serving their punishment is unclear. The question arises from this how exactly these individuals will be able to obtain food and other basic necessities if they are no longer able to work during the term of their punishment, but they can only receive a pension upon their release. Moreover, a person unable to work will not have money in his or her personal account earned in the place of deprivation of liberty. The pension could be the main source of money to obtain food and other basic necessities for such a convicted individual. In this case, the convicted person, in order to be able to buy anything in the shop, can only hope for a package from some benefactor or other, which may be a fairly forlorn hope.

This version also leaves unresolved the issue of ensuring pension payments for individuals who reach pension age during their sentence. If Part 3 of Article 122 of the Penal Code applies to them, then how does one deal with Article 56 of the Law of Ukraine «On pensions», according to which the work of prisoners given payment of national insurance contributions counts as work record giving the entitlement to a pension? Why is the work of individuals deprived of their liberty counted towards their pension, but the actual right to the pension, under the Penal Code, only valid upon completion of the punishment? And this is when Part 1 of Article 8 of the Penal Code includes the receipt of a pension as a basic right of those convicted.

Having declared their commitment to international standards of treatment of prisoners, those who drew up the Penal Code in Part 1 of Article 132, where the imposition of such duties as «being assigned extra turns in cleaning the premises and territory of the settlement», yet again ignored the recommendations set out in Part 1 of Article 28 of the Minimum standards for treatment of prisoners, in accordance with which «No prisoner shall be employed, in the service of the institution, in any disciplinary capacity»³⁹¹

Article 133 of the Penal Code gives a definition of a persistent offender in infringing established rules of the penal institution. In this way, the behaviour of the convicted person is not being assessed, but rather a label is being attached to the actual person, namely that he or she is a persistent rule breaker. Basing one's reasoning on the fact that the legislators have moved away from recognizing an individual as a particularly dangerous repeat offender to providing an assessment, a qualification in criminal law, of the deed, of socially dangerous activities, and not of a particularly dangerous personality condition, then it would surely be analogous, if one is consistent, in Article 133 of the Penal Code to give a definition of a persistent infringement of the regulations, and not of a persistent offender in infringing established rules of the penal institution. Even more so given that the definition of a persistent offender in infringing established rules of the penal institution did not stand in the way of providing for, in Part 7 of Article 134, of punishment for persistent infringement of established rules of the penal institution. However, bearing in mind the theory of social defence which is embodied in the norms of the Penal Code of Ukraine, making a convicted person responsible for a dangerous personality condition as a persistent offender in infringing established rules of the penal institution is entirely natural.

³⁸⁹ V.S. Nersesyants: *Философия права: Учебник для вузов. /The Philosophy of Law. Textbook for Institutes / – Moscow, NORMA-INFRA-M, 1999, p. 149.*

³⁹⁰ European Prison Rules: Revised European version of the Standard Minimum Rules for the Treatment of Prisoners, 1987, Strasbourg

³⁹¹ Standard Minimum Rules for the Treatment of Prisoners, 1977

One should mention the surprising position of the Ukrainian legislators who know that Article 44 of the Constitution of Ukraine guarantees the right of those who are employed to strike, but who categorize convicted individuals who have stopped work in order to resolve labour or other conflicts as persistent offenders in infringing established rules of the penal institution. It could be said that by using threats of measures involving disciplinary and material responsibility in order to hinder convicted inmates participating in a strike, the Ukrainian legislators will force penal settlement administration to teeter on the edge of a foul given that preventing participation in a strike under the relevant conditions could be qualified as a crime, as envisaged by Article 174 of the Criminal Code of Ukraine.

Article 97 of the Penal Code does not define the time limit for holding a convicted person in a unit of heightened control despite the fact that the regime established there is envisaged for holding convicted inmates in maximum security penal settlements, that is, a regime analogous to that which is established in a penal institution of special regime. This is seen, in particular, in the amount of money which inmates can spend on buying food and basic necessities (70% of the minimum wage); the possibility of receiving short visits every month, with a long visit once every three months; also in the fact that during the year those convicted may receive five parcels and two postal deliveries with printed materials. However if this is an original manifestation from those who drew up the Penal Code of the principle of boundless humanism, why, according to the Corrective Labour Code of 1970, was transfer to cell premises in a penal institution possible for a period of six months? The period for holding convicted people in units of heightened control is not specified since, in accordance with Article 97 of the Penal Code a convicted person could be there until the completion of «a special individual program which sets out measures of an individual educational, psychotherapeutic and psychologically regulative nature». If Ukrainian legislation goes further in inculcating a concept of «new social protection», it will in future be just one step away from generally applying unlimited sentences. Signs of the movement in that direction can already be seen in the fact that:

1) the courts have been divested of the possibility of determining the type of penal institution, which had always been a component function of the justice system;

2) in accordance with Part 2 of Article 65 of the Criminal Code of Ukraine, an individual may now be «assigned punished necessary and sufficient for the person's reform and for the prevention of new crimes».

It thus remains only to grant corrective institutions the right to hold convicted people as long as it takes to complete «a special individual program which sets out measures of an individual educational, psychotherapeutic and psychologically regulative nature».

The wording of Article 136 of the Penal Code raises the question whether the list of situation when convicted inmates «must compensate losses caused the penal settlement and any additional costs connected with preventing the escape of a convicted person, the treatment of a convicted person who deliberately inflicted on him- or herself bodily injuries» is exhaustive. After all, a penal settlement can also incur other additional costs, for example, with stopping mass disturbances, or when imposing quarantine in a case where a convicted person has caused an epidemic in the penal settlement, or in connection with funeral expenses where a convicted person committed suicide, and so forth. Who and according to which procedure must compensate these or other costs caused the penal settlement if Article 136 of the Penal Code does contain an exhaustive list?

Article 137 of the Penal Code sets out that «material losses caused the State by convicted inmates while serving their sentence shall be deducted from their wages at the decision of the Head of the penal settlement». In our opinion, compensation for material losses, caused by convicted inmates at the decision of the Head of the penal settlement can only be relevant where the loss was caused during the process of carrying out labour duties. If such a loss was caused, then the Head of the penal settlement who is at the same time the Director of the enterprise has all authority to apply labour legislation norms. However, in other cases, if the loss can be compensated on grounds established by civil legislation, the Head of the penal settlement should do what is foreseen by the Civil Procedure Code of Ukraine, namely file a civil suit in court. The wording of Article 137 offered by the Ukrainian legislators does not extend the jurisdiction of the court to penal settlements since during the serving of the sentence compensation for the loss can be obtained according to the procedure outlined by this Article of the Penal Code. Only after the release of the convicted individual, as stated in Part 7 of Article 137 of the Penal Code, is it possible to receive compensation, on the ruling of the court, for losses incurred during the serving of the sentence. The proposed procedure for compensation of losses only at the decision of the Head of the penal settlement thus runs counter to Article 124 of the Constitution of Ukraine, in accordance with which the courts have jurisdiction over all legal relations which arise in the State.

Perhaps only the Ukrainian legislators are clear to what extent Article 24 of the Constitution of Ukraine which proclaims «material and moral support of motherhood and childhood» is complied with by Part 1 of Article 141 of the Penal Code which states that women sentenced to deprivation of liberty for a period longer

than five years for premeditated serious and particularly serious crimes, cannot have their children housed in the children's building where conditions vital for the normal life functions and development of the child are created. It follows that Part 3 of Article 141 of the Penal Code does not apply to such mothers, that is, they cannot be sent to those penal settlements where there are children's buildings, where «the conditions necessary for the normal life functions and development of the child are ensured. The question arises in connection with this as to why the child is deprived of conditions necessary for its normal life functions and development? Why should the child suffer because its mother has been sentenced to deprivation of liberty for a period over five years? This is a somewhat unusual understanding of the aim of «protecting the interests of the individual, society and the State», as declared in Part 1 of Article 1 of the Penal Code.

The wording of Article 143 of the Penal Code also leaves a great deal to be desired, given that the formal rejection of corrective penal settlements of heightened regime has not led to the corrective penal settlements that are presented in the Penal Code corresponding according to all the elements of the regime to the former collective labour penal settlements of general regime. This concerns, in particular, such an element of the regime as receiving parcels since according to the old Corrective Labour Code, those under the general regime had the right to receive 10 parcels, whereas according to Article 143 of the Penal Code, they can receive only 9.

Part 1 of Article 148 of the penal Code is concerned with «consolidation of the results of reform». In connection with this it can be asked exactly what kind of results are being discussed, if reform in Article 6 of the Penal Code is defined as «readiness», and readiness is a state which precedes the achievement of a result?

Article 151 of the Penal Code sets out the procedure and conditions for the implementation and serving of a sentence to life-long deprivation of liberty which, in terms of the elements of the regime, do not differ from those which were created in prisons for this category of convicted prisoners. At the same time, the conditions of custody in penal settlements of maximum security for individuals sentenced to life-long deprivation of liberty are harsher than for other categories of individuals serving sentences in the given corrective penal settlements. In this respect, one might ask whether it would have not been expedient to direct in Article 151 of the Penal Code that individuals sentenced to life-long deprivation of liberty be held in units of heightened control in penal settlements of maximum security?

Going further, Part 1 of Article 151 of the Penal Code states that those convicted and serving a sentence of life-long deprivation of liberty are held in cells, as a rule, with one other person. This approach makes it possible to conclude that the Ukrainian legislators have not heeded the recommendations contained in Article 9 of the Standard Minimum Rules for the Treatment of Prisoners which say: «it is not desirable to have two prisoners in a cell or room»³⁹²

It would seem that the imposition of administrative surveillance over individuals released from penal institutions (Article 158 of the Penal Code) is entirely in keeping with the theory of «new social protection» embodied in the norms and institutions of the Penal Code of Ukraine, with its axioms about the need for using preventive measures over a dangerous personality condition. At the same time, however, the imposition of administrative surveillance contravenes the principle of justice enshrined in Article 5 of the Penal Code. The principle of justice in penal matters is based on punishment being proportional to the crime committed. This means that State coercion in applying punishment should be limited to the framework outlined by a verdict of the court. Use of State coercion beyond the framework defined by the court verdict runs counter to the principle of justice, extending coercion beyond the requirements of punishment. Such a conclusion makes it possible to define the concept of administrative surveillance as a system of temporary compulsory preventive measures of surveillance and control over the behaviour of individuals released from places of deprivation of liberty. It follows from this that administrative surveillance is this same additional coercion applied beyond the requirements of punishment, which in turn is defined in Part 1 of Article 50 of the Criminal Code of Ukraine as a coercive measure.

Furthermore, one should note the fact also that restrictions on the rights and freedoms of a convicted person, in accordance with Part 3 of Article 63 of the Constitution of Ukraine may only be «determined by law and established by a court **verdict**», not by a **decision of a judge** about imposing administrative surveillance.

One has doubts about the formulation in Articles 160 and 161 of the Penal which talks about the imposition of surveillance by civic or labour organizations over individuals released early from serving their sentence, and that educational work is carried out with these individuals. From the wording it is unclear whether carrying out educational work with these freed individuals is a right or an obligation of civic or labour organizations. Articles 161 and 162 of the Penal Code do not establish either the obligation of those who were convicted to be under control or of civic or labour organizations to carry out such control over those released early.

³⁹² Ibid

From an overall analysis of the regulation of interrelations between the convicted person and the administration, one can state that the convicted person is entirely in the power of the administration of the penal institution, and cannot even make a complaint about their actions. It is no accident that not a single claim against the conditions of custody in penal institutions and pre-trial detention centres, or against the actions of the administration, has reached human rights NGOs through legal channels, but only as they say «through freedom», bypassing the compulsory checks of mail by representatives of the administration.

On the whole, despite certain positive aspects, one can conclude that the Penal Code requires substantial revision at both the conceptual level, and in details. This could have been avoided had the attitude to preparing this important legislative act been different. Unfortunately there was a lack of collective discussion of the relevant Draft Law which should have taken place prior to its being presented for consideration in the Verkhovna Rada, public opinion was not heeded, there was no qualified assessment of the Draft Penal Code by specialists in the field of Penal Law, and the wider public was not even made aware of it.

4. CONDITIONS OF CUSTODY OF THOSE CONVICTED: SOME EXAMPLES

Unfortunately, many of the guarantees of prisoners rights proclaimed in the Penal Code have been rendered meaningless by by-laws of the Department, in particular, the Rules of Internal Order (RIO) of penal institutions, approved by the Order of the Department № 275 from 25 December 2003.

As already mentioned, even at the level of the Penal Code there are infringements of the principle in Paragraph 2 of Article 7 of the Penal Code declaring that convicted individuals enjoy all human and civil rights, with the exception of limitation defined by laws of Ukraine and the Penal Code, and established by verdict of the court. The detailed, and one could say, petty regulation of prisoners' life seriously undermines this declaration. For example, custody in resocialization units, according to inmates' accounts and in violation of Article 96 of the Penal Code, takes place in local sectors, each of which is under lock and key. The question begs itself, what kind of resocialization can be meant? The norms of Article 129, which guarantee the right of convicted individuals to use their leisure time at their own discretion and which stipulate that the said leisure time should be no less than two hours a day, are effectively cancelled by Paragraphs 18, and 23 of the Rules of Internal Order, according to which those convicted have the right to a daily walk lasting one hour. Those convicted can thus already not spend two hours of leisure time walking in the fresh air. We could provide many such examples. As testified by prisoners of Penal Institution № 88 в Orekhovo (Zaporizhye region), units of heightened control turn into units of prison regime, voluntary mass events become compulsory, endless checks during the day turn quite literally into torture, complaints cannot be lodged against the administration, nor can appeals be addressed to the court³⁹³.

We quote a letter from a prisoner of Penal Institution № 58 (Iziaslav, Khmelnytsky region), retaining the style of the original.

«At approximately 11 a.m. Kyiv time, on 30 May 2001, some special unit officers burst into the cell where prisoners are held, and used their rifles to beat the convicted prisoners onto the floor. The special unit men kicked the prisoners as they were lying and those who weren't, in their view, lying the way they should, were beaten with rifles and forced to lie as they said. After that, the prisoners were dragged from the floor one by one and made to run between two rows of special unit officers along the corridor who beat them with truncheons. Then the prisoners were marshalled out into the corridor and the special unit men, together with prison staff, forced them to totally undress, turn to the wall with their legs spread out, almost sitting on the floor in a «splits» position. The special unit men walked up from behind to the prisoners that the prison staff pointed out and inflicted blows to various parts of the body (the leg muscles, kidneys, liver and spine). They then made the prisoners squat down making a croaking noise. While all the above was taking place, a part of the special unit totally ripped apart the cell where the prisoners were held. Prisoners' personal belongings were pulled out of bags and flung in a general pile on the floor, which the special unit men stamped on, completely destroying some of the things. The prisoners in the corridor were again commanded by the administration to run past the lines of special unit men, but this time naked. The soldiers kept hitting out at parts of the body with their truncheons until the prisoners ran into the cell which by that stage had been turned upside down. The beatings went together with the cynical laughter of those who planned and carried it out. The procedure described there was applied to about 120

³⁹³ «Frant», Kupyansk, №35, 26 August 2004.

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convicted prisoners serving their sentence in the prison. The intimidation process was conducted in stages, separately for each cell.

After the torture described above had ended, representatives of the administration – Lieutenant Colonel Zakharov, Major Mazepa and others went through the cells and told the prisoners that the exercise had been carried out with the consent of the prosecutor's office and the Department on Penal Issues. If any of the convicted prisoners had complaints, they were ready to hear them (at this time the special unit soldiers were in the corridor around the door to the cell). Obviously, the prisoners all kept their mouths shut, so that, God help them, it didn't happen again.

On 29 January 2002 a swift response special unit was again brought into the penal institution 3BK-58, and on the instructions of the administration mercilessly beat up all those convicted prisoners on strict regime and also those serving their sentence in prison regime. At about 10 a.m., soldiers of the swift response special unit armed with rifles, burst into the cells, firing blank shots, pushed the inmates into the corridor where they beat them, tormented them, forcing them to say things about themselves which denigrated their honour and dignity. Those who refused were beaten particularly severely. Many of the convicted prisoners received serious bodily injuries. Oleksandr Pavlusyk, Valery Batanov and Serhiy Kostenko had broken ribs as a result of which they were in a bad condition for some time. Serhiy Kostenko, to stop the beating, cut the veins on his wrists, but this only annoyed those who were beating him still more, and he was flung, barely alive, back into the cell.

The special unit soldiers forced me to stand up straight to the wall and used their truncheons to beat me around the legs, kidneys, liver, forcing me to say that I would not infringe the custody regime (meaning making complaints about the administration). They made me say things that were humiliating. When I refused to say what they wanted, they beat me until I lost consciousness and flung me in the cell.

This behaviour was meted out to all prisoners who were in the severe regime cells on 29 January 2002. There were about 80 convicted prisoners..

Convicted prisoners from cells of prison regime (from the first to sixteenth), with an overall number of around 100 men were also beaten. However the beating here was carried out selectively. Prisoners in some cells were beaten more brutally, in others less. The administration provided instructions as to who to target and how to apply force.

All of what I have described above was carried out in the presence of three prosecutor officials on observing the law in penal institutions. I personally saw Y.O. Volkov and V.L. Stasyuk (his assistant). I do not know the surname of the third person, but they say that he was a representative of the prosecutor of the Khmelnytsky region.

The administration of the institution told the convicted prisoners that the action had been carried out on the instruction of the State Department of Ukraine on Penal Matters and had been agreed with the prosecutor's office of the Khmelnytsky region.

After the beatings we were told that such «preventive work» would be carried out regularly. The custody regime began to tighten up immediately. I want to tell you about the 58th penal settlement and what I know about the settlements of the region from other people, so that you get some idea about what is happening there. I'll start from the very beginning and say a couple of words about the history of camp № 58, what I learned from people who were serving sentences there during communist times.

The camp has existed for a very long time, and in Soviet times it was one of the most lawless. People say that a human life was worth the price of a packet of cigarettes and one of tea. The camp administration crushed anybody who annoyed it by bribing other inmates, by weaving intrigues between prisoners leading to conflict and violence. And also by simply subjecting the prisoners to constant terror in the form of disciplinary persecution, being placed in solitary isolation, etc. After this, people were psychologically broken and began to collaborate with the administration or become seriously ill after which they ceased to be of any interest to those in charge. And although times have changed, and you don't see such open terror now, the administration has stayed the same. Now they carry out their nasty deeds more furtively.

Convicted prisoners who have come from penal settlement № 98 (the city of Klementovychy, Shel-emivsky district of the Khmelnytsky region) recount that in November and December 2001 they also had forces of a special unit brought in, who tormented the prisoners. Inmates were beaten, and then taken, one by one, into a closed room where they were read a supposed death sentence, after which they were shot at with rifles shooting blank bullets.

In the 69th penal settlement in the Poltava region, such visitations to impose beatings occur regularly, once a month. Those people who have come from there have got used to such treatment and keep silent.

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One prisoner wrote to me that from the beginning of the year it had become more severe, but had been suspended before the elections. Woman have said the same thing. I have kept these letters. I think that the instruction came from the President to departments because the prosecutor's offices were also involved. I have sent the General Prosecutor a complaint about all this. Has he received it?»

Unfortunately, we could provide many such letters, sent bypassing the censorship of the institution, about beatings of convicted prisoners. The administration of the institutions claims that all is made up and that we have no way of checking such complaints. However, the fact that people who do not know each other from different institutions in different regions all say the same things is highly suspicious.

5. RECOMMENDATIONS

1. To limit through legislation the time limit for custody on remand at all stages of the criminal investigation and judicial process, in particular, to reduce the maximum time limit for pre-trial detention from 18 to 9 months, and to limit the total time spent in custody on remand during the periods of pre-trial investigation and court proceedings to two years, after which custody on remand must be changed to another preventive measure not involving deprivation of liberty;

2. To conduct an international expert examination of the Draft of a Penal Code and other acts of penal legislation to determine how they comply with the practice of the European Court on Human Rights and the norms of law of the European Union, inviting specialists from other countries to participate;

3. To conduct an expert examination of Ukrainian penal legislation to determine how it complies with Committee against Torture standards with a check of whether recommendations from the Committee against Torture made to the Ukrainian government in reports on periodic visits to Ukraine in 1998, 1998, 1999, 2000 and 2002 have been implemented;

4. To adopt amendments to the Penal Code aimed at bringing it into line with international standards on penal institutions;

5. To immediately create special units in several pre-trial detention centres for holding those accused who are suffering from tuberculosis, and to accordingly change the joint Order of the Department on Penal Matters and the Ministry of Health of Ukraine № 3/6 from 18 January 2000, the Order of the Department № 192-2000 and Directive № 24/44 from 3 January 2003;

6. To change court practice, and apply forms of punishment not involving deprivation of liberty must more widely;

7. To introduce a course on human rights into the program of professional training for staff of the penal system, and in particular, the study of documents pertaining to torture and cruel treatment;


8. To broaden the legal bases for court and civil control over the activities of law enforcement bodies.

XIX. OBSERVANCE OF THE RIGHTS OF PEOPLE LIVING WITH HIV OR AIDS³⁹⁴

1. THE RIGHTS OF PEOPLE LIVING WITH HIV

Taking into account the requirements of a range of strategic international documents, first and foremost, the Millennium Declaration adopted by the UN General Assembly and the Declaration of Commitment on HIV/AIDS, Ukraine has undertaken to implement a comprehensive package of measures aimed at stemming the HIV/AIDS epidemic, first and foremost among young people and vulnerable groups, and also at increasing the availability of appropriate treatment for the sick with HIV/AIDS and softening the influence of the epidemic on Ukrainian society.

According to an official statement from the UN United Program on AIDS (UNAIDS), Ukraine is presently the epicentre of the HIV-infection in Eastern Europe. The number of people at risk of being infected with AIDS is rising every year. The official statistics for the spread of HIV in Ukraine according to the International HIV/AIDS Alliance in Ukraine in 2004 can be seen in the following table.

	The number of new cases of people officially registered HIV-positive			The number of new cases of AIDS			Number of deaths from AIDS			
	Year	Adults	Children	Total	Adults	Children	Total	Adults	Children	Total
	2002	7 377	1 379	8 756	1 306	47	1 353	811	23	834
	2003	8 166	1843	10 009	1 847	68	1 915	1 247	38	1 285
	2004	10 198	2 293	12 491	2 647	96	2 743	1 742	33	1 775

According to estimation data of international and national experts, the total number of people living with HIV/AIDS in Ukraine is about 1% of the population and could reach 1.44 million people by 2010, if no efficient and coordinated HIV-infection preventive measures are taken, especially among representatives of the most vulnerable groups.

The average life expectancy of an HIV-positive person, from when an «AIDS related complex» is first diagnosed is less than a year.

According to data from the Ukrainian Centre for the prevention of and fight against AIDS, from 1987 to 2003 more than 62 thousand people in the country were officially diagnosed as HIV-positive, six thousand being children, 5855 of whom were born of HIV-positive mothers. During that period, 5 thousand adults and 170 children developed AIDS, of whom 2,8 thousand adults and 95 children died. In 2003, more than 1,000 people living in Ukraine died of AIDS, 31 of them children. Ukraine is effectively on the verge of a national HIV/AIDS epidemic. Most disturbing is the fact that over the last five years the number of cases of HIV infection in Ukraine has risen 20 times, and at present, according to estimates of experts, approximately 400,000 people have the infection, virtually 1% of the adult population.

The prevalence of HIV infection in 2004 was 20 times higher than in 1995. Among those diagnosed HIV-positive, almost 38 thousand are injecting illegal drugs. These make up 60% of the total figures of

³⁹⁴ Prepared by Dmytro Groysman, Head of the Vinnytsa Human Rights Protection Group and member of the Ukrainian Helsinki Human Rights Union.

HIV-positive individuals. In 2003 the number of those who contracted tuberculosis as an accompanying pathology increased almost threefold in comparison with 1990.

Among those who are HIV-positive, the majority are between the ages of 20 and 39, with cases constantly registered as well among teenagers. People are diagnosed as HIV-positive in all regions. The worst affected areas are the Donetsk, Dnipropetrovsk, Odessa, Mikolayiv, Zaporizhyye, Kharkiv, Poltava, Luhansk and Cherkasy regions, as well as the cities of Kyiv and Sevastopol, and the Autonomous Republic of the Crimea. A particular feature of the epidemic situation in these regions is the fact that around 75% of all those HIV-positive inject themselves with narcotic substances.

The following recent developments are potentially very dangerous:

- the rise in the number of diagnosed HIV-positive individuals among blood donors, and as a result, thus far isolated cases of HIV infection of people receiving blood (Kirovohrad region, Kyiv);
- an increase in the number of HIV-positive pregnant women, and also their new-born babies;
- the increase in certain regions, in particular, in the Donetsk and Odessa regions, of the number of cases where the infection is transmitted through heterosexual contact.

All this demonstrates that as well as the high-risk groups, the entire population is being gradually drawn into the epidemic process and the problem of HIV infection in Ukraine is becoming a critical medical and social issue. Over the last two years, the infection has been spreading through the blood of drug-injecting addicts, through sexual relations and from mother to child. The scale of the HIV/AIDS epidemic is influenced by factors exacerbating the crisis situation, namely: economic instability, the rise in unemployment, in drug addiction and prostitution, the limited efficacy of preventive measures. The development of the epidemic has led to a build-up of its negative effects in society, which, together with the demographic crisis (a fall in population, the ageing of the population and lowering of the average life expectancy) and a worsening in the state of health of the population is having a negative impact on the well-being of the population, national security and prestige of the country.

Current Ukrainian legislation regulating the sphere of prevention and control over the HIV infection, that is, the new version of the Law of Ukraine «On Prevention of the Acquired Immune Deficiency Syndrome (AIDS), and social protection of the population», approved by the Verkhovna Rada on 3 March 1998, on the whole complies with the norms set out in international human rights documents and the recommendations of the World Health Organization which Ukraine is a full member of.

The main achievement of the new Law is the move away from a policy of compulsory surveillance of certain groups of society and the introduction of testing on condition of prior consent and guarantees of confidentiality.

According to this Law, the Ukrainian Ministry of Healthcare becomes the specially authorized central executive body responsible for the management and inter-departmental coordination in the area of fighting AIDS. State policy on fighting AIDS is carried out via the organization of implementation of this Law, Resolutions of the Cabinet of Ministers on this issue, and also through drawing up and ensuring the implementation of appropriate national, regional and local programs which set out a system of measures for preventing the spread of HIV infection, informing and raising awareness of the population, for specially training medical personnel, conducting fundamental and applied scientific research, and developing international cooperation in this area.

Despite the fairly progressive nature of Ukrainian legislation aimed at counteracting HIV/AIDS, a number of provisions of national legislation pertaining to this sphere require further refinement, as is correctly noted in the Recommendations of parliamentary hearings «Socio-economic issues of HIV/AIDS, drug addiction and alcoholism in Ukraine and ways to resolve them», which took place in February 2004. The purpose of such refinement should be to increase the effectiveness of the measures to control the epidemic, while at the same time strengthening the safeguards to human rights, ensuring greater limitation of potential for discrimination and ostracism of people living with HIV, their relatives, and groups in society vulnerable from the point of view of HIV/AIDS.

In our opinion, an important step towards improving Ukrainian legislation on AIDS would be to change the very definition of the concept of «acquired immune deficiency syndrome» in such a way as to remove the disease from the list of especially dangerous infections which AIDS in essence is not.

It is also necessary to remove the provision of Article 11 of the Law of Ukraine «On Prevention of the Acquired Immune Deficiency Syndrome (AIDS), and social protection of the population» which establishes the compulsory, and therefore, discriminatory rules on AIDS tests for aliens and stateless individuals applying for entry visas to Ukraine.

The Criminal Code of Ukraine, in the new version from 2001, establishes criminal liability for deliberately infecting a person with the immune deficiency virus (Article 130):

«The conscious placing of another person in danger of becoming infected with the immune deficiency virus, or any other incurable infectious disease presenting a threat to life, shall be punishable by custodial arrest for a period of up to three months, or limitation of liberty for up to five years, or deprivation of liberty for a period of up to three years.

The infection of another person with the immune deficiency virus, or any other incurable infectious disease by a person who knew that he or she was a carrier of this virus shall be punishable by deprivation of liberty for a period of between two and five years.

The acts set out in part two of this Article, if carried out in relation to two or more people, or to a minor, shall be punishable by deprivation of liberty for a period of between three and eight years.

The deliberate of another person with the immune deficiency virus, or any other incurable infectious disease presenting a threat to life, shall be punishable by deprivation of liberty for a period of between five and ten years».

However, there have no cases where this Article of the Criminal Code has been applied in practice.

It is also a criminal offence to consciously place another person in danger of being infected with HIV, which could involve sexual relations without using preventive measures, somebody who is HIV-positive giving blood or tissue as a donor, non-observance of preventive measures aimed at preventing the spread of HIV infection (for example sharing needles which have not been sterilized when injecting drugs), however this norm of the Criminal Code has not been applied in practice.

Current legislation imposes the following obligations on people living with HIV or AIDS:

- 1) to use measures to prevent the spread of the HIV infection, suggested by healthcare institutions;
- 2) to inform anybody they had sexual relations with before being diagnosed of the risk that they have been infected;
- 3) to not be donors of blood, blood components, other biological liquids, cells, organs and tissues for medical purposes.

A person who, upon medical examination, is identified as having the HIV infection, is informed of this by a member of staff of the healthcare institution where the examination has taken place with due consideration of the legal requirements regarding confidentiality of the given information. At the same time, the person infected is informed of the need to observe certain preventive measures, about the guarantees of rights and freedoms of people with HIV, and also about criminal liability involved in placing others in danger of being infected, or infecting them with the immune deficiency virus.

Ukrainian legislation prohibits discrimination against a person on the grounds of being HIV positive. In real life, as demonstrated by sociological research (for example, «Access to services and the rights of people living with HIV in Ukraine» by the All-Ukrainian Network of people living with HIV), the overwhelming majority of those with HIV feel that they are stigmatized and discriminated against.

Although the Law stipulates that testing for HIV should be voluntary, almost 40% of people with HIV who were surveyed said that they had been tested without their prior consent and appropriate consultation before the tests.

Human rights and HIV support organizations note the low level of awareness of people living with HIV/AIDS about their rights and the guarantees of social protection provided for by legislation.

For example, it transpired from a survey conducted by the Vinnytsa Human Rights Protection Group that not more than 5% of those living with HIV or AIDS knew about such guarantees as:

- being able to stay with children up to the age of 14, with time off from work and with paid hospital care;
- retention of unbroken employment record and payment of unemployment benefit for a mother or father who has left their job in order to look after a child under 16 with HIV infection on condition that the mother or father returns to work when the child turns 16;

– the payment for HIV-positive children up to 16 of monthly assistance amounting to 34 UH.

According to the above-mentioned survey of the All-Ukrainian Network of people living with HIV, every third case where the rights of an HIV positive person are infringed involves an infringement to their rights to employment or education, while two thirds of respondents (68.8%) have encountered infringements of their right to medical assistance. Almost 70% of respondents mentioned that their right to confidentiality as regards their diagnosis had been infringed. The issue of confidentiality is of concern to those who are HIV-positive because of its impact on work relations, and also in the sphere of medical services. People are interested in the legal aspect of their relations with medical personnel, in particular, who from the medical staff has the right to know about a patient's HIV status, and under what circumstances they can be denied medical assistance, whether doctors have the right to take an HIV test without the knowledge of the patient, or to disclose the result of such a diagnosis after the patient's death.

A big problem remains access of those with HIV to antiretroviral treatment. Thanks to the efforts of international donors, access to antiretroviral treatment was provided in 2004 for almost all HIV-positive children however it remained unavailable to many of those adults who would be able to use it.

Prejudice in society against people living with HIV or AIDS is a reason why disclosing one's HIV status is a significant problem for people with HIV. Having to hide their HIV-positive status then makes it impossible for them to enjoy their legal rights and benefits, leads to a passive reaction when their rights are violated. It is staggering that in the course of the sociological survey, people who are HIV-positive said that it was specifically medical staff who were the least tolerant members of society in relation to people living with HIV.

Another major problem is the widening epidemic of HIV among people injecting themselves with drugs. Drug addiction has social grounds and its prevalence has clear regional features. The largest numbers of addicts are in the southern and eastern regions of Ukraine and it is specifically there that the absolute figures and dynamic of the spread of the HIV epidemics are the most worrying. In our opinion, the time has come to totally reassess the Ukrainian policy on drugs, and reject excessive criminalization which hits average drug addicts more than the drug dealers, and to concentrate the efforts of the State on harm reduction programs and, in particular, on the promising direction of substitution therapy for drug addicts.

One of the reasons why the widespread implementation of substitution therapy as one of the methods for treating drug dependence has been stalled is the lack of officially approved relevant methodological recommendations and instructions from the Ministry of Healthcare, which would need to standardize the conditions and procedure for application of this method of treatment, including measures aimed at safeguarding appropriate State control over the circulation of these narcotics for treatment.

The legalization of methadone, the introduction of methadone programs in penal institutions would in our opinion help to control the epidemic and reduce the dependence of drug addicts on the illegal use of injected hard drugs, the illicit use of which is always connected with the risk of contracting HIV.

Of particular concern is the increasing epidemic of HIV amongst those deprived of their liberty. There is effectively no work aimed at encouraging safer behaviour and agreeing to HIV tests among convicted prisoners. The sanitary conditions in penal institutions border on the inhuman and denigrate human dignity. For example, Mr Aliyev in his claim against Ukraine, submitted to the European Court of Human Rights, on the grounds of violation of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which was satisfied by the Court, stated that in the Simferopol pre-trial detention centre «all convicted prisoners, some of whom are suffering from AIDS, shave with one razor blade».

On the basis of an analysis of Ukrainian labour legislation in the context of the problem of HIV/AIDS, in particular, of those provisions which relate to protection from infection of staff in the course of their official duties, one can suggest that it would be expedient to introduce the relevant amendments to normative acts which would outline the need for protection in the workplace, especially with regard to medical personnel. Measures for controlling the spread of AIDS must be extended not only to personnel of healthcare

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institutions, which carry out diagnostic testing for HIV, and provide medical assistance to AIDS patients, and also have contact with blood and other biological substances from those infected with HIV, but to all medical staff without exception.

The part of national legislation of Ukraine which has impact on the availability to the public of medical means and products for medical use which are of great importance in the context of the problem of HIV/AIDS also needs to be improved.

In particular, the legislators should review the possibility of introducing a zero rating of import duty on antiretroviral medication. The possibility needs to be provided by legislation for providing free urgent medical preventive measures against HIV infection for people who have been subjected to the risk of infection as a result of sexual violence, and medical personnel who have been placed in danger of infection while performing their professional duties.

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Yevgeniy Zakharov

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36 Olegivska Str., Room No. 309

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