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Olena Ashchenko • Vadym Chovgan

**UKRAINIAN  
PENITENTIARY LEGISLATION  
IN THE LIGHT OF THE STANDARDS  
OF THE UN AND COUNCIL OF EUROPE  
ANTI-TORTURE COMMITTEES**

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**Ukrainian penitentiary legislation in the light of the standards of the UN and council of Europe anti-torture committees /**

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We offer the Reader an analysis of compliance of Ukrainian legislation governing the order of detention in custody, serving of punishments connected with deprivation of liberty, with the international standards enshrined in the UN Convention against Torture and expressed in the conclusions and recommendations of the UN Committee against Torture, as well as numerous reports of the European Committee for the Prevention of Torture (the CPT) after the visits to Ukraine. Translations of conclusions and recommendations of the UN Committee for the consideration of 3rd, 4th and 5th periodic reports of Ukraine and the last report of the CPT's visit of 2013 are printed in Ukrainian version.

*The views and conclusions expressed in this publication belongs to the authors alone and do not necessarily reflect the views of the Ministry of Foreign Affairs of Denmark, United Nations Development Programme and other UN agencies.*

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## Abbreviations

- Prisons — correctional colonies and pre-trial detention facilities;
- DISO, DIZO — disciplinary isolator;
- The SPS of Ukraine — the State Penitentiary Service of Ukraine;
- The ECtHR — the European Court of Human Rights;
- The PC of Ukraine — the Penal Code of Ukraine;
- The CC of Ukraine — the Criminal Code of Ukraine;
- The Committee, the CPT — the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;
- The UN Committee — the United Nations Committee against Tortures and Cruel Treatment;
- The IR of PI — the Internal Regulations of penitentiary institutions;
- SIZO — a pre-trial detention facility (Isolator);
- The IR of SIZO — the Internal Regulations of pre-trial detention facilities of the State Criminal Executive Service of Ukraine;
- CTP, PKT — cell-type premises;
- PI — a penitentiary institution.

## Introduction

We offer for the Reader our Report on the results of analyzing of the Ukrainian penitentiary legislation, for its compliance with, firstly, the recommendations of the UN Committee against Torture and ill-treatment given to Ukraine by the results of consideration of the Third, Fourth and Fifth Periodic Reports of the Government (consideration took place in 1997, 2001 and 2007) on measures directed on implementation of the UN Convention against Torture, and secondly, the standards of the European Committee for the Prevention of Torture and ill-treatment and recommendations for the Government of Ukraine expressed on the results of periodic visits of the Committee to Ukraine in 1998, 1999, 2000, 2002, 2005, 2009, 2012 and 2013.

For convenience, we publish the findings and recommendations of the UN Committee and the latest Report of the CPT's visit in 2013 since it was released on April 29, 2014, when this Report had been already prepared. Accordingly, the analysis of the Report of the CPT's visit in 2013 is placed in a separate section.

The purpose of the analysis was not only to identify specific inconsistencies of the current legislation in the penitentiary sphere with recommendations and standards of international bodies, but also to point out gaps in the regulatory framework, which cause its inconsistency with these standards due to lack of specific rules necessary for the implementation of a particular standard.

This research is extremely important. It has the potential to become the basis for the implementation of policies in bringing relevant legislation in line with international standards by the State Penitentiary Service of Ukraine, the Verkhovna Rada of Ukraine and other concerned authorities. This is due to the fact that the research is comprehensive and includes all periodic reports of the Government to the Committee and all the CPT's visits to Ukraine and its General Reports.

The Kharkiv Human Rights Protection Group expresses sincere gratitude for the UNDP and ISAR "Ednannia" for assistance in realization of this project.

*Evgen Zakharov*

## Preface

Well organized and maintained penitentiary system is one of the key tasks of a modern country. It's an important indicator of the country's ability to provide human rights defense as the highest social value. Overlooking the current situation in Ukraine, it's obvious that the law enforcement system and the penitentiary system have reached the peak of their conflict, with long-term historical tradition of neglecting human rights and dignity on one hand, so common for the Russian Empire and the Soviet Union, and the respect of human rights and freedom on the other hand, valued in the modern world.

Having declared the aim to join the European nations community, Ukraine obliged to follow most of the international laws in the area of human rights, designed by the European Council for regional use in addition to the universal practice. The specialty of the regional human rights law system is that they are backed up by powerful institutions and mechanisms aimed at providing the execution of these laws. The main institution to provide that is the European Court of Human Rights.

Providing human rights for imprisoned individuals is a particularly difficult task for more than just post-soviet countries with their grim historical experience and a yet strong (fully or partially) culture of neglecting human dignity by the country administration and its employees in addition to the influential criminal subculture. The majority of European countries have their own negative experience in this area. Thus, the mechanisms of the European Court of Human Rights adopted a "proactive" structure named the European Committee for the Prevention of Torture (CPT) in 1987. The CPT forms recommendations after visiting prisons, based on the result of their visit. These recommendations are sent to the appropriate countries and are the basis for dialog between the CPT and the governments of the addressee-countries. Such dialogs are based on the obligations made by the countries to cooperate with the CPT and aim at improving the conditions for individuals imprisoned by

the public authorities, in accordance with the European Convention on Human Rights and Fundamental Freedoms (including those imprisoned for short terms in all the imprisonment facilities — police stations, penitentiary institutions, facilities for illegal emigrants, psychiatric facilities, boarding schools, etc.). The dialogs between the Committee and the national governments are confidential, which is in fact a payment for the right to enter any imprisonment facility, stated in the convention of creation of the CPT. The Committee holds the right to enter any imprisonment facility, talk to any imprisoned individuals without witnesses and also the right to attend any documentation involved. However, confidentiality should not be seen as something negative in this case. On the contrary — it is important and necessary, because confidentiality allows the Committee and the public authorities to be fully open and sincere to each other.

However, the confidentiality of the CPT is not absolute. Majority of the European Council member-countries (with Ukraine amongst them) sanction publications of the Committees reports on the aforementioned countries (usually, together with an answer to the recommendations of the CPT). Especially serious cases of the convention obligations violation to cooperate with the Committee and improve the situation in accordance with the recommendations, provide the CPT with the right to brake the confidentiality agreement and make a public announcement.

As part of its work, the CPT takes to attention all objective issues which occur inside the countries during the process of executing the Committees recommendations. At the end of the day, the foundation of the CPT aimed at helping the countries that seek to provide the execution of human rights for those individuals held in prisons. In my opinion, the checkpoint in this situation is the sincerity of such aims. There are a few indicators of inappropriate approach of a country to its obligations on cooperating with the CPT:

- Actions meant to complicate the work of the Committee delegations during their visit (hiding information or intentionally wrong interpretation of important facts, or, and this is the worst, intimidation of prisoners for frank conversations with the Committee representatives).
- Providing insignificant answers (a classic example — lengthy quotations of the current national law system instead of reacting to concrete recommendations).
- Adding intentionally wrong information to the government answers addressed to the CPT.

Such behavior is not only against the law, but very harmful for the country. Such actions only make serious problems grow more serious instead of looking for ways to solve them.

I must admit that even the public Committee reports, published on their web site are seldom used by the European Council member-countries in the most effective way. Reports are published using the language they were written in by the Committee (English or French) and seldom in the language of the country they are published in (mostly, the translation is done by the national authorities and the CPT cannot guarantee its accuracy). Despite the Committees desire to make their reports understandable for audience without juridical education, there are points, which are complicated for non-professionals. In the end, each report of the CPT simply keeps the dialog going between the Committee and the national governments, so full understanding of the subject is often complicated without the knowledge of the evaluation processes of the current issues and its national contexts.

“Ukrainian penitentiary legislation in the light of the standards of the UN and Council of Europe anti-torture committees” analytical publication, prepared by professionals from the Kharkiv human rights group, is aimed at two very important issues. Firstly, this publication analyzes the recommendations of the CPT and the UN Committee against Torture in light of the existing law system in a very comprehensible and interesting way. Secondly, this publication is the basis for applying means of reforming the crime-corrupted law system of Ukraine in light the country’s international obligations and standards, existing as on the universal level, as on the regional level. I would like to welcome the authors of this research, which has a great potential to become an important step in the realization of Ukraine’s penitentiary reform.

*Mykola Hnatovsky,  
second vice-president of the European Committee for the Prevention of Torture  
and Inhumane or Degrading Treatment or Punishment*

## ***Section 1***

# **Implementation of the conclusions and recommendations provided to Ukraine by UN Committee against Torture<sup>1</sup>**

### **1. Some general problems**

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On February 24, 1987 Ukraine ratified the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (hereinafter — the Convention). By this, Ukraine committed itself to provide safeguards against ill-treatment to all people within its territory.

One of these commitments, in particular, is providing the UN Committee against Torture with periodic reports on compliance with the Convention in our country.

Since 1990, the Government of Ukraine has submitted to the UN Committee five periodic reports. As a result of their review, the UN Committee made its conclusions and recommendations, compulsory for fulfillment, the purpose of which is correction of legislation and practice of public authorities aimed at improving the situation with the human rights for protection from torture and other forms of ill-treatment.

The First and Second periodic reports of Ukraine were sent to the UN Committee in 1989, when Ukraine was the part of the Soviet Union, and in 1993. They were small in volume and contained only general provisions about situation with observance of human rights in Ukraine.

Accordingly, on the results of their review, the Committee did not provide significant recommendations for improving the situation of the right for protection from ill-treatment in Ukraine, particularly in the system of execution of sentences.

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<sup>1</sup> The author of the Section — Olena Ashchenko.

In this regard, we will considerate more thoroughly the three subsequent reports and recommendations of the UN Committee developed on the results of their consideration.

Examined in May 1997 at the Eighteenth session of the Economic and Social Council of the UN the Third periodic report of Ukraine, the UN Committee noted certain deficiencies concerning the sphere of execution of sentences, which led to emergence of cases of ill-treatment of people who are held in these institutions.

In particular, it is mentioned in paragraph 13 of the Conclusions and Recommendations of the Committee against Torture:

“The conditions prevailing in premises used for holding people in custody and in prisons may be described as inhuman and degrading, causing suffering and the impairment of health”.

In paragraph 25 the Committee noted, that “a radical reform of correctional institutions, such as colonies and prisons, and places of pre-trial detention is essential to ensure full compliance with the provisions of the Convention. Solitary confinement and especially conditions of imprisonment give rise to particular concern”.

Moreover, in paragraph 27 the Committee stressed on importance of organizing special training for the personnel of correctional institutions, especially doctors, in the principles and standards of the Convention.

In their Forth periodic report the Government of Ukraine (hereinafter — the Government) pointed to educational activities aimed at legal education of the staff of the penitentiary system in the spirit of the Convention.

In particular, in paragraph 74 of the Forth periodic report the Government mentioned: “Staff at remand centres administered by the Ukrainian Security Service attend regular courses on various legislative acts concerning the rights, liberties and legitimate interests of the individual, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”.

As we can see in this report, the Government pointed to only one small aspect of implementation of the recommendations of the Committee, which indicates the improper implementation of the Committee’s recommendations.

We can come to the same conclusion when applying to the Conclusions and recommendations of the Committee elaborated on the results of its consideration of the Forth periodic report of Ukraine.

In particular, Conclusions and recommendations adopted by the Committee on the 27<sup>th</sup> Session of November 12-23, 2001 contain the following provision concerning the system of execution of sentences.

As states in paragraph 4 of Conclusions and recommendations:

“The Committee expresses its concern about the following:

(...)

- j) Overcrowding and lack of access to basic hygienic facilities and adequate medical care, as well as high incidence of tuberculosis, in prisons and pre-trial detention centres;
- k) The lack of adequate training of police and prison personnel in their duties under the law and on the rights of detainees; (...)”

In paragraph 5 the Committee recommended:

“(...)

- j) Take effective measures to improve conditions in prisons and pre-trial detention centres, including those relating to space, various facilities and sanitation, and establish a system of inspection of prisons and detention centres by independent monitors, whose findings should be published;

(...)

- l) Expedite the process of training of law enforcement and medical personnel as to their duty to respect the rights and dignity of people deprived of liberty;

(...)

- p) Continue the programme against tuberculosis in prisons and pre-trial detention centres (...).”

As we can see, after consideration of the Forth periodic report the Committee observes the same problems of the penitentiary system of Ukraine, as after examination of the Third periodic report, namely, poor conditions of detention in places of deprivation and restriction of liberty, lack of training for the staff of these institutions, including health care workers.

In their fifth periodic report the Government of Ukraine tried to point to some positive changes in the law and practice of Ukraine aimed at improving the situation with providing human rights in the sphere of execution of sentences.

Thus, in the Fifth periodic report concerning special education programs for the staff of penitentiary institutions the Government noted:

- “92. More attention has recently been paid to training junior prison officers. Training takes place at staff colleges in Dniprodzerzhinsk and Bila Tserkva.
93. As recommended by the Committee against Torture, the training curriculums at the institutions have been reviewed and completely reworked. Much training time is devoted to learning about the legal system and to psychological and social training and developing interpersonal skills. The curriculum includes international law as it relates to the treatment of prisoners.
94. International legal texts published by the United Nations and the Council of Europe which regulate convicts’ legal status and civil-society involvement in penal enforcement are used in both institutions to study criminal law, prison theory and policy and the Ukrainian prison system, the principles of international law, prison education and other disciplines.
95. To upgrade job skills at the workplace, the training scheme includes classes on the international standards governing the observance of human rights and the treatment of prisoners, and handbooks produced for penal correction system personnel include those standards. (...)”

Nevertheless, the Committee noted the same problems in its Conclusions and recommendations made after consideration of the Fifth periodic report of Ukraine.

In particular, in paragraph 12 of the Conclusions and recommendations elaborated on the 38<sup>th</sup> Session the Committee recommended the state authorities to establish a formal status for the “mobile groups”, provide them with a strong mandate, guarantee their independence and provide them with adequate resources. The State party should also inform the Committee on the measures it has taken to set up a national preventive mechanism in accordance with the Optional Protocol to the Convention.

In paragraph 13 of the Conclusions and recommendations the Committee pointed to the fact that “the State party should also ensure that the anti-terrorist unit is not used inside prisons so as to prevent the mistreatment and intimidation of inmates”.

In paragraph 18 of the Conclusions and recommendations it is mentioned: “The Committee notes with concern the delay in transferring the Department for the Execution of Punishments to the authority of the Ministry of Justice.

The State party should complete the transfer of the Department for the Execution of Punishments to the Ministry of Justice as soon as possible, with the aim of institutionalizing oversight and accountability for executive decisions in the judicial branch of government”.

In paragraph 22 the Committee mentioned: “The Committee regrets the insufficient training regarding the provisions of the Convention for law enforcement personnel, including penitentiary and border control staff, judges, prosecutors and the personnel of the armed forces. The Committee also notes with concern the lack of specific training for medical personnel acting in detention facilities in the detection of signs of torture and ill-treatment.

The State party should reinforce its training programmes on the absolute prohibition of torture for all law enforcement and military personnel, as well as for all members of the judiciary and prosecutors on the State party’s obligations under the Convention.

The State party should also ensure adequate training for all medical personnel involved with detainees, in the detection of signs of torture and ill-treatment in accordance with international standards, as outlined in the Istanbul Protocol”.

Moreover, in paragraph 25 the Committee repeatedly stressed on the problem of inadequate conditions of detention in the places of deprivation of liberty: “The Committee is concerned at the poor conditions of detention, such as overcrowding, and at the prevalence of HIV/AIDS and tuberculosis amongst detainees. The detention conditions of pre-trial detainees in police custody are inappropriate for long periods and place detainees in a situation of great vulnerability. The Committee also expresses its concern at the absence of alternative measures to pre-trial detention.

The State party should adopt effective measures to improve conditions in all detention facilities, reduce the current overcrowding and meet the needs of all those deprived of their liberty, in particular regarding health care, in conformity with international standards”.

Detailed analysis of the implementation of each paragraph recommendations of the Committee against Torture is provided below. The analysis was written considering the comments provided by the Government of Ukraine and the findings of human rights organizations in Ukraine and international bodies in the area human rights.

## **2. Creation of the national preventive mechanism in accordance with the Optional Protocol to the Convention**

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When assessing the level of implementation of recommendations of the Committee concerning the need to create the national preventive mechanism under the Optional Protocol to the Convention, it is necessary to note the following.

On July 21, 2006, the Verkhovna Rada of Ukraine adopted the Law no. 22-V, by which the Optional Protocol to the Convention against torture and other cruel, inhuman and degrading treatment or punishment was ratified. This law came into force on October 19, 2006. On September 27, 2011, a presidential decree Ukraine no. 950/2011 “On the Commission on the Prevention of Torture” was adopted, which envisaged the creation of a permanent advisory body under the President of Ukraine — the Commission on the Prevention of Torture, and on November 18, 2011 by the Decree of the President of Ukraine no. 1046/2011 the composition of the Commission was approved.

Powers of this Commission included realization of the following tasks:

- Identification of cases of torture and other cruel, inhuman or degrading treatment or punishment and then submission of proposals to the President of Ukraine on elimination and prevention of such cases in the future;
- Participation in the preparation of proposals for improving the legislation on the prevention of torture and other cruel, inhuman or degrading treatment or punishment and submission of the proposals to the President of Ukraine.

Due to the fact that the Commission had not carried out the full functions of the national preventive mechanism in 2012 the Department for Implementation of the National Preventive Mechanism (NPM) in the Secretariat of the High Commissioner of the Verkhovna Rada of Ukraine on Human Rights (hereinafter — the Ombudsman) was created.

An important step in developing the NPM was the adoption of the Law of Ukraine “On Amendments to the Law of Ukraine” On the High Commissioner of the Verkhovna Rada of Ukraine on Human Rights” regarding the national preventive mechanism” on October 2, 2012.

In particular, this law established the right of the Ombudsman to attend without prior notification of time and place of visit, places where people are forcibly held under a court decision or a decision of an administrative body in accordance with law, including temporary detention facilities; rooms for detained and delivered to the duty stations of the bodies of internal affairs; premises for

temporary residence of foreigners and stateless people who are illegally residing in Ukraine; rooms for holding of temporarily detained military men; pretrial detention facilities; arrest houses the penal institution, reception centers for children; schools and professional schools of social rehabilitation; centers for medical and social rehabilitation of children; special educational institutions; military units; guardhouses; disciplinary battalions; special reception centers for the detention of people, who are sentenced to administrative arrest; city, district departments and divisions, linear departments, divisions, branches and points of police, special vehicles (including vehicle of the convoy), premises (rooms) for holding the accused (convicted) people in the courts, institutions of compulsory treatment; psychiatric institutions; temporary accommodation centers; facilities of the transfer of passengers at checkpoints across the state border; baby homes, children's boarding schools; shelters for children; boarding schools for orphans and children deprived of parental care; centers for social rehabilitation of children with disabilities, socio-psychological rehabilitation of children; psycho-neurological boarding schools; geriatric pensions for the elderly and disabled people; pensions for veterans of war and labor; center of social rehabilitation.

Moreover, the Law of Ukraine "On the High Commissioner of Verkhovna Rada of Ukraine on Human Rights" was supplemented by Article 191, which directly regulates the procedure of implementation by the Ombudsman the function of the NPM.

The above mentioned Law authorized the setting up of a special unit within the structure of the Ombudsman's Secretariat to address the issues of inadmissibility of torture and other cruel, inhuman and humiliating practices and punishments. It created the opportunity to involve (on contractual or pro bono basis) public activists, experts, scholars and specialists, including those from other countries, in regular monitoring of the penitentiary institutions.

Since the very beginning the Department on the realization of the NPM has been closely and fruitfully collaborating with non-governmental organizations. Together with human rights activists it elaborated the algorithm for NPM functioning on the basis of the "Ombudsman+" model. Under this algorithm regional Ombudsman's representatives, regional PR coordinators, NPM expert council, all-Ukrainian non-governmental "Association of independent monitors" (on the basis of the contract signed with the Ombudsman for one year) and other HR organizations get actively involved in the NPM realization.<sup>2</sup>

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<sup>2</sup> Annual report of the human rights organizations "Human Rights in Ukraine", Ukrainian Helsinki Union On Human Rights, Kharkiv, "Prava Lyudyny", 2013, pages 23–24.

The above information indicates that the recommendation of the Committee on the establishment of the national preventive mechanism under the Optional Protocol to the Convention has started to be implemented in life with considerable delay in five years. The main obstacle for the implementation of this recommendation was lack of specifically designated budget funds for financing of the NPM. In turn, the NPM funding was not provided due to lack in the budget of this area of activity of the Ombudsman in the past, which was enshrined by amendments adopted by the Law of Ukraine of October 2, 2012. Thus, we can conclude that for during the considerable period of time, from adoption on July 21, 2006 the Law Ukraine on Ratification of the Optional Protocol to the Convention and to adoption of the Law of Ukraine on October 2, 2012, the state authorities of Ukraine did not make any significant steps for the implementation of the recommendations of the Committee on the establishment of effective national preventive mechanism for the prevention of torture and other forms of ill-treatment.

### **3. Eliminating the practice of using anti-terrorist units in prisons**

UN Committee against Torture which in its Conclusions and Recommendations following its consideration of Ukraine's Fifth Periodic Report, stated that: «The Committee is also concerned with the reported use of the anti-terrorist unit inside prisons acting with masks (e.g. in the Izyaslav Correctional Colony, in January 2007), resulting in the intimidation and ill-treatment of inmates» It went on to say that «The State party should also ensure that the anti-terrorist unit is not used inside prisons and hence to prevent mistreat and intimidation of inmates». In general, until proper legal regulation for the Department's anti-terrorist unit in accordance with the tasks vested with it in current legislation (and exclusively within its limits without unwarranted intrusion in the sphere of penal relations), there can be justification for the existence of such a formation.<sup>3</sup>

According to Article 6 of the Law of Ukraine "On the State Penal Service" composition of the State Penal Service includes militarized formations. As stated in Article 12 of this Law, militarized formations are units which in

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<sup>3</sup> Annual report of the human rights organizations "Human Rights in Ukraine", Ukrainian Helsinki Union On Human Rights, Kharkiv, "Prava Lyudyny", 2008, pages 276–277.

accordance with law act within the makeup of penal bodies and institutions, investigative isolation units, and are intended for security, prevention and stopping of actions which disorganize the work of the corrective institutions. Article 392 of the Criminal Code states that actions which disorganize the work of the corrective institutions are the terrorizing in corrective institutions of prisoners, or an attack on the administration, as well as the formation for this purpose of an organized group or active participation in such a group, carried out by individuals serving a sentence involving restriction or deprivation of liberty. In criminal law the term terrorizing of prisoners is understood as the use of physical force against them or threats to use such force, while an attack or the threat of an attack on the administration is seen as commitment of violent actions against it.<sup>4</sup>

Thus the first key moment in the functioning of militarized formations in the Penal Service is the sphere of their designated purpose, confined to two spheres: 1) security for places, 2) prevention and stopping of the actions set out in Article 392 of the Criminal Code. Thus any utterances or other infringements of order and the conditions for serving sentences, including failure to comply with regime requirements do not fall under the sphere of influence of militarized formations. Another key point is the need for a special law to set down the functioning of such special purpose units.<sup>5</sup>

The only legislative grounds for this at present are the Law from 20.03.2003 «On fighting terrorism». According to that act, terrorism is a socially dangerous activity constituting the conscious and deliberate use of violence through the seizure of hostages, arson attacks, murders, torture and intimidation of the population and authorities or other attempts against the life and health of innocent people, or threats to carry out criminal actions in order to achieve criminal aims. A terrorist act is criminal action in the form of use of weapons, the causing of an explosion, arson or other actions, the liability for which is set out in Article 258 of the Criminal Code. Article 4 of the Law stipulates those engaged in fighting terrorism, with the list including the Department.<sup>6</sup>

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<sup>4</sup> *Yakovets I. S.* Existence and action of special forces and rapid response groups. Disclosure of crimes. // Problems of prisoners' rights in the penitentiary system of Ukraine. / B. A. Badyra, O. P. Bukalov, A. P. Gel, M. V. Romanov, I. S. Yakovets; Under the general editorship of E. Yu. Zakharov; Kharkiv Human Rights Group. – Kharkiv: Prava lyudyny, 2009. — Pages 102–108.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

In other words, within the limits of its competence, the Department may fight terrorism. Article 5 §6 of this Law envisages that the Department shall use measures on preventing or stopping crimes of a terrorist aim on Penal Service sites. And such prevention is undertaken by a special anti-terrorist unit, the regulations for which were approved by Department Order No. 167 from 10.10.2005 (registered with the Ministry of Justice on 16.02.2006 as no. 138/12012). All apparently fine except that Item 3.5 of this Order includes among the functions of the anti-terrorist unit the carrying out of checks and searches of prisoners and people remanded in custody, their things, checks of other people and their things, vehicles on the territory of penal institutions, enterprises of these institutions, and on adjacent territory, as well as the removal of prohibited items and documents. It is this that has, in practice, become the main work of the anti-terrorist unit.<sup>7</sup>

The decision to register the Order has now been cancelled, On the basis of Ministry of Justice Opinion no. 15/88 from 24.12.2007 Order no. 167 was struck out of the State Register of Normative Legal Acts on 14.01.2008. However practice shows that the cancellation of State registration of the act on special purpose units in no way indicates the dissolving of the latter, at least this can be seen from official Department statements. For example, a press release regarding media reports about the events in the Manevytska Penal Colony (No. 42) on 25 October 2008 (10 months after the cancellation of the Order, reads: "Special purpose units and swift response groups were not deployed in the penal institution". The existence of special purpose units is also confirmed by Item 58 of the Rules of Internal Procedure for penal institutions, passed by the Department on 25.12.2003, No. 275 (registered with the Ministry of Justice on 31 December 2003 as no. 1277/8598), which has remained without the relevant changes. This item allows the Department to assert that the special purpose units provide assistance in carrying out searches of prisoners, without any use of physical force.<sup>8</sup>

Finally on July 3, 2013 the Order of the Ministry of Justice of Ukraine no. 1325/5 was issued and approved the Regulation on regional (interregio-

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<sup>7</sup> *Yakovets I. S.* Existence and action of special forces and rapid response groups. Disclosure of crimes. // *Problems of prisoners' rights in the penitentiary system of Ukraine.* / B. A. Badyra, O. P. Bukalov, A. P. Gel, M. V. Romanov, I. S. Yakovets; Under the general editorship of E. Yu. Zakharov; Kharkiv Human Rights Group. – Kharkiv: Prava lyudyny, 2009. — Pages 102–108.

<sup>8</sup> *Ibid.*

nal) paramilitary forces of the State Penitentiary Service of Ukraine, which regulates the procedure for application of special units in prisons of Ukraine.

Despite the absence of a special normative act during the significant period of time from 24.12.2007 to 03.07.2013, in practice, special units for combating terrorism have been often used as a means of intimidation of prisoners.

The practice of using special units for beating prisoners in correctional colonies of Ukraine have been repeatedly mentioned in the articles of the experts of the Kharkiv Human Rights Group. In particular, the mass beating of prisoners was noted in the Simferopol SIZO:

“Soldiers of a special unit of the State Penitentiary Service are located in Simferopol SIZO by order of the administration of the State Penitentiary Service; Information Service of the institution reported<sup>9</sup> that soldiers are acting under the operation “Shield”.

We found out the names of the victims of mass beatings (information obtained from multiple sources and requires thorough examination):

- 1) Rudiy Sergiy Mikhailovych, born in 1960 — broken legs.
- 2) Sergey Kozlov, born in 1984 — cell number 24 — batted kidney.

Also beaten:

- 3) Kutoviy Volodymyr.
- 4) Lugovoy S. V.
- 5) Eliseev D. V.
- 6) Onishchenko Eduard Oleksandrovych
- 7) Haniyev Ruslan — sitting in a disciplinary cell for refusing to strip in front of cameras number 162H and number 155H<sup>10</sup>

A similar case was also observed in Dnipropetrovsk correctional colony no. 89:

“As we have known, on 05.07.11, soldiers of the special unit of the State Penitentiary Service were used during the mass beatings and intimidation of prisoners of the 89<sup>th</sup> colony of Dnepropetrovsk.

The following staff of the prison promoted and possibly participated in the beatings:

1. The major of the State Penitentiary Service (the SPS) Lehkobyk Valentin Valentynovych, responsible for the division in which the cameras are situated life-sentenced prisoners, enhanced control division, cell-type premises and disciplinary unit.

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<sup>9</sup> <http://kvs.crimea.ua/>

<sup>10</sup> <http://khpg.org/index.php?id=1305032377>

2. Lieutenant of the SPS Khomenko Andrew Leonidovych, a member of the internal security establishment;
3. Nasevych Olexandr, head of the department;
4. Lieutenant Colonel of the SPS Igor Martynov Henadiyevych, temporary head of the institution.

The following prisoners were heavily beaten:

1. Kalugin Yuri Ivanovich, who is serving a life sentence;
2. Dzesiv Oleksandr Viktorovych;
3. Urtsov Gregory Hryhoriyevych;
4. Timoshenko Sergiy Olexandrovych;
5. Pogorelov Anatolij Ivanovych;
6. Dudnik Mykhaylo Eduardovych;
7. Bondarenko Roman Volodymyrovych;
8. Isakov Oleksandr Yevhenovych;
9. Kostecky Andriy Mykhailovych;
10. Kutlyayev Vadym Ivanovych;
11. Ryzhikh Oleksandr Volodymyrovych;
12. Mushynskyy Vyacheslav Ivanovich;
13. Heraskin Oleksandr Valeryovych;
14. Stoyan Volodymyr Yevhenovych;
15. Dmitry Olegovych Romanenko.<sup>11</sup>

The European Court of Human Rights in its decisions regarding Ukraine also pointed to the problem of the use of special units in prisons. Thus, in the judgment *Davydov and others v. Ukraine*, no.no. 17674/02, 3908 1/02 the ECtHR found a violation of Article 3 of the European Convention on Human Rights concerning the mass beating of prisoners in the Iziaslav correctional colony no. 58 in 2001, and the lack of proper investigation on the fact of the beating. In this judgment the ECtHR noted: “The Court further finds that excessive force was used against the prisoners, without any justification or lawful grounds. The force and special equipment were used without any reasonable grounds and contrary to international standards for use of force and special equipment (see paragraphs 101–102 and 108 above). It also is of the opinion that the manner in which these trainings were organised unavoidably led to the injury and humiliation of the prisoners. This resulted not only from the excessive use of force by the officers, who aimed at complying with

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<sup>11</sup> <http://khpg.org/index.php?id=1309969087>

short time-limits for inspections inside the cells, but also from dragging the prisoners out of the cells, their “speeding up” when they left their cells and enforcement of unjustified and humiliating orders by the officers participating in the training. Humiliating orders included those to completely undress and to swear in front of others that the applicants would comply with the prison administration’s demands and that they would not break the regime of detention. Injuries were inflicted on the applicants if they resisted, refused to comply or were not sufficiently fast, from the officers’ point of view, in complying with their orders or in reacting to a sudden inspection of the cell (see paragraphs 212–214 and 226–227 above).<sup>12</sup>

“The Court considers that the excessive force and equipment used, such as helmets and masks, so as to conceal identity of the officers who participated in the trainings and so that those involved in the training could not be distinguished or identified, making any further complaints practically impossible, coupled with injuries and the humiliating manner in which the searches were conducted (see paragraphs 207–220 and 222–230), caused physical and mental pain or suffering to the first and second applicants as a result of the first training and to all three applicants as a result of the second training”.<sup>13</sup>

In its judgment in the case *Karabet and Others v. Ukraine*; no.no. 38906/07, 52025/07 the ECtHR for the second time found a violation of Article 3 of the European Convention on Human Rights concerning the mass beating of prisoners in Izyaslav correctional colony no. 58 in 2007. In particular, in this judgment the ECtHR noted: “In the present case it is common ground between the domestic authorities and the applicants that on 22 January 2007 an operation was carried out in Izyaslav Prison, where the applicants were serving sentences at the time. That operation included, in particular, searches of the premises within the prison, body searches of a group of forty-one detainees, unspecified “preventive security measures for enhancing order” and training drills (see, in particular, paragraph 15 above).<sup>14</sup>

“As acknowledged by the authorities, the aforementioned operation took place without the legally envisaged monitoring by the regional prosecu-

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<sup>12</sup> *Davydov and others v. Ukraine*, judgment of 1 June 2010, no.no. 17674/02, 3908 1/02, §266.

<sup>13</sup> *Ibid*, §269.

<sup>14</sup> *Karabet and others v. Ukraine*, judgment of 17 January 2012, no.no. 38906/07, 52025/07, §304.

tor in charge of supervision of compliance with the law in penal institutions (see paragraph 145 above).<sup>15</sup>

In both cases Davydov and Karabet prisoners were subjected to beatings and abuse by special units for combating terrorism after they had sent a complaint on poor conditions of detention in Iziaslav colony no. 58.

As we can see from the above judgments of the European Court of Human Rights practice of using special units for combating terrorism to put pressure on the prisoners in correctional institutions in Ukraine is quite common spread.

As for the new Regulations, their content raises a number of observations. In particular, if in the previous Regulations, approved by Order of the Department of 10.10.2005 no. 167, main tasks of the Unit included prevention and suppression of crimes of terrorism on the objects of the penitentiary system, and the prevention and suppression of acts that disorganize the work of penitentiary institutions and pre-trial detention facilities, the new Regulations were added with the following task, as participation in measures for ensuring the regime and its main requirements in the PI and SIZOs.

In our opinion, specified provision creates substantial opportunities for abuse by the administration penitentiary institutions to involve special military units for carrying out unlawful pressure on the prisoners. Since the regime of penitentiary institutions is rather broad concept which even includes such issues as the wearing of a uniform by prisoners, observing established daily routine by prisoners, work of prisoners, storing personal belongings of prisoners, it is still controversial question as to in which cases of violation of the regime in penitentiary institutions special purposes units can be involved. Thus, as a reason to call up on the special unit for intimidating prisoners, the administration may indicate, for example, delayed get up or going to bed by a prisoner. In this regard, in order to prevent abuses by the penitentiary administration, the indicated task of the special units should be excluded from the Regulations.

In addition, paragraph 3.1 of Regulations does not contain any specification of actions that could be an indication of committing crimes of terrorism, which may also contribute to rather broad interpretation of this provision by the administration of the institution.

The negative aspect of the new Regulations is that they still contain the rule which allows conducting surveys and searches in residential and indus-

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<sup>15</sup> *Karabet and others v. Ukraine*, judgment of 17 January 2012, no.no. 38906/07, 52025/07, §305.

trial areas, personal belongings of prisoners and detainees, surveys of other people and their belongings, vehicles in the territory of the objects of the State Penitentiary Service of Ukraine, for which the regime requirements are established, and withdrawal of prohibited items and documents. The same provision was contained in the foregoing Regulations, which was canceled due to a number of violations, including violations of the specified rule.

Among the positive aspects of the new Regulations we can be divided into rule, provided in paragraph 6.7 according to which during conducting exercises, classes and training by the Unit, including those with the personnel of the Groups of Rapid Response of PI and SIZOs, on the objects of the State Penitentiary Service of Ukraine, prisoners and people taken into custody, shall not be involved in these activities.

A fundamentally new Section 7 of the Regulations, which provides informing the public about involvement of the Unit, is also important. However, in our opinion, this Section also needs refinement, as it does not stipulate the procedure and terms for such informing.

Thus, we can see that the new Regulations also require refining and exclusion of the rules that create the preconditions for abuse in the form of the involvement of special military units for committing unlawful violence against prisoners.

#### **4. Transfer of the State Penitentiary Service of Ukraine (former State Department of Ukraine for Execution of Sentences) to the Office of the Ministry of Justice of Ukraine**

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In the draft of the Sixth periodic report the Government of Ukraine pointed out that the implementation of the recommendations of the Committee set out in paragraph 18 of the Conclusions and recommendations elaborated on the 38<sup>th</sup> Session, the State Penitentiary Service of Ukraine (former State Department of Ukraine for Execution of Sentences) was transferred to the Office of Ministry of Justice of Ukraine, which was adopted by the Decree of the President of Ukraine of April 6, 2011 no. 394/2011, which approved the Regulations "On the State penitentiary Service of Ukraine. "According to this provision, the State Penitentiary Service of Ukraine is the central body of executive power, coordinated by the Cabinet of Ministers of Ukraine through the Minister of Justice of Ukraine, is included to the system of executive au-

thorities and ensures the implementation of state policy in the enforcement of criminal penalties, but the Service is still an autonomous structure and not a part of the Ministry of Justice as it was required by the standard.

Thus, for today, the indicated Committee's recommendation is not fully implemented.

## **5. Elaborating of special training programs for medical staff working with people who are held in places of deprivation of liberty, in accordance with "Istanbul Protocol"**

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Regarding the implementation of the recommendation provided by the UN Committee in paragraph 22 of the Conclusions and recommendations elaborated on the 38 th Session, the Government of Ukraine did not provide any information regarding the education and training of medical staff working with prisoners, aimed at detecting evidence of torture and ill-treatment in accordance with international standards as set out in the "Istanbul protocol".

Accordingly, we can conclude that for today in Ukraine there is no developed system of special training of medical staff that would meet the requirements set forth in the "Istanbul Protocol" and education standards lag behind of the requirements of the UN Committee.

In order to make a conclusion about which legal acts require amendments for implementation of this recommendation in the first place, it is necessary to analyze the general provisions of the Istanbul Protocol, which fix the procedure of medical examination of the person who is complaining on subjecting them to torture and other forms of ill-treatment.

According to Paragraph 83 of the Istanbul Protocol: "Medical experts involved in the investigation of torture or ill-treatment should behave at all times in conformity with the highest ethical standards and, in particular, must obtain informed consent before any examination is undertaken. The examination must conform to established standards of medical practice. In particular, examinations must be conducted in private under the control of the medical expert and outside the presence of security agents and other government officials. The medical expert should promptly prepare an accurate written report. This report should include at least the following:

- a) The circumstances of the interview. The name of the subject and name and affiliation of those present at the examination; the exact

- time and date, location, nature and address of the institution (including, where appropriate, the room) where the examination is being conducted (e. g. detention centre, clinic, house, etc.); any appropriate circumstances at the time of the examination (e. g. nature of any restraints on arrival or during the examination, presence of security forces during the examination, demean our of those accompanying the prisoner, threatening statements to the examiner, etc.); and any other relevant factor;
- b) The background. A detailed record of the subject's story as given during the interview, including alleged methods of torture or ill-treatment, the time when torture or ill-treatment was alleged to have occurred and all complaints of physical and psychological symptoms;
  - c) A physical and psychological examination. Are cord of all physical and psychological findings upon clinical examination including appropriate diagnostic tests and, where possible, colour photographs of all injuries;
  - d) An opinion. An interpretation as to the probable relationship of physical and psychological findings to possible torture or ill-treatment. A recommendation for any necessary medical and psychological treatment or further examination should also be given;
  - e) A record of authorship. The report should clearly identify those carrying out the examination and should be signed".

After analyzing the legislation of Ukraine which regulates the procedure of examination of people who are held in the places of deprivation of liberty in order to identify any body injuries, which may indicate subjecting these people to torture and other forms of ill-treatment we can see the following.

According to the Rules of interaction between health care institutions of the State Penitentiary Service of Ukraine with the civil health care institutions about providing medical assistance to convicts, approved by joint order of the Ministry of Justice of Ukraine and the Ministry of Health Care of Ukraine no. 710/5/343 from 10.05.2012:

"2.1. All people who arrive in the institution of execution of sentences (hereinafter — IES) of the State Penitentiary Service of Ukraine, shall pass the primary medical examination in order to identify people who have injuries and who constitute epidemic threat to the environment or require emergency care.

Results of initial medical examination of newcomers in the IES shall be recorded in the medical record (form no. 025/o) (hereinafter — the

medical record f.025) and sent to SIZO together with the personal file of a convict.

In case of identification of injuries on the body of a convict a medical worker shall immediately notify an administration of the IES, three copies of a certificate shall be made, in which it shall be provided detailed description of the nature of the lesions, their size and location. Two copies of the certificate shall be attached to material of personal case file of a convict things and medical record f.025, and the third copy shall be given to the convict.

During one day after revealing body injuries the administration of the IES shall inform the prosecutor in writing about the discovery of the convicts injuries and mention those injuries in the Journal of body injuries of people who arrive at the IES (Annex to the Rules).

- 2.2. All people who leave the IES shall pass a medical examination with x-ray examination (except those whose x-ray was carried out less than 11 months ago). Upon completion of examination the conclusion about state of health of a person who leaves shall be made and recorded in the medical record f.025.

A medical worker who conducts an examination shall put the signature under the conclusion on the open certificate of personal file of a convict who leaves the IES”.

The Journal of of body injuries of people who arrive at the IES, attached to the aforesaid Rules, shall contain the following information:

“1) the date and time of revealing of bodily injuries; 2) name and birth date of the person who was found to have the injuries, the name of the institution from which the person arrived; 3) the circumstances of the incident, time and place of bodily injury; 4) name (name of office) of the person who, according to the victim, caused him/her bodily harm; 5) the date, time and data of a medical worker who conducted the examination of the victim; 6) the nature, size and location of the identified bodily injuries; 7) the date, time and name of an assistant of a chief of the IES who received the provided; information 8) the date and time of sending information to the prosecutor, name of an official who signed it; 8) the action taken and the date of the decision taken at the results of verification”.

Comparing the provisions of the Istanbul Protocol on the conduction of a medical examination of a person in order to identify signs of torture and ill-

treatment, with the provisions of the above Rules, we can make a conclusion about the necessity to amend the last in order to bring it into conformity with the Istanbul Protocol.

In particular, in addition to information which is specified in the Journal of of body injuries in people who arrive at the IES, it would be well to specify information about all the relevant circumstances existing at the moment of conduction of the medical examination of a person (e. g. nature of any restraint devices during arrival or during the examination; the presence of the staff of the IS during the examination; the behavior of people who accompany the prisoner, threatening statements addressed to person who conducts the examination). In addition, provisions of paragraph 2.1. of the Rules, which regulate a medical examination of the newcomers to the IES shall be supplemented with the provisions which imply the need to photograph all bodily injuries that were found on the body of the person.

Besides of the Rules of interaction between health care institutions of the State Penitentiary Service of Ukraine with the civil health care institutions about providing medical assistance to convicts mentioned above, medical assistance to people deprived of their liberty, is also regulated by the Rules of interaction between health care institutions of the State Penal Service of Ukraine with the civil health care institutions about providing medical assistance to detained people, approved by joint order of the Ministry of Justice of Ukraine and the Ministry of Health Care of Ukraine from 10.02.2012 no. 239/5/104, and the Instruction about providing medical assistance, use of health care institutions, involving their medical personnel and conducting medical examination in the special premises provided for temporary detention (temporary holding facility of the Department for providing of investigation of the Central Office of the Security Service of Ukraine) approved the common order of the Security Service of Ukraine and the Ministry of Health Care of Ukraine no. 178/268 of 11.05.2011.

The Rules of interaction between health care institutions of the State Penal Service of Ukraine with the civil health care institutions about providing medical assistance to detained people, the same provisions as the Rules of interaction between health care institutions of the State Penitentiary Service of Ukraine with the civil health care institutions about providing medical assistance to convicts.

As for the Instruction of 11.05.2011, the relevant provisions of this document enshrine the following:

- “2.1. Detained and people taken into custody upon arrival to an ITT VZDS shall pass an initial medical examination in order to identify individuals who may pose an epidemic threat to others or need emergency care.
- 2.2. The initial medical examination is performed by a doctor or paramedic of the VZDS (in their absence — by a doctor of emergency room of VMC) in a specially equipped room. During a primary medical examination an external examination of the skin of the whole body, head is conducted in order detect injuries and damage, as well as possible external manifestations of sexually transmitted infections and diseases that can be dangerous for inmates. It is also detected the presence of all the latest injury, their size, location and, if possible lapse of time and circumstances of their origin and distinguishing marks (scars, tattoos, etc.).

The certificate shall be made after conduction of medical examination, which shall contained information about the health of detainees and arrested people, the possibility of holding them in the conditions of ITT of VZDS, and shall be attached to the documents of the detainee or the personal file of the person taken into custody; the conclusion about the state of health of a person shall be made in the Register of detainees and arrested people. People with acute infectious diseases or those suspected to have them shall be immediately isolated after the initial medical examination in a separate room.

If detainees and people taken arrive with traumas, injuries or obvious signs of disease, the administration of the VZDS shall take measures for their immediate medical examination and emergency medical care. The fact of the revealing of traumas, injuries or obvious signs of disease shall be communicated with the person or body conducting the criminal investigation and the prosecutor by the administration of the VZDS”.

Thus, after analyzing of both these documents we can come to the conclusion, that none of these legal acts are not fully consistent with the provisions of the Istanbul Protocol regarding the proper identification and fixation of traces of torture and other forms of ill-treatment.

For today it also remains unresolved question about psychological examination of people who complain about the use of torture and ill-treatment against them. In particular, in situations where external physical signs of torture (such as bruises, scratches, injures) may disappear by the time of the ex-

amination, the only possibility to prove circumstances of torture and ill-treatment is conduction of psychological examination.

Legislation of Ukraine in the field of execution of sentences, which operates today, provides psychological work with convicts and people to whom a preventive measure of detention is applied, in order to reduce the negative impact on the identity from being isolated from society. Conduction of social and educational work with such people is governed by the Regulations on the social and psychological services and typical official duties of a psychologist of a penitentiary institution and SIZO approved by order of the Ministry of Justice of Ukraine no. 2300/5 from November 4, 2013.

None of these documents contains any provisions regarding the possibility of conducting psychological examination in case of receiving complaints on torture or other forms of ill-treatment against convicted or detained people.

It is state in the Istanbul Protocol that “there are groups of symptoms and manifestations of mental reactions, with appropriate frequency observed and documented with respect to people who have been victims of torture.”

Thus, in our view, an important step in bringing national legislation into line with the provisions of the Istanbul Protocol is adoption of new legal acts or amendment of the existing legal acts in order to perpetuate the requirement for psychological examination in the case of obtaining a complaint on torture and other forms of ill-treatment.

With regard to the question of the elaboration of training programs for medical staff working with people deprived of their liberty, after analyzing of all the legal documents of the Ministry of Health Care of Ukraine, as well as legal documents of the State Penitentiary Service of Ukraine, we have not found any legal act, or even individual rules that would provide the necessity of special training of medical staff working with prisoners and people taken into custody in order to improve their knowledge in the detection and fixation of traces of torture and other forms of ill-treatment in accordance with the Istanbul Protocol.

Thus, we can conclude that today in Ukraine there are no training programs for medical staff to implement the recommendations of the Committee against Torture, elaborated at the result of consideration of the Fifth periodic report of Ukraine.

## **6. Improving conditions of detention in penal institutions and ensuring the right of prisoners for access to medical assistance**

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Regarding requirements about improving the conditions of detention in penal institutions, and ensuring the right of prisoners for access to medical assistance, in the draft of the Sixth periodic report the Government refers to the draft of amendments to the Penal Code of Ukraine concerning the rights of prisoners in penal institutions, which were approved on December 7, 2011 at a meeting of the Cabinet of Ministers of Ukraine. The mentioned draft of the Law of Ukraine was prepared on the basis of the situation that had emerged in the sphere placement of the existing number of prisoners in correctional facilities and detention centers, as on January 1, 2012 force provision of the Penal Code of Ukraine came into force according to which living space per person sentenced to imprisonment or detention shall be 4 square meters (currently 3 sq. m.). The draft provides postponement of the entry time of coming into force of the above-mentioned provision and establishment of the term by January 1, 2015. In this regard, for keeping the number of people sentenced to imprisonment and arrest, it is necessary to increase the rate of living space per prisoner to 4 square meters including the placement in living blocks.

According to information provided by the Government, to solve the problem of the placement of people taken into custody and prisoners, providing them with specialized medical care, the Institutional order of 14.06.2010 no. 191 (as amended) "On Amendments to the List of correctional facilities in the territory of which divisions of pre-trial detention facilities (SIZOs) are established" was issued, so there were established the divisions of SIZO in the territory of correctional colonies with general capacity of 2466 people (as of 01.04.2012 1094 people were held in them), 404 of which are in specialized TB hospitals and arrest houses for 1077 places in 39 prisons, where people sentences for arrest are transferred from the SIZOs. During 2011 two areas of SIZO for 43 people were established in TB hospitals in Poltava and Kharkiv regions. In the first quarter of 2012, the number of these places was increased to 45. Due to limited funding, creating areas of SIZO in the territories other specialized TB hospitals is expected to be completed during the 2012–2015 years.

Government further noted that currently appropriate measures within departmental programs against TB in penal institutions and detention centers on SBS years 2012–2017 are carried out, as well as the Program on prevention of HIV, treatment, care and support for HIV-infected AIDS for 2009–2013.

In turn, we note the following.

Recognizing the critical situation, the Ukrainian government decided to reform the penitentiary system in order to come closer to European standards. April 29, 2013 the Cabinet of Ministers adopted the state purpose program of reforming, developed by the Ministry of Justice. The program is scheduled for four years, 2013–2017, with an estimated budget of 6 billion hryvnas for a specified period of time<sup>16</sup>. It is also planned to increase the rate of living space and move from the large prison cells that resemble barracks for accommodation of groups of people to block system with a relatively small cameras and fewer prisoners placed in them<sup>17</sup>. Another measure aimed at solving the widespread problem of overcrowding in cells, is the implementation of the system of probation, which makes it possible to impose penalties without having to imprison a convict. Systems of “taking into custody” of western countries are widely used through electronic monitoring method by using “electronic bracelets”, which also allows unloading pretrial detention facilities (in Ukrainian SIZO — investigation isolator), which are particularly affected by over crowding. Until now, overcrowding in these institutions was even sanctioned by law. According to Article 11 of the Law “On Pre-trial Detention” every detainee should have free space of at least 2.5 square meters. Rate of 2.5 square meters per person not only violates international standards, but often the State Penitentiary Service of Ukraine, is unable to provide even this rule due to lack of sufficient space for prisoners. In 2012, the SIZO Kiev and Donetsk SIZOs were severely overcrowded. In the first case, the maximum capacity was exceeded by 37 percent, whereas in the latter, 2898 prisoners were in the SIZO detained instead of the allowable 1970<sup>18</sup>.

However, one of the main obstacles on the way to solving the problem of chronic overcrowding is the elimination of any incentives to fill penitentiary

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<sup>16</sup> [http://www.ukrinform.ua/eng/news/penitentiary\\_service\\_reform\\_will\\_take\\_uah\\_6\\_billion\\_303962](http://www.ukrinform.ua/eng/news/penitentiary_service_reform_will_take_uah_6_billion_303962)

<sup>17</sup> Ibid.

<sup>18</sup> <http://ukrainianweek.com/Investigation/48620>

establishments with detainees So far, according to the Law of Ukraine “On the staff numbers of the State Penitentiary System of Ukraine”, the total number of staff in pre-trial detention facilities and correctional colonies depends on the total number detainees with a ratio of one to three. Therefore, a large number of detainees is in the interests of the State Penitentiary Service of Ukraine, which by this provides occupation for its employees.

In addition, it is necessary to analyze in detail the laws that directly regulate the conditions of serving the sentences.

On September 5, 2013 the Law of Ukraine no. 435-18 “On Amendments to the Penal Code of Ukraine regarding the manner and conditions of execution of sentences” was adopted. This law made insignificant improvements aimed at enlargement of rights of convicts, in particular, the amendments were made to Article 92 of the Penal Code under which the requirement of separate holding of convicts shall not apply to those who were sentenced to life imprisonment, after serving a sentence of twenty years in the cell type premises are transferred to ordinary premises with a minimum level of security. The rights of prisoners serving sentences in correctional facilities also were enlarged. In particular, under Article 143 of the Penal Code of Ukraine in the version of the Law of Ukraine no. 485-18, they are entitled to short-term meetings without limitations and a long-term meeting once a month. In the previous version of this Article these prisoners were only allowed to obtain one short meeting once a month, and one long-term meeting every three months. In addition, underage prisoners serving sentences in colonies by order of the chief of the colony are entitled to one short-term meeting outside correctional facilities once every three months.

However, in addition to positive changes, this Law restricted existing at the time of the adoption of the rights of prisoners. In particular, Article 59 of the Penal Code, in the version of Law of Ukraine no. 435-18 provides long meetings to people sentenced to confinement, only with close relatives (spouses, parents, children, adoptive parents, adopted children, siblings, grandparents, grandchildren).<sup>19</sup> Prior to the adoption of the Law no. 435-18 this article, did not contain comprehensive list of people with whom a person, sentenced to confinement, was entitled to have a long-term meeting. In addition, from Article 59 of the Penal Code was excluded the right of people, sentenced to confinement, for temporary staying outside the territory of

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<sup>19</sup> <http://zakon3.rada.gov.ua/laws/show/435-18>

the colony in their spare time. Article 95 of the Penal Code was supplemented by part 3, according to which during their detention in the division of quarantine, diagnosis and distribution meeting for convicts are not available, except meetings with a lawyer. Thus, there was restriction on the rights of prisoners to respect for their private and family life, as this rule denies them the opportunity to get even a short meeting with relatives. The amendments of Part 7 of Article 102 of the Penal Code provided that any money, valuables and other things which are found in convicts items in all cases shall be transferred into the budget of the state. According to the amendments of Part 4 of Article 107 there was greatly expanded the list of actions that are prohibited to do by convicted' people.

In particular, according to these amendments in addition to the previously established prohibitions, it is also prohibited for the convicts: to stay without permission of the administration of a colony in dormitories and departments in which they do not reside, or production facilities in which they do not work; to curtain or change beds, organize them in public places and other business or industrial premises without permission of the the administration of a colony; to prepare and eat food in unexpected place, to take food from the dining room without permission of the administration of the colony; to carry objects and items in the range and quantity beyond the limits set by the central executive body to the formation and implementation of public policy in the shere of execution of criminal sentences; to smoke in a disciplinary cell, ordinary cell, cell-type premises (single cells) and juvenile colonies, as well as in non-designated areas; to send and receive correspondence against the order established by the central executive body to the formation and implementation of public policy in the sphere of execution of criminal sentences; to make tattoos for themselves or cell mates; to keep animals; produce, to store self-made electrical items and use them; to re-plan, change structural elements of buildings of the colony, to build different objects in production facilities (bath, laundry, showers, safes, booths, rooms and facilities for leisure, heating).<sup>20</sup>

Given that some of these prohibitions can be justified by safety requirements (e. g. prohibition of smoking in non-designated areas; making tattoos; producing and storing of electrical items and using them), then for example, the prohibition to carry objects and things in range and quantity beyond the

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<sup>20</sup> <http://zakon3.rada.gov.ua/laws/show/1129-15/ed20140101/page2>

limits set by the central executive body to the formation and implementation of public policy in the execution of criminal sentences can not be explained by the requirements of security.

The amendments made to Article 111 of the Penal Code prescribed that short-time trips outside the territory of a correctional colony may be provided only for convicts who are held at correctional colonies with minimum level of security with light conditions of detention, divisions of rehabilitation of correctional colonies with minimum level of security general conditions of detention, correctional colonies with medium level of security and juvenile colonies. In contrast, the previous version of this article permitted short-time trips for convicts held in correctional colonies with minimum level of security, division of social rehabilitation in correctional colonies with medium level of security, juvenile colonies.

According to the amendments that were made to Article 134 of the Penal Code convicts are placed in a disciplinary cell and a punishment cell are prohibited to obtain not only meetings, but the even phone call.

Thus, analyzing the aforementioned law, we can conclude that despite partial improvement of conditions of serving the sentences, in the most part, it contains provisions that worsen the situation of prisoners.

On April 8, 2014 the Law of Ukraine no. 1186-VII «On Amendments to the Penal Code of Ukraine concerning adaptation of legal status of the convicted to European standards” was passed.

The adoption of this law envisions a significant expansion of rights of convicts in comparison to existing before.

In particular, this law made significant amendments to Article 8 of the Penal Code which provides the list of the fundamental rights of convicts. These amendments fixed the duty administration institution or body responsible for execution of sentences, provide convicts with information about their rights and obligations, and conditions of execution of a sentence; right of convicts to receive packages and gear in the established order; right for paid work with the duration of the working day to 8 hours; the right to exercise the freedom to practice any religion or express beliefs related to attitude to religion; right to proper material welfare under the procedure established by law. In Article 21 of the Penal Code it was assigned the duty of keeping convicts with tuberculosis another premises than other inmates, which is one of the guarantees of the rights of convicts to health care.

It is unable to leave aside the amendments made to Article 24 of the Penal Code which governs the procedure for visiting of penal institutions. Thus, the scope of people who have the right to attend the penitentiary without special authorization (accreditation) has been extended by the granting of such rights to members of community councils in the central executive body that implements the state policy in the field of execution of criminal sentences; media representatives and medical professionals who may be involved in such a visit.

Amendments to Article 51 of the Penal Code extended the rights of people sentenced to arrest, which were provided all rights, obligations and prohibitions that have convicts sentenced to imprisonment. Before these amendments people sentenced to detention were not allowed to submit proposals, applications and complaints to state bodies, public organizations and officials; receive remittances; receive and send letters and telegrams without limits; have meetings with close relatives.

Amendments to Article 59 of the Penal Code also were made according to which people sentenced to restriction of liberty was granted the right to carry portable computers and their accessories, money, mobile phones and their accessories, valuables, use the money without restrictions; the right to use the mobile communication devices; the right to obtain short-term meetings without limitations as long-term meeting for three days once a month with any person; the right to receive legal assistance provided for people sentenced to imprisonment. Thus, by the Law of Ukraine no. 1186-VII to 08.04.2014 the earlier provision of the Law of Ukraine no. 435-VII of 09.05.2013, which provided the obtaining by people sentenced to restriction of liberty long-term meetings only with close relatives.

In addition, in Article 63 of the Penal Code it was enforced the right of people sentenced to restriction of liberty, convicted who are held in health care facilities to obtain legal aid and use mobile communication.

In Article 84 of the Penal Code the right of convicted military officers to use mobile communication was enforceable.

Also, the Law of Ukraine no. 1186-VII of 08.04.2014 supposed to guarantee convicts' rights for respect for family life, due to the fact that Article 93 in the version of these Law establishes that convicts shall serve his/their entire term of sentence in the same correctional colony or juvenile colony, usually within the local government area in accordance with his/their

residence before conviction or to the or place of residence of relatives of a convict.

An important step to ensure the convicts' rights for respect for family and private life, and contact with the outside world, as well as the right to file petitions and complaints against the administration of correctional institutions are enshrining in Articles 99, 100, 110, 142 the right to use mobile communications and the Internet. However, it should be noted that to date, the State Penitentiary Service of Ukraine has not solved the issue of ensuring the practical implementation of this provision.

It is also necessary to note the amendments that were made to Part 3 of Article 110 of the Penal Code according to which convicts are provided with the opportunity to communicate with a lawyer or other professional in the area of law in a room without a solid protective glasse, with their consent, and also provides convicts that are treated in inpatient health care facilities with the right to receive legal assistance. Also there are positive innovations in Article 113 of the Penal Code under which a convict has the right to refer the correspondence defense counsel in criminal proceedings directly during a meeting with him.

Also, the Law of Ukraine no. 1186-VII of 04.08.2014 extended socio-economic rights of convicts. In particular, Article 118 of the Penal Code was amended, under which convicts are involved in paid work and have the right to work in the field and in occupations prescribed by the prison administration. In the previous version of of this article convicts had only work in the field and in occupations prescribed by the prison administration.

In addition, it was provided in Article 122 of the Penal Code that the work of convicts during the period of serving sentences of imprisonment is credited seniority for the purpose of labor pensions.

It should also be noted that the Law of Ukraine no. 1186-VII of 08.04.2014, prohibition on telephone conversations between convicts during their detention in prison and penal punishment cell, established by the Law of Ukraine no. 435-VII from 05.09.2013, was canceled.

As for the rights of convicts to medical care, the Law of Ukraine no. 1186-VII of 08.04.2014, also made some improvements in this area.

Thus, in accordance with paragraph 5 of Article 116 of in the new version convicts are entitled to seek advice and treatment in health care institutions that are licensed by the Ministry of Health of Ukraine to provide paid medical services and are not within the jurisdiction of the central executive govern-

ment that implements the state policy in the enforcement of criminal sentences. In the need of inpatient treatment, a convict has a right to obtain eligible medical care and treatment, including medical services paid by personal funds or funds of family and friends, in these health institutions. The basis for the provision of such medical care is an agreement on the provision of health services concluded between health care institution and family, friends, or legal representative of a convict.

Before passing of the Law of Ukraine no. 1186-VII acted of 08.04.2014 the provision was in force which did not provide the rights of convicts to seek advice and treatment to health facilities that are not within the jurisdiction of the central executive body that implements the state policy execution of criminal sentences. Thus, convicts were unable to receive medical care in health care institutions, which are not under the jurisdiction of the State Penitentiary Service of Ukraine.

Despite the positive amendments which were made to the legislation of Ukraine to ensure the rights of convicts to medical care, the actual situation in the health care sector in the Ukrainian penitentiary institutions remains critical. Due to chronic underfunding there is a lack of qualified medical personnel and often a lack of medical equipment to detect various diseases. Detention facilities frequently run out of medication urgently needed to treat the sick. Given the high proportion of inmates with infectious diseases and other chronic diseases, the medical wards within the penitentiary centers are overburdened. Yet even gravely ill inmates, for whom imprisonment is life threatening, are not being released.<sup>21</sup> Furthermore, medical check-ups on a regular basis are not carried out. The latest efforts to reform the State Penitentiary Service also aim to improve the health care infrastructure in detention facilities in order to ensure inmates' access to up-to-date medical help.

On February 10, 2012 the Ministries of Justice and Health issued a joint order, which approved procedure for interaction of medical units of the State Penitentiary Service with health care institutions on providing health care to detainees. This order provides people detained in custody with the right to freely choose a doctor from a health care institution. Although the adoption of this order is a definite positive step, the right to free choice of doctor may

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<sup>21</sup> <http://khpg.org/en/index.php?id=1358889278> (last access 9 July 2013).

only be enjoyed by those detainees who have the means of paying for this which is direct discrimination caused by the legislation.

In addition, a number of measures are going to be introduced offering new methods in psychological counseling and pedagogical support for the inmates. Another frequently voiced concern involves poor qualification of staff. In this regard, the reform from 2013 includes a new personnel recruitment procedure and improved training and professional development training for prison officers. Ukraine's government has on numerous occasions announced reform of the penitentiary system, so we need to await tangible results in the near future.

The problem is particularly acute of ensuring the right to health of remand and convicted prisoners suffering from grave illnesses. At best, they will be sent to one of the State Penitentiary Service medical institutions. These, however, are often unable to provide adequate medical care, and then, according to the law, a prisoner shall be transferred to a civic hospital for proper treatment. In most cases, the prison authorities do not want to do this, and they may only be forced through an ECHR decision on applying interim measures in accordance with Rule 39 of the ECHR. This decision obliges the state to transfer the patient to a general civic hospital. In cases where a detainee or an inmate suffers from a serious disease included on the List of Diseases which are the Basis for Application to the Courts for Relief from Further Punishment» (hereinafter — “the List of Diseases”), adequate medical care must be immediate. The List of Diseases mainly contains incurable diseases, and furthermore, in the terminal stage. In such cases there is no possibility to save a man's life even with the most modern methods of diagnosis and treatment. In fact, the practice is to release people, when they are near death. Pre-trial and court procedure for releasing a person from continuing their sentence take a lot of time.. In addition, even in the case of an application from the penitentiary institution to the court to release a person, the court in many cases rejects this. Such patients need not only medical, but also palliative care, the provision of which is not provided at all in places of imprisonment. Such cases often end with the prisoner dying in the colony. According to Ukraine's Supreme Court<sup>22</sup> when deciding whether to release a person, a court should take into account not only the medical report, but also the gravity of the offense, the behavior

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<sup>22</sup> Resolution of the Plenum of the Supreme Court of Ukraine no. 8 of 28.09.1973, “On the Application of Legislation regarding the Release of Convicted Prisoners suffering from a Severe Disease by the Courts” (as amended).

of the prisoner while serving his/her sentence, attitude to work (the account of this fact seems particularly unjustified in respect to people with serious diseases, who are unable to work for health reasons), degree to which they have reformed and other circumstances. Having unlimited discretion with regard to release of a person on the grounds of illness, the courts in some cases refuse several times to allow applications from the colony administration to release people who are near death in the absence in most cases of the necessary medical aid and care. Even more problematical is the situation for those suffering from a serious disease before any sentence has been passed by a court, and who are kept in a detention facility or SIZO. Although the same Article 84 of the Criminal Code allows for the release of such people, implementation in practice is extremely problematical.

There is no resolution of the Plenum of the Supreme Court of Ukraine, which would give recommendations to the courts regarding the issue of release with regard to suspects and defendants suffering from a serious disease in contrast to the release of a person already serving a sentence. In one way or another, the release of a person on the grounds of illness during the criminal proceedings before a verdict has come into force is the exception. This problem is aggravated by the fact that SIZOs, in general, are worse equipped with medical personnel, facilities and special equipment than penitentiary institutions.

Another specific case of violation of the right to health care is the lack of medical care for arrested people and detainees who use and are addicted to drugs. For those patients who get methadone substitution therapy, this violation occurs in the form of interruption of therapy during their detention in the ITT as well as SIZO. For people from this group who were receiving methadone substitution therapy at the time of their arrest, but were in a state of abstinence, medical care should be provided in accordance with medical protocols for drug treatment services (detoxification). Despite the special regulation, which provides procedures for ensuring the continuity of the methadone substitution therapy in the case of arrest of a person and his/her detention, in practice the lack of medical aid of this kind is quite frequent, in some cases with lethal consequences (see the information in paragraph 17 of the List of Issues).

Another pressing problem is the problem of providing medical aid, and in particular cases the treatment of people suffering from severe diseases during their transfer from one place of detention to another. This problem is ag-

gravated not only by improper conditions in transit, but also by the lack of access by personnel to the personal case file and medical records of the prisoner before they arrive at their destination. The negative effect of this regulatory ban on access to the personal case file is that it makes it impossible to add information regarding medical aid provided to him during the transfer to his medical documents. It thus makes the very health care (except for emergency cases where there is a threat to the person's life) impractical. In accordance with SPTS information, medical records (hospital records, medical history, etc.) shall be contained under seal in the personal case file of a convicted prisoner. The administration of places where the person is held temporarily (SIZO) is not allowed access to this without the permission of the court or relevant prosecutor. Thus, if a person suffers from a chronic disease, there is no possibility of full treatment during his transit movement.

A separate problem is also the administrative subordination of the medical staff of SIZO and penitentiary institutions to the administration which inevitably leads to situations of internal conflict of interest related to their "dual status" (both medical personnel and penitentiary service employees). Accordingly, if it is necessary to provide medical aid to a person who is in conflict with the administration, in case of pressure by the administration (a kind of punishment of a rebellious inmate), the amount of such aid can be reduced or not provided at all.

Another serious problem is the lack of appropriate conditions for the detention of women with infants at the SIZO, as well as the impossibility of providing the adequate medical care to the infant in the conditions of SIZO. A flagrant case which highlighted this problem was the case of K. who had to appeal to the ECHR to apply urgent measures as the medical personnel of the Kharkiv SIZO were not providing medical care to her three-month son in the absence of a pediatrician at the medical staff of SIZO.<sup>23</sup> And the pediatrician of the Health Ministry institution responsible for observing children in the Kharkiv SIZO according to the Clinical Protocol of the medical supervision of healthy children under the age of 3 years old approved by the order of the Ministry of Health of 20.03.2008 no. 149 had not examined the child for a long time. The reason of this is the established practice of the relations between the SIZO administration and health center where pediatricians do not examine children who are with their mothers in the SIZO on a regular basis, but only

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<sup>23</sup> <http://5.ua/newsline/245/0/55382/>

when requested by the SIZO administration. For the same reason the child did not receive the necessary vaccinations. Unfortunately, it should be noted that this is not the only case where a child who is with his/her mother in the SIZO does not receive medical treatment.

Thus, from the above it can be concluded that despite the formal implementation of recommendations of the UN Committee for improving the conditions of detention of prisoners and providing them with medical care, for today, there is a problem with the practical implementation of the adopted legislative norms. Consequently, the activity of public authorities should be aimed at solving this problem.

## *Section 2*

# **Implementation of conclusions and recommendations of the European Committee for the Prevention of Torture and ill-treatment given to Ukraine<sup>1</sup>**

### **1. Some general problems**

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Standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment are one of the few progressive driving forces for changing national penitentiary legislation and practice. Together with the standards of the European Court of Human Rights, they are the real adversaries of the shortcomings of the national penitentiary system. Meanwhile, the recommendatory nature of the CPT's standards does not allow them to achieve the maximum possible strong impact on the legislation in the penitentiary sphere.

At the same time, we should not forget about the "indirect compulsory" of these standards. This is the absolute authority of the Committee for the European Court of Human Rights, which often turns in its judgments to observations made after the visit to Ukraine, and generally maintaining their orientation and content, adopts a judgment against our country. These judgments and the need to pay the satisfaction under them become the result of neglect of the Government to recommendations expressed by the Committee.

Ensuring implementation of observations of this body also relies on a kind of "soft pressure". It is also about the self-involvement of international agencies, and international and national NGOs in their lobbying. Also the very fact of the visits of its delegations and "putting to shame" administration places of detention by unacceptable conditions of detention and treatment of prisoners, the provisions of legislation, which often has a significant impact on

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<sup>1</sup> The author of the Section — Vadym Chovgan.

the implementation of the recommendations. This approach is reinforced by the fact that the Committee reiterates its recommendations from year to year and makes national authorities to feel uncomfortable when justifying their “disobedience” in their responses to the observations of the Reports of the Committee.

In recent years, the CPT has increased its activity towards institutions of the State Penitentiary Service of Ukraine. Thus, if more than a 10 years (from 1998 to 2009) it carried out 7 visits to Ukraine, one of which did not concern institutions of this agency, from 2010 to the beginning of 2014 there were 4 such visits, including visits unplanned ad hoc. In addition, for the last four years, visits have been conducted each year: 2011, 2012, 2013, and 2014. Its focusing on penitentiary sphere has become almost a tradition.

This is not surprising. For example, observations made during a visit in 2012, exceeded even the negative conclusions that were made during its previous visits. This visit was unprecedented in its “explosiveness» not only in the history of the CPT’s visits to Ukraine, but also in the history of its existence, and it is almost 25 visits to 47 countries of the Council of Europe.

This statement is based on the fact that according of the results of this visit the procedure of “public statement” has been started. It may lead to a public statement against our country. Such right of the Committee is provided in paragraph 2 of Article 10 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment if national authorities refuse to cooperate or refuse to improve the situation with regard to the recommendations of the Committee. In fact, Ukraine had already done these actions as it is stated in the Report.

It is necessary to draw attention of the Reader to the fact that during the whole period of its existence, the Committee has made the decision to make a public statement only for the three countries. The first was Turkey due to omission of the authorities in the fight against ill-treatment in police station, the second — Russia in connection with the situation in Chechnya, where mass tortures in detention centers as a result of the Russian-Chechen armed conflict were practiced, and the third, in comparison recently, has been Greece due to the appalling conditions of detention in special centers for migrants (duration of detention, detention common man and woman, and so on).

Thus, Ukraine is the first country in the history of the CPT which may become the subject of a public statement of the CPT due to poor cooperation for improving the situation in prisons. In this, our country may become truly

exceptional. In particular, special concern of the CPT was caused by a brazen intimidation of prisoners by penitentiary administrations (or other prisoners with their motivation) before, after and even during its visit. These actions were carried out in order to prevent the communication of prisoners “in the wrong direction” (in the Oleksiyivska prison no. 25 and the Stryzhavska prison no. 81).

However, this is not the only motive. As it is evident from the Report, it raises a number of other serious systemic problems of national penitentiary system. Conditions of detention in prisons, torture, unacceptable treatment of prisoners by the staff, their working conditions, corruption, situation with life-sentenced women and men and even unsatisfactory procedure and terms of service of prison staff — all this became a matter of concern of the Committee.

It should also be noted that the CPT often does not dare to talk about tortures in penitentiary institutions. In most cases in its practice of torture made comments about the police and its departments. However, in the Report of 2012 the use of torture in the correctional colonies was described and this was the focus of the CPT’s concern. The Reader’s attention should not avoid the fact that only the European Court of Human Rights may officially recognize the presence or absence of torture in each case, and therefore, accordingly, it is not within the competence of the Committee. However, it has a right to emphasize that certain behavior can potentially be considered as torture, as it did in §16 of the Report (on the Oleksiyivska colony no. 25), §17 (on the Stryzhavska colony no. 81). In the future, such its observations, as the practice of the ECHR shows, with a great degree of probability will form the basis for judgments against Ukraine and, in fact, will be a kind of “evidence” of torture in these colonies during determining violations of the rights of Ukrainian prisoners by this Court.

The visit of 2012, as well as the Report on it, distinguished by the fact that during this visit, at the first time in its history, the Committee had found instruments of torture in prison (in the Stryzhavska colony no. 81). Earlier it happened only in the police stations. Photos of these items, by the way, are available on the website of the CPT. They include wooden sticks wrapped in paper or plastic wrap, wooden paddle used for stirring food in the kitchen and so on. Explanations of prison administration that all this was used as trellis for plants are ridiculous. However, the delegation of the Committee called these statements “unconvincing.”

Interestingly, the unofficial translation of the State Penitentiary Service did not contain not only these photos, and even guidelines for the presence of annexes to the Report of 2012, including, in particular, the annex of consolidated recommendations for our country (which in the Reports itself are usually only allocated but not systematized) and mentioned photographs.

Even in 2013 it was confirmed that the SPS of Ukraine had not learned from their previous experience. During the visit of the CPT in October 2013, some penitentiary institutions generally tried to deceive it in the literally sense of the word. For example it happened in the Stryzhavska colony no. 81, where during its visit in 2012, the CPT expressed serious concerns over intimidation of some prisoners who were talking confidentially after the end of the visit of a delegation of the CPT. Despite this unfortunate story, new facts become known that confidential conversations with prisoners which are given a great importance are tapped by means of special devices. In addition, the same trick aimed obviously at revenge for some prisoners for evasion of officials of responsibility was used in 2013 as it was suspected by the CPT.

The provision of inaccurate information by the staff of the Krivorizhska colony no. 3 and the Dnepropetrovsk SIZO, about the use of dogs to life-sentenced prisoners held in them can be considered just as another attempt of deception.

By a similar negligent context the co-operation with the Committee on the implementation of its recommendations about the need for amending the national legislation can be characterized, which will be shown in this section.

An indication that the Reports of the CPT are not a priority for penitentiary agency is that often from year to year it repeats the same remarks. The SPS of Ukraine (formerly the same policy was embodied by the State Department for the Execution of Sentences) just does not want to implement them excusing, justifying and otherwise evading their implementation, which will be discussed in this text. Nevertheless that usually for the implementation of standards only the political will of the leadership of this body is needed.

Of course, changing the laws of Ukraine, which are often contrary to the standards of the CPT is not within the competence of the SPS of Ukraine. However, they should at least begin to change their departmental normative material. In addition, given the current practice, penitentiary service plays an im-

portant role in the field of legislative initiatives of the Government of Ukraine in the penitentiary field.

Unfortunately, the opportunity to influence the situation is not used in order to implement international standards, but for lobbying their official interests under the guise of desire for improvement of the situation with human rights. For now the Service has not developed any draft law that would be specifically intended to implement the CPT's recommendations, though, as it is evidenced by the analysis of its Reports on the visit to Ukraine, dozens changes should be made in one Penal Code of Ukraine, without mentioning other acts relating to the penitentiary sphere.

It is not surprising, because in the Concept of State Policy on reforming the State Penitentiary Service of Ukraine the standards of the CPT are only mentioned, but there are no delineated ways of implementation of them, even an intention to implement them is not declared.

All these circumstances prompted us to conduct this research aimed at the implementation of the recommendations relating to the necessity of changing the regulatory framework.

It should be noted that the specificity of this research is also that it was carried out during changing large array of regulatory material in the penitentiary sphere, so sometimes we analyze those draft regulatory documents have been prepared and have the potential to be adopted in the future. We can immediately tell that in these draft regulations there are no traceable intentions to improve the situation, particularly with the implementation of recommendations of the CPT. Particular concern is caused by determination of such a monumental the internal life of prisons document as the Internal Regulations of penitentiary institutions. We hope that its adoption will be delayed for proper and genuine public discussion with the existence of political will on the perception of the recommendations made by the public, had not been heard during the "discussion" of the IR of PI and absolutely had not taken place during adoption of the controversial IR of SIZO.

The analysis of penitentiary legislation in the light of the standards and recommendations of the CPT is carried out in this Section given the state of the legislation of April 30, 2014. In particular, the major changes to the Penal Code of Ukraine, which became came into force on April 29, 2014, are taken into account. However, the recommendations of the Report of the CPT on the results of his visit to Ukraine of 2013, which was published on the same day, are considered separately in the next Section.

## 2. Contacts with the outside world

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### 2.1. Visits and telephone conversations

The Committee devotes considerable attention to the contact with the outside world. Its importance is certified by the science of criminal executive law, which confirms that maintenance of contacts with the outside world has a positive influence on the behavior of the convicts/detainees during their stay in penitentiary institutions, and after release from these institutions, and reintegration into society. Recent studies have repeatedly confirmed that maintenance of contacts with outside world has a major impact on reducing recurrence<sup>2</sup>.

In its General Standards (extract from 2nd General Report of 1991, paragraph 51) the Committee states:

“It is also very important for prisoners to maintain reasonably good contact with the outside world. Above all, a prisoner must be given the means of safeguarding his relationships with his family and close friends. The guiding principle should be the promotion of contact with the outside world; any limitations upon such contact should be based exclusively on security concerns of an appreciable nature or resource considerations.

The CPT wishes to emphasize in this context on the need for some flexibility as the application of rules regards on visits and telephone contacts vis-a-vis for prisoners whose families live far away (thereby rendering regular visits impracticable). For example, such prisoners could be allowed to accumulate visiting time and/or be offered improved possibilities for telephone contacts with their families.”

In other words, this is the standard of the general idea — a maximum of contacts with the outside world for prisoners. It also contains comments on the justification of limitations of contacts and need for flexibility in procedure of provision of visits, in particular, the ability to accumulate unused visits. In the light of this, the first discrepancies are observed, because the national legislation in force does not provide such a possibility, but in practice it is interpreted as a prohibition. This is confirmed by non-implementation of

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<sup>2</sup> *Duwe G., Clark V. Blessed Be the Social Tie That Binds: The Effects of Prison Visitation on Offender Recidivism // Criminal Justice Policy Review.* — 2013. — no. 24. — pp. 271–296.

this standard into the Project of Internal Regulations of the Institutions of Execution of Sentences (hereinafter — IRIES), in which it is stated that “unused visits in the current period are not transferred for the next period,” while there are no exceptions and assistance for people serving sentences far from their homes (Section 14.1). This provision shall be replaced by permission for accumulation of visits at least for those convicts who are serving sentences not in the region of residence of their relatives.

A serious problem is the availability of the automatic prohibition of receiving visits and phone calls for all prisoners who are placed in a disciplinary cell. The Law of Ukraine of 05.09. 2013 “On Amendments to the Penal Code of Ukraine regarding the manner and conditions of serving of criminal sentences” even worse was fixed in section 11 of Article 134 of the Penal of Ukraine, which is completely divorced from of good prison practices:

“During the detention in a disciplinary cell (DISO), a punishment cell (kartzler) or cell-type premises (solitary confinement), the convicts are prohibited to have visits, phone calls, buy food and necessities, receiving parcels (assists) and packages, use board games”.

Before the convicts were also prohibited to have visits, receive parcels (assists) and packages, but phone calls were not prohibited. However, even in such a version, this provision was incompatible with the standards of the CPT.

General Standards (§61 of the 21-st General Report of 2011), in particular, contain the following information:

“As with all other regimes applied to prisoners, the principle that prisoners placed in solitary confinement should be subject to no more restrictions than are necessary for their safe and orderly confinement must be followed. Further, special efforts should be made to enhance the regime of those kept in long-term solitary confinement, which need particular attention to minimize the damage that this measure can do to them. It is not necessary to have an “all or nothing” approach to the question. Each particular restriction should only be applied as appropriate to the assessed risk of the individual prisoner”. In this case, the approach “all or nothing” refers to an approach in which all convicts are forbidden to perform or not to perform some action, have some items without any previous procedure of their individualization, i. e., without the possibility of the imposition of such restrictions when they are really needed. Instead, the automatic limit is applied for the rights of all prisoners with a particular status (in this case,

for example, the placement into a disciplinary cell, a punishment cell or cell-type premises).

Considering the above, the prohibition of phone calls all people who are placed into a disciplinary cell, a punishment cell or cell-type premises, contradicts General Standards of the CPT. Similarly, the prohibition of visits prisoners who are placed to a disciplinary cell, a punishment cell or cell-type premises contradicts these Standards, given the absence of any justification for such restrictions, and their automatic nature.

This is additionally confirmed by the CPT's Standards, namely, the need of the principle of necessary limitations while serving a disciplinary penalty is emphasized in §55 of the General Report of 2011:

“(The) rule that only restrictions necessary for the safe and orderly confinement of the prisoner and the requirements of justice are permitted applies equally to prisoners undergoing solitary confinement (in context, this means not only single, but also other types of disciplinary cell, what is indicated by the CPT. — *Author's note*<sup>3</sup>). Accordingly, during solitary confinement there should, for example, be no automatic withdrawal of rights to visits, telephone calls and correspondence or of access to resources normally available to prisoners (such as reading materials). Equally, the regime should be flexible enough to permit relaxation of any restriction which is not necessary in individual cases.

The same thing was emphasized in the Report on the visit to Ukraine of 2009 (§150):

“It should be added that inmates placed in DIZO/kartzer and PKT cells are, as a rule, automatically deprived of contact with the outside world (i. e. visits, letters and phone calls). **The CPT recommends that the Ukrainian authorities take steps to ensure that placement of prisoners in a DIZO/kartzer and PKT does not include a total prohibition on family contacts** (see also Rule 60 (4) of the European Prison Rules). **Any restrictions on family contacts as a form of punishment should be used only where the offense relates to such contacts**” (emphasis of font is unchanged). It is said in the last sentence that if disciplinary action is im-

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<sup>3</sup> It should be noted that “solitary confinement” under §54 of the 11th General Report should not be interpreted literally and can mean retaining more than 1 person in extra isolation, the main feature of which is that it is used “as a result of the judgment, as disciplinary sanctions, as a preventive measure, administrative measure, or for protection of a specific the convict.”

posed due to violations of procedure of visits, the person can be reasonably limited in visits.

However, the Law of Ukraine "On Amendments to the Penal Code of Ukraine concerning adaptation of legal status of the convicted people to European standards" of 24.04.2014 has improved in some way the situation of convicts by amending Article 134 of the Penal Code of Ukraine and providing permission to have visits while staying in DISO, punishment cell or solitary confinement cell with lawyers or other experts in law, who are entitled to provide legal assistance in person or on behalf of legal entity.

For similar reasons, the unreasonable restriction is prohibition of visits for convicts during detention in the division of quarantine, diagnostic and distribution (except for visits from a lawyer). This provision was included in the recent repressive legislation bill of 05.09.2013 "On Amendments to the Criminal Procedure Code of Ukraine regarding the manner and conditions of serving of sentences." Also, according to this act, the list of people with whom people sentenced to restriction or deprivation of liberty shall have the right for long-term visits, and sentenced to life imprisonment — short-term visits, now includes only close relatives (spouses, parents, children, adoptive parents, adopted children, native brothers and sisters, grandparents, grandchildren), that just is not acceptable, if we take into account the standard of the CPT about inadmissibility of automatic restrictions of the rights of convicts.

This rule will complicate maintaining contact with people who are not included in this list, let alone the setting up some useful contacts. If, in respect of people sentenced to imprisonment for a definite term of imprisonment, this restriction may not be strongly expressed, as they can maintain contact with such people at least during short-term visits, then sentenced to life imprisonment may be in a situation of serious discrimination because if they do not have families, it means that they do not have any right for visits.

## **2.2. Conditions and grounds for conduction of visits**

Many standards of the CPT that have been expressed regarding the right for visits itself and conditions or the visits are related to the life-sentenced prisoners. However, the essence of these standards is equally applicable to the prisoners sentenced for deprivation of liberty for definite period of time.

As an example we can begin from consideration of the CPT's reaction to problems of obtaining of visits for life-sentenced prisoners, and especially

the prohibition of long-term visits for life-sentenced prisoners, which was canceled the adoption of the Law of Ukraine no. 4525 "On Amendments to the Penal Code of Ukraine on the adaptation of the legal status of convicted people to European standards" on 24.04.2014.

In §92 of its Report on the result of the visit to Ukraine of 2009 the CPT noted:

"(...) life-sentenced prisoners should only be prohibited from receiving long-term visits on the basis of an individual risk assessment"; "(...)special efforts should be made to prevent the breakdown of family ties of prisoners serving life sentences. Ukrainian legislation continues to impose severe restrictions on the visiting entitlement of life sentenced prisoners".

In general, necessity to consider individualization during application of restriction of rights of prisoners have long turned to the standard of the CPT and is mentioned in many General reports.

This standard was repeatedly reminded in its reports on the result of its visits to Ukraine, including the paragraphs, related to the rights of life-sentenced prisoners. For instance, in §75 of its Report on the results of its visit to Ukraine of 2000 the CPT noted that risk/needs assessment of life-sentenced prisoners should therefore be made on a case by case basis".

Special attention was paid to the conditions of the openness of visits (absence of partitions between people who have visits, absence of control of conversations by the staff of institution, etc.).

In the Memorandum of the CPT Actual/real life sentences CPT (2007) 55, prepared by Mr Jørgen Worsaae Rasmussen it is mentioned:

"Frequent visits and visits of long duration under conditions that allow for privacy and physical contact are equally essential (for maintenance of family relations — Author's note) (...)

(If) letters or visits endanger safety and security, consideration should be given to allowing them to continue using preventive procedures, for example reading correspondence and searching before and after visits.

The negative effects of institutionalization upon prisoners serving long sentences will be less pronounced, and they will be better equipped for release, if they are able effectively to maintain contact with the outside world. (...)

To systematically deny to life-sentenced prisoners — for years on end — the possibility of having open visits, is indefensible. The granting

or withholding of open visits should be based on individual risk assessments”.

Interestingly, the prohibition of long-term visits is often seen as being discriminatory on the ground of gender, because life-sentenced women are allowed to obtain such visits.

Application of automatic and inflexible restrictions, as interference in the right to privacy, provided by Article 8 of the Convention for the Protection of Human Rights and fundamental freedoms (hereinafter — the Convention), in the context of the situation of life-sentenced prisoners, is contrary to the standards of the CPT from another point of view. Restrictions of visits for life-sentenced prisoners and others sentenced to imprisonment are not justified by the circumstances in which the visit are conducted — supervision and even listening, glass partition as a barrier to any physical contact. It should be specifically mentioned that our further observations on the conditions of the visits are related both with rights life-sentenced prisoners and other prisoners, and therefore should be taken into account as those which require appropriate changes in legal framework.

As it was specified, life-sentenced prisoners are automatically deprived of any opportunity to obtain any visits in conditions which allows certain openness, physical contact. This prohibition is applied to all prisoners in this category, regardless their behavior and social danger, attitude to work and training. Among other things, it is contrary to the standards of the European Court of Human Rights, despite the fact that the Court has previously found violations by Ukraine of its obligations under the Convention in this respect (see, for example, §44, *Trosin v. Ukraine*, no. 39758/05).

In this judgment it is just pointed out a very important idea for national penitentiary practice about the necessity of development of individual assessment when laying restrictions on prisoners which, incidentally, are the essence of punishment (Article 50 of the Criminal Code of Ukraine). The Court expressed it as follows: “in the present case the relevant provisions of domestic law introduced automatic restrictions on frequency and length of visits for all life prisoners and did not offer any degree of flexibility for determining whether such severe limitations were appropriate or indeed necessary in each individual case even though they were applied to prisoners sentenced to the highest penalty under the criminal law. The Court considers that regulation of such issues may not amount to inflexible restrictions and the States are expected to develop their proportionality assessment technique enabling

the authorities to balance the competing individual and public interests and to take into account peculiarities of each individual case" (§42). Similar arguments were made about systematic presence on the staff of institution during visits: "Accordingly, the manner of conducting the family visits, which was also rigidly regulated by law without any individualisation procedures, did not allow any privacy and excluded any physical contact between the applicant and his visitors. The manner in which the meetings were held affected different aspects of the applicant's family life in so far as different types of relations between the applicant and each visitor were involved. Moreover, the presence of the prison officer affected the intimacy of the applicant's communication with the family members. The Court does not find any evidence to show that such far-reaching restrictions were necessary in the applicant's case. (...) The Court therefore considers that the State did not take the necessary measures to ensure that the applicant's private interest in meeting with his family was properly balanced against the relevant public interest in restricting prisoners' contact with the outside world. It further holds that the restrictions complained of were not justified as regards the frequency and length of the family visits, the number of people admitted per visit, and the manner of conducting these visits. For the above reasons there has been a violation of Article 8 of the Convention". (§§46, 47)

This approach is consistent with the previous practice of the Court. In one of the most important judgments in the penitentiary sphere — *Dickson v. the United Kingdom* the Court found that the regulation of such matters cannot be based on inflexible restrictions and, therefore, the states are expected to develop methods for assessment of their proportionality and balance of competing individual and public interests, tailored to each individual case (no. 44362/04, §§82–85).

The European Court has its own test for assessment of the reasonableness of restrictions of the rights enshrined in the Convention, for compliance with its provisions, which equally applies for justification of restrictions of prisoners' rights<sup>4</sup>. It includes three components:

- a) the provision of a restriction by law;
- b) compliance with the objectives set out in the Convention;

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<sup>4</sup> For details, see.: *Chovgan V. O.* Standards of restriction of prisoners' rights in the European Court of Human Rights // Problems of legality: collection of scientific papers. / Edit. by V. Ya. Tatsiy — Kh.: Nat. Univ. "Yaroslav the Wise Law Academy of Ukraine" — 2013. — Vol. 122. — pp. 251–258.

- c) the need in a democratic society. As part of this test, adequacy or proportionality of each restriction, the validity of the purposes to which it is directed is estimated. The idea of proportionality also includes an indicated standard of “individualization” of restrictions, which requires from each state development of evaluation of techniques of assessment of necessary for use of restriction of citizens’ rights, particularly rights of prisoners. Regarding the latter, there is the tendency of “additional” standard of restrictions in the Court’s practice, which means taking into account penology grounds for restrictions. However, even these grounds should fit the requirements of the test with the caveat that the case law has not yet formed this standard, taking into consideration that restrictions of the prisoners’ rights have a special nature, as they shall be consistent with the goals of punishment and their execution in each country.

In this regard it should be noted that the CPT, apparently in order to facilitate this task, and even for supplementation/clarification of the Court’s practice, specifically outlined its view of this test concerning the reasonableness of the restrictions which are applied during imprisonment in solitary confinement cells and are generally applied for other restrictions. All restrictions, in his view, should be (further there is represented only language that is equally suited to all prisoners’ restrictions):

- a) proportional: any additional restrictions of the prisoners’ rights should be linked with actual or potential harm that prisoners may cause or have caused by their actions (or damage which they may suffer themselves) in prison conditions;
- b) lawful: information about restrictions should be provided in a comprehensible form to all who may be exposed to them. The law should specify the specific circumstances in which they may be assigned, people who may apply them, a procedure which such people should follow, prisoners’ rights to influence decision-making and make requests under this procedure (this obviously applies to the so-called law enforcement constraints, i. e., the application of which depends on the administration of the institution);
- c) reasonable;
- d) necessary: only those restrictions should be applied that are necessary for the safe and orderly serving of prison term, and they should be justified. Accordingly, there could not be, for example, the automatic

denial of visits, phone calls and letters or access to resources for which prisoners usually have access (e. g., reading materials). The same treatment should be flexible enough to allow removal of any restrictions that are not necessary in some cases;

- e) non-discriminatory: when applying restrictions not only all relevant circumstances should be considered, but redundant restrictions should not be applied.

Issues concerning techniques of assessment of individual risk were outlined in 2003 in Recommendation Rec (2003) 23 of the Committee of Ministers of the Council of Europe to member states on the management by prison administrations of life sentence and other long-term prisoners. In particular, it includes special chapter dedicated to this problem, in which there are the main requirements for assessment of individual risk. Thus, a careful appraisal should be made by the prison administration to determine whether individual prisoners pose risks to themselves and others. The range of risks assessed should include harm to self, to other prisoners, to people working in or visiting the prison, or to the community, and the likelihood of escape, or of committing another serious offence on prison leave or release. Needs assessments should seek to identify the personal needs and characteristics associated with the prisoner's offence(s) and harmful behaviour ("criminogenic needs"). To the greatest extent possible, criminogenic needs should be addressed so as to reduce offences and harmful behaviour by prisoners both during detention and after release. The initial risk and needs assessment should be conducted by appropriately trained staff and preferably take place in an assessment centre. Use should be made of modern risk and needs assessment instruments as guides to decisions on the implementation of life and long-term sentences. Since risk and needs assessment instruments always contain a margin of error, they should never be the sole method used to inform decision-making but should be supplemented by other forms of assessment. All risk and needs assessment instruments should be evaluated so that their strengths and weaknesses become known.

Also, in §22 of this Recommendation it is noted that visits should be allowed with the maximum possible frequency and privacy. If such provision endangers safety or security, or if justified by risk assessment, these contacts may be accompanied by reasonable security measures, such as monitoring of correspondence and searches before and after visits. It should be noted that here we are not even talking about the possibility of restrictions with the pur-

poses of security, physical contact between prisoners and people who come to visit them, but only for surveillance.

In the same vein provisions of Recommendation R (82) 17 of the Committee of Ministers of the Council of Europe to the members states on the custody and treatment of dangerous prisoners are formulated. In this Recommendation the governments of member states are recommended: to apply, as far as possible, ordinary prison regulations to dangerous prisoners; to apply security measures only to the extent to which they are necessarily required and in a way respectful of human dignity and rights; to ensure that security measures take into account the varying requirements of different kinds of dangerousness; to have a system for regular review to ensure that time spent in reinforced security custody and level of security applied do not exceed what is required.

Speculative in light of these standards is that in Ukraine individualization during application of restrictions of right, technique of verification of their validity, the assessment of individual risk, are not even mentioned in the penal law and are not applied in practice.

Moreover, our experience shows that the management of the State Penitentiary Service of Ukraine is not often familiar with the idea of necessity of individualization of restrictions of prisoners' rights and is continuing the policy, of implementation of automatic restrictions which are fixed in the legislation. It is not surprising, because the Ukrainian penal legislation in its substantial part inherited the ideas incorporated in Soviet corrective-labor legislation, which was designed to ensure "compliance of the same rules by all convicts", provide prohibition by the same principle — based solely on the status of the convict in a colony of a particular lever of security. The practice of those times, of course, showed the failure of this idea, and in return it carried a kind of "individualization", meaning the use of certain volume of restrictions of rights as something informal and depending on merits of prisoners before administration. It should be noted that we do not deny the existence of the idea of individualization of execution of sentences, but only its significant limitations in identifying of restrictions of rights which are applicable for prisoners.

Thus, the idea of assessment of individual risk, practical techniques for its implementation is a key to the proper implementation of the standards of the CPT and other bodies of the Council of Europe. It should have a major impact on penal legislation, especially the part that sets the range of restrictions of rights which are applicable for prisoners. It includes, among other things,

restrictions of visits, phone calls of prisoners, for which the rules shall be ensured with the possibility of the discretion of the administration of the penal institution for their use, at what, the minimum guarantees obtaining the right for the purpose of limitation reasonable discretion shall be fixed. For example, the minimum number of visits prisoners may be established, but there shall be indicated the possibility of its increase based on assessment of individual risk. This risk assessment shall be provided only in the light of the prisoner's behavior, not the other way around. So, for instance, provision or not provision of visits shall not be the part of the disciplinary practices, and during consideration of the issue about provision of a visit only those features shall be taken into account that characterize the prisoner as the one who can pose a danger to others, but not the one who "badly behaved" with the administration of the institution.

The same approach should be applied in relation to the conditions of the visits. Supervision during visits, fencing by glass partitions, communication through a telephone handset, another limitation of contacts are allowed only on the basis of assessment of individual risk of harming the others.

In this regard, we should also recall that in accordance with Rule 24.4 of the European Prison Rules "the arrangements for visits shall be such as to allow prisoners to maintain and develop family relationships in as normal a manner as possible."

At the same time, except the above problems with openness of visits, in accordance with Section 46 of the IRCES, short-term visits for prisoners are provided with relatives and other individuals under the supervision of prison officials. Any element of flexibility of this rule is not allowed, any assessment of individual risk needs of a prisoner is not applied. In accordance with Annex 14 to the Internal Regulations of pretrial detention facilities of the State Penitentiary Service of Ukraine (Order of the Ministry of Justice of 18.03. 2013) in detention facilities short-term visits are provided for life-sentenced prisoners, which are held in them, as well as for prisoners who are brought to responsibility for committing heinous crimes; booth for visits are additionally equipped with metal bars; doors with mechanical lock and little windows for removal (put of) of handcuffs.

From all this we can make a conclusion about necessity of amending the rules about mandatory supervision over the visits, which in principle can be done, but outside the listening by the administration and in an environment that does not deny the possibility of personal contact between prisoners and

people who come to visit them. A visit may be made without the possibility of personal contact on the basis of assessment of individual risk.

The rules of provision of visits fixed in the of Penal Code of Ukraine should be amended, in particular, the rules regarding the frequency of visits for prisoners sentenced for a fixed term of imprisonment or life-sentenced prisoners should be revised in the direction of increasing (at least once a week, as is done in most countries of the European Union), and there also should be included provisions that would allow more flexibility in determining the number of visits. Today's edition of the Penal Code raises unanswered questions such as "Why is there one short-term visit once a month instead of two?" "Why is there one long-term visit every three months instead of two and a half, for example?"

We should not forget that the increase of number of such visits can only lead to positive outcomes concerning the research cited above. Whatever this thesis is skeptically, but society is also interested in larger number and openness of conditions of visits for prisoners.

It finds its justification in the CPT's standards. Pursuant to Section 3 of §3 of the 11th General Report of 2000 negative effects of detention for prisoners serving long-term sentences may be reduced if prisoners are able to maintain proper contacts with the outside world.

As for long-term visits for life-sentenced prisoners, then, as it was pointed out, recently they finally have been allowed to have one long-term visit in three months. However, on the CPT's point of view, the amount of rights of these prisoners as a whole must be on the same level as for the other prisoners. This requirement is supported by §100 of the Report on the visit to Ukraine of 2002, in which the CPT stressed the equalization of the visits for the life-sentenced prisoners and other prisoners, §114 of Report on a visit of 2005, the same content, §53 of the Report on the visit to Ukraine of 2012, which states: "the visiting entitlements (for life-sentenced prisoners — The Author's remark) remain far too modest. In addition, lifers were still not entitled to long visits and the rare short visits always took place in booths through a glass partition, with close relatives only. The CPT calls upon the Ukrainian authorities to amend further the legislation with a view to bringing the visit entitlement of life-sentenced prisoners at least on a par with that of inmates held in conditions of minimum security 43. Any restrictions (e. g. organization of short visits through a partition, limitation of categories of visitor, prohibition of long visits, etc.) should be strictly necessary and applied on the basis of an individual

risk assessment". "As a general rule, visits should take place in open conditions (e.g. around a table), visits through a partition being the exception" (§92 of the Report of the visit to Ukraine of 2009.

In another Report on the visit to Ukraine of 1998 the Committee mentioned in §136 the need to ensure adequate human contact for this category of prisoners. It was pointed out that, if necessary, the relevant legislation be amended.

Accordingly, the number of visits should be equalized, however, it remains unclear, with comparison to what categories it should be made, as prisoners serving sentences in the division of rehabilitation, and, for example, prisoners serving sentenced in division of socialization have different number of allowed visits.

Overall, all the arguments on the need for more open conditions of the visits are entirely suitable prisoners sentenced for deprivation of liberty for a specified period and people taken into custody. Visits with them must be done in confidential conditions with the possibilities of physical contact and closed conditions should be the exception rather than the rule.

Additionally, there should be mentioned some of the recommendations of the CPT in this regard.

Thus, in 137 of the Report of the visit to Ukraine of 2002 the CPT noted:

"With regard to the conditions under which visits take place, the CPT regrets the fact that short visits generally took place in glass booths, and prisoners and visitors had to use a telephone... A welcome exception was the room set aside in SIZO No. 21 for visits at a table for minors and economic prisoners. This is an example to be followed... (The Committee) would finally appreciate the Ukrainian authorities' views on the invitation to the authorities, reiterated in paragraph 123 of its report on the 2000 visit, to review the conditions under which visits take place in order to ensure that, as far as possible, both sentenced and remand prisoners receive visits in more open conditions". In their response to these observations the national authorities said: "With the purpose of improving conditions of direct contact during short-term visits, at Romny correctional colony no. 56 and Shostka correctional colony no. 66 the glass barriers separating prisoners from their visitors were removed as an experiment. If the experiment is successful, recommendations will be given to other penal establishments to this effect".

In the Report on the visit to Ukraine of 2005 the CPT mentioned (§145):

“As in the past, short visits took place in glass booths, with prisoners and visitors speaking to each other by telephone (some of which, at Colony No. 65 for example, were not in service). The Ukrainian authorities stated in this connection that the installation of visit facilities without a glass separation was envisaged as part of major renovation work of the visiting areas”.

This recommendation was modified and repeated in the report of 2009 (§153): The CPT calls upon the Ukrainian authorities to:

“...modify the facilities for short-term visits in order to enable prisoners to receive visits under reasonably open conditions. Open visiting arrangements should be the rule and closed ones the exception, such exceptions to be based on well founded and reasoned decisions following individual assessment of the potential risk posed by a particular prisoner. Further, the capacity of the short term visiting facilities should be increased to meet the prison population’s needs”.

### **2.3. Contacts with outside world for people held in the pre-trial detention facilities**

Grounds and procedure visits for people taken into custody, does not hold water. Not surprisingly, the CPT has repeatedly pointed to the need of changing the approach to the contacts for this category of prisoners.

The problem has its origin in several components.

A) In accordance with Article 12 of the Law of Ukraine “On pre-trial detention” visits of relatives or other people for people taken into custody may<sup>5</sup> be granted by the administration of a pre-trial detention facility only with the written permission of the investigator or the judge engaged in criminal proceedings, at least three times a month. A bit hypocritical is the last part of the disposition, indicating that the frequency of visits should be at least three per month. In fact, if there is no permission of a court or an investigator carrying out criminal proceedings, there are no visits, so this warranty is illusory. How-

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<sup>5</sup> The wording “may” in this case is unacceptable and requires special underlining through excessive degree dispositiveness and, therefore, the threat of abuse. It as well needs to be amended.

ever, it is still important to ensure the provision of a minimum of three visits by the administration of the facility, if there is such permission.

B) According to §1.1 of Internal Regulations of pre-trial detention facilities of the State Penitentiary Service of Ukraine (Order of the Ministry of Justice of 18.03. 2013) (hereinafter — IR of the SIZO), the resolution of the investigator or the court engaged in criminal proceedings is valid only for one visit. This leads to debilitating “bustle” of relatives (or defense lawyer who helps the relatives to get a visit) in order to get a visit with detainee that should be done separately for each visit.

C) Conditions of visits are far from those that contribute to the maintenance of normal contact at least with family members. Such conditions of visits exclude the possibility of direct contact with them, and communication is done via the handset and through the glass (double glass 6 mm thick or organic glass). Equally unacceptable is the norm, which provides equipment of glass partitions with so-called “decorative bars”, which could not only add scenery but could bring further suffering to the inhumane procedure of visits. All these and some other details of restrictive approach to equipment booths visits are fixed in the Annex 14 of the IR of the SIZO.

Detainees are allowed to see a defense lawyer in conditions which “exclude the possibility of listening or eavesdropping”, while visits are held under conditions that allow the administration of the SIZO to see a detainee or a convict and defense lawyer, but not to hear them. Unfortunately, these conditions are not still applied to visits of relatives and friends which are carried out “in the presence of the “prison authorities.”

Due to this approach to the organization of visits, which is justified by the requirements of security, in the end it still favors negative consequences for the environment of visits with family members. Moreover, this approach violates Article 8 of the European Convention on Human Rights and Fundamental Freedoms in view of the fact that the restriction is automatic, and the state does not establish a fair balance between the interests of the individual and society for the purposes of restriction of the right for privacy, enshrined in paragraph 2 of Article 8.

The situation is even worse, taking into account that the following conditions are also subjected to visits of children of the detainees. In this regard, it is worth to recall the judgment of the European Court of Human Rights Horych against Poland (application no. 13621/08). In this judgment the Court found a violation of Article 8 of the Convention, in particular concerning not

open condition of visits with children for prisoner in custody. In order not to hurt them Mr. Horych had to withdraw from the visits in such circumstances. The reasoning of the Court was the following (§131):

“The Court would note that, by the nature of things, visits from children or, more generally, minors in prison require special arrangements and may be subjected to specific conditions depending on their age, possible effects on their emotional state or well-being and on the personal circumstances of the person visited. However, positive obligations of the State under Article 8, in particular an obligation to enable and assist a detainee in maintaining contact with his close family (see paragraphs 123–124 and 129 above), includes a duty to secure the appropriate, as stress-free for visitors as possible, conditions for receiving visits from his children, regard being had to the practical consequences of imprisonment. That duty is not discharged properly in situations where, as in the present case, the visits from children are organised in a manner exposing them to the view of prison cells and inmates and, as a result, to an inevitably traumatic, exceptionally stressful experience. The Court agrees that, as the applicant said, the exposure to prison life can be shocking even for an adult and, indeed, it must have caused inordinate distress and emotional suffering for his daughters (see paragraphs 39 and 119 above). It further notes that, owing to the authorities’ failure to make adequate visiting arrangements, the applicant, having seen the deeply adverse effects on his daughters, had to desist from seeing them in prison. Throughout his detention from 14 July 2004 to the end of 2008 he saw his oldest daughter twice and each of the two younger ones once. In effect, he was deprived of any personal contact with them for several years.”

It is interesting that juvenile detainees can receive visits in separate rooms without telephone booths and partitions (§1.7 of the IR of the SIZO). It is clear that in this case, logic does not work: all, even minors, relatives of the detainee have to get a visit through the wall and the handset, and juvenile prisoners — no. This does not mean that the in practice visits with open conditions for juvenile prisoners should be terminated, but rather that it should be allowed to all prisoners except those for which those conditions are reasonable in view of the risk assessment which is specifically carried out.

The CPT has repeatedly noted the need for organizations of visits in SIZOs in more open conditions. First time this issue was indicated in the Report on the visit to Ukraine of 1998 (§196).

D) Detainees in SIZOs are not allowed to receive phone calls. Law of Ukraine "On pre-trial detention" does not allow receiving phone calls, and so they are not allowed. Under doubt in this case, by the way, should be put the same type of regulation which is applied: "only that is allowed what is prescribed by law", i. e. specially-allowed type of regulation.

This component also causes some logical comments if we try to justify it by the interests of investigation. Detainees in SIZO are allowed to receive confidential visits by a lawyer, to whom if necessary, they can transferred any information from accomplices, etc., however, the threat of negative information lies at the root of widespread motivation for prohibition of visits.

Also, instead of total prohibition of phone calls, there are no obstacles for providing the right for phone calls with the possibility of relatives dropping by the administration of the institution for all detainees and prediction of possibilities of prohibitions of such calls if there is reason to believe that it could harm the investigation.

All four components as the characteristics of national legislation are contrary to the standards of the CPT. Even in §168 of its Report on the visit to Ukraine of 1998, the CPT states:

"As far as visits to remand prisoners are concerned, the CPT recognizes that it may sometimes be necessary, in the interests of justice, to place certain restrictions on visits for particular remand prisoners. However, these restrictions should be strictly limited to the requirements of the case and should apply for the shortest possible period. On no account should visits between a remand prisoner and his/her family be banned for a prolonged period. If there is considered to be an ongoing risk of collusion, it is preferable to authorize visits but under strict supervision. This approach should also cover correspondence with relatives.

**The CPT recommends that the question of remand prisoners' visits and correspondence be reviewed, in the light of the above remarks (...)"**

In §106 of its Report on the visit to Ukraine of 2002 the CPT noted:

"The CPT considers that the time has also come for the Ukrainian authorities to review the regimes applicable to remand prisoners and to prisoners awaiting final sentencing (having appealed against their sentences). These regimes have certain unacceptable features in that prisoners were, depending on the stage of the proceedings, required to obtain authoriza-

tion from the investigator, prosecutor or court in order to work and keep in contact with the outside world (visits, correspondence).

The CPT recalls that it recognizes that in certain cases it will be necessary, in the interests of an investigation, to limit the contacts of remand prisoners with fellow inmates or with the outside world. However, such restrictions should be decided according to the circumstances of each individual case and applied for the shortest possible time. Further, the need to impose restrictions on certain prisoners cannot justify the blanket imposition of a restrictive regime on the remand population as a whole. Finally, the CPT sees no reason why those awaiting final sentencing should be kept under such a regime solely on the grounds that they have appealed against their sentence.

**The CPT recommends that the Ukrainian authorities take steps without delay — including, if necessary, the removal of any existing legal obstacles — to put an end to the restrictive regime applicable to remand prisoners and prisoners awaiting final sentencing.”**

In continuation of these recommendations and due to their non-implementation, the CPT did not stop repeating the same comments and insist on its recommendations about the contacts. In §152 of the Report on the visit to Ukraine of 2009 the CPT noted:

“Despite previous recommendations by the CPT, the situation as regards remand prisoners’ contact with the outside world remained unchanged. It was rare for such people, including juveniles, to be authorized to receive visits and even to be authorized to send/receive letters, and no telephone calls were allowed. In some instances, the ban on visits continued even after the criminal investigation had been terminated. The delegation met prisoners who had not had any visits for up to 21 months.

**The CPT calls upon the Ukrainian authorities to take measures in order to ensure that remand prisoners are entitled to receive visits and send/receive letters as a matter of principle. Any refusal to permit visits or send/receive letters should be specifically substantiated by the needs of the investigation, require the approval of a body unconnected with the case in hand and be applied for a specified period of time, with reasons stated. If necessary, the relevant legislation and regulations should be amended.**

Further, **the CPT recommends that access to a telephone be guaranteed for remand prisoners; any decision to prohibit or impose restrictions on a given prisoner’s access to a telephone should be based**

**on a substantiated risk of collusion, intimidation or another illegal activity and be for a specified period. The law should be amended accordingly.”** (*bold font is saved*).

From the answer to this remark on the visit of 2009 we can see that the national authorities had also recognized that such restrictions lead to deprivation of detainees from studying by correspondence.

At last, in §50 of the Report of the visit to Ukraine the CPT stated:

“(…) despite the specific recommendations made by the Committee after all previous visits to Ukraine, severe restrictions were still frequently being imposed regarding remand prisoners’ contacts with the outside world. Many remand prisoners were not allowed to receive any visits from people other than their lawyer (or legal representative) nor make telephone calls, for prolonged periods; in a number of cases, this situation had been ongoing for more than a year. Such a state of affairs is not acceptable.

**The CPT once again calls upon the Ukrainian authorities to take measures in order to ensure that remand prisoners are, as a matter of principle, entitled to receive visits and send/receive letters. Any refusal to permit visits or send/receive letters should be specifically substantiated by the needs of the investigation, require the approval of a body unconnected with the case in hand and be applied for a specified period of time, with reasons stated. If necessary, the relevant legislation and regulations should be amended.**

Further, **the Committee reiterates its recommendation that steps be taken to ensure that remand prisoners are, as a rule, granted regular access to a telephone 20.** If there is a perceived risk of collusion in an individual case, a particular phone call could always be monitored. **Any decision to prohibit or impose restrictions on a given prisoner’s access to a telephone should be based on a substantiated risk of collusion, intimidation or another illegal activity and be for a specified period.”** (*bold font is saved*).

We cannot ignore the reference of the CPT in these recommendations to the European Prison Rules (not supplied in the quoted text), which are equally applied to people held in custody. In particular, Rule 24.1, which provides:

“Prisoners shall be allowed to communicate as often as possible by letter, telephone or other forms of communication with their families, other people and representatives of outside organizations and to receive visits from these people” and §99 which provides that **“Unless there is a spe-**

**cific prohibition for a specified period by a judicial authority in an individual case** (*bold font by the Author*), untried prisoners: *a.* shall receive visits and be allowed to communicate with family and other people in the same way as convicted prisoners; *b.* may receive additional visits and have additional access to other forms of communication; and *c.* shall have access to books, newspapers and other news media.”

Analysis of the content of all the above standards indicates that they are ignored by the Law of Ukraine “On pre-trial detention” and the IR of the SIZOs. They also demonstrate that the philosophy of limitation of contacts should be changed. Instead of presumption of prohibition of contacts (visits, correspondence and telephone calls) there should be a presumption of permission of these contacts. Accordingly, all contacts should be allowed from the beginning of detention and instead of getting permission for visits and receiving of correspondence (phone calls, as mentioned, are not allowed at all), the subject who carries out the investigation should be able to limit such contacts. Simultaneously, as it follows from the cited standards of the CPT, every decision about such limitation should be reasonably motivated due to an increased risk of collusion or other illegal activities the person taken into custody, and should clearly define the term of this limitation. Of course, a detainee should be provided with the right for appeal against the decision about such limitation, which also should be enshrined in legislation.

#### **2.4. Correspondence of prisoners, applying with complaints, applications and offers**

Possibility of freely sending and receiving letters, including complaints, applications and a proposal (both kinds of applications of citizens in accordance with the Law of Ukraine «On Applications of Citizens») has a special significance for human rights in closed institutions. The fact is that this law is a guarantee of other rights, because for their protection usually it is necessary to apply freely to any public authority, institution or organization.

During the visit in 2002, the CPT recommended the government to provide detainees and convicts with confidential access to government agencies, whose competence is dealing with complaints, and in accordance with its requirements, to international bodies (paragraph. 124).

However, our analysis shows that this recommendation is far from proper implementation at the legislative level.

Problematic and discrepancy of legislative regulation of the CPT's recommendation is also complicated by the narrow range of subjects, with whom the correspondence may be confidential. As is stipulated in Part 4 of Article 113 of the Penal Code of Ukraine: the only correspondence of convicts that can not be revised (incoming and outgoing), is the correspondence addressed to the High Commissioner of Verkhovna Rada of Ukraine on Human Rights, the European Court of Human Rights and other relevant international organizations, which provided their membership to Ukraine, authorized people of international organizations and the prosecutor. In accordance with paragraph 5 of this Article the correspondence which is addressed to the defense lawyer in criminal proceedings who under the Criminal Procedure Code of Ukraine also should not be subjected to revision.

This means that, for example, correspondence with courts and even territorial management of the SPS of Ukraine is subjected to revision. In other words, convicts can complain confidential on national lever only to the prosecutor and the Ombudsman. Even the appeal against illegal decisions, actions or inaction in administrative proceedings is not protected from revision.

A lawyer, representing the interests of a convict cannot always help here either, because if the representative is not a defense lawyer, correspondence with him should always be reviewed. Moreover, even if he has a defense lawyer's license, which is not a frequent event, the correspondence with him about other things than related to criminal proceedings, should also be reviewed.

These consequences of the imperfect law can be seen from of jurisprudence. For example, under the ruling of Zhytomyr district court the lawyer was denied in satisfaction of her claims concerning unlawful revision letters from the lawyer, who is not a defense counsel in a criminal case:

"Regarding the claim about violation of the applicant's right to correspondence from a lawyer O. Sapozhnikova, which is not subject to review, this part of the claim cannot be satisfied because, as it is seen from the provided copy of the agreement of 09.12.2011 between Mr. Panych Pavlo Oleksandrovych and the lawyer Sapozhnikova Olena Evgenivna, subject of this contract is provision of legal assistance and representation of client's interests in administrative, civil and commercial cases, while Article 113 of the Penal Code of Ukraine clearly provides that only the correspondence addressed by the convicts to the defense lawyer in criminal proceedings, who shall acts under Article 44 of the Code of Criminal Proce-

ture of Ukraine shall not be reviewed, that's why this part of the claim is unfounded and baseless<sup>6</sup>”.

Interestingly, the Ministry of Justice has recently issued the document which is important for the functioning of the places of deprivation of liberty and the rights of prisoners — Order no. 1304/5 «On the adoption of the Instruction of the organization of review of the correspondence (letters) of people held in penal institutions and detention facilities”, which replaced previous similar order SPSU no. 13 of 25.01.2006. Despite the existence of the large number of observations for the provisions contained in the previous Order which directly led to violations of the European Convention on Human Rights and Fundamental Freedoms, their failure to ensure confidentiality, efficiency procedure for submitting complaints, they have moved unchanged to the new Order.

One of the main stumbling blocks of this document is mandatory censorship of correspondence (except for some subjects). The current Penal Code of Ukraine in contrast to the former Correctional Labor Code of the USSR has allegedly abolished the procedure of compulsory censorship of correspondence and replaced it with the procedure of “revision” (Article 113 of the Penal Code of Ukraine). By definition this revision means the process that aims to identify prohibited items in letters rather than reading these letters. Nevertheless the mentioned act keeps the norm which provides that “letters ... (containing — the Author’s note) information which should not be disclosed, shall not be send to the recipient, shall not be given to convicts or people taken into custody, and shall be withdrawn.” This means that: a) the administration of penal institutions is obliged to reveal such information, and therefore read correspondence; b) administration of the institution has a possibility of lawful inclusion into the category “information that should not be disclosed” everything at their discretion, which leads and will lead to massive abuses in this field. As a result, letters that are “not profitable” for administration of penal institutions are just not sent and are not delivered.

Also the practice shows that the fact of sending letters which may disclose illegal actions of the officers of penal institutions can scarcely be proved. It is noteworthy that the SPS of Ukraine has expressed willingness to resolve the issues tangent to this problem and even involves interna-

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<sup>6</sup> Ruling of the Zhytomyr district court of 18.04.2012 // <http://hr-lawyers.org/index.php?id=1339756231>

tional experts for this activity. It is known that among the provisions of the report of one of them — the experts of the Council of Europe James Murdoch, there are many provisions to which the SPS of Ukraine should pay significant attention. In this regard, we need to emphasize that an especially relevant and necessary stage at present is the development, discussion and implementation into the law system and practicing the idea of “immunity” of outgoing correspondence through involvement of social service workers or Ukrainian Post because its censorship and revision actually creates more problems for human rights and security of both convicts and society, rather than vice versa.

Allusions and ideas of this kind are shown in the CPT’s recommendations. For instance, §124 of the Report on the visit to Ukraine of 2000 points to a way of ensuring confidentiality of prisoners’ correspondence– installation of boxes, with exclusive access to them by credible people. In §136 of the Report on the visit to Ukraine of 2002 the noted the need for immediate implementation of recommendations of confidentiality of appeals procedure, expressed in previous reports, including the establishment of boxes that can be checked only by credible people.

## **2.5. Visits of a defense lawyer**

It is not appropriate to list all the recommendations of the CPT on of such an important element of the legal status of prisoners as the right for free and confidential access to a lawyer. We shall mention only the latest recommendation on this issue expressed in the Report on the visit to Ukraine of 2012 (§40):

“access to the prisoners’ lawyers should be prompt and should include the right for the inmates concerned to talk to them in private (e. g. without audio surveillance or penitentiary officials being present).”

If in general there is no problem with the issue of confidentiality, there are some barriers for quick access for lawyer in terms of legislation, which must be eliminated by incorporating regulatory changes.

For example, §2.3 of Chapter 7 of the IR of SIZOs states that “visits prescribed in paragraphs 2.1 and 2.2 of this chapter, shall be provided without limitation in time free from conducting of investigation actions participation in trials, in hours, determined by the daily routine of the SIZO”. However the

Typical daily routine for detainees and convicts who are held in SIZO, states that prisoners have only half an hour of free time, which is also provided for such visits — from 14-00 to 14-30.

Thus in §2.6 of Chapter 7 of the IR of SIZOs states that “visits for detainees and convicts, who are held in health care facilities (it means that the detainee fell ill in SIZO and was taken for treatment to the health care facility outside the institution. — Ed.), are provided by the written permission of the chief of the SIZO or his deputy.”

It should also be noted that the representatives of detainees and convicts in civil, commercial, family and other than criminal, fields of law have no guarantees of free access if they are not lawyers. The result of this is that, for example, a representative of the person in the case on appeal in administrative proceedings against unlawful decisions, actions or inaction of the administration of the penal institutions is not eligible for free and confidential visit. In addition, in accordance with §88 of the IR during imposing sanctions on a convict administration of the colony gives him an opportunity to inform about this the relatives, the defense lawyer or other professionals in law, who are entitled by law to provide legal assistance in person or by proxy of a legal entity.

This situation leads to the fact that prisoners are simply not able to protect themselves efficiently against unlawful decisions, actions or inaction of administration of the penal institutions, as they definitely need to hire a lawyer for this, what usually took a lot of money which they usually lack. An example it can be mentioned the almost complete lack of appeals to the courts against disciplinary actions in the form of placement in DISO via a legal representative.

Unacceptable in terms of the specified standard of the CPT is also the provision fixed in §49 of the IR according to which prisoners shall have visits of a defense lawyer or another legal expert, who has the right to provide legal assistance in person or by proxy entity, during the time free of work and only from get up to bed time. We cannot consider reasonable and normal the provision of the Draft of the IR according to which prisoners shall have visits only such in their spare time from having meals. Prisoners should be able to pick myself that it is more important for them, and ask a lawyer to wait if it is acceptable. On the other hand, if the rule remains unchanged, it can facilitate abuse of the administration of penal institutions in order to delay the time for meetings of defense lawyers with defendants.

### **3. Medical assistance**

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Recently the State Penitentiary Service of Ukraine has drafted the common Order of the Ministry of Justice of Ukraine and the Ministry of Health Protection of Ukraine about adoption of "Rules on organization of provision of medical assistance for people sentenced to deprivation of liberty". It has been placed in the official web-site of the SPS of Ukraine for discussion. Kharkiv Human Rights Protection Group has sent large number of its proposals and observations, concerning, among other things, standards of the CPT.

We should stress that all standards described below shall be applied not only for convicted people, but also for people for whom preventive measures in the form of placement into custody was chosen, taking into consideration the specifications of these preventive measures.

#### **3.1. Confidentiality of medical information**

The national legislation which regulates the aspects of provision of medical assistance in penitentiary institutions requires implementation of the CPT's standards especially, in particular, on confidentiality of medical information. The starting point in regulation of confidentiality shall become the position set in §50 of the 3<sup>rd</sup> General Report of the CPT according to which medical secrecy should be observed in prisons in the same way as in the community. Moreover, pursuant to the standards of the CPT protection of confidentiality of medical information for HIV-positive people is axiomatic, and necessarily of obtaining of informed consent on revealing of HIV-status is "the matter of principle" (§31 of the 11th General Report of the CPT). This position is totally consistent with the World Health Organization's (WHO) guide to the essentials in prison health (2006, Vienna), in which it is mentioned that: "the same requirements of confidentiality applicable under the rules of ethics in medical practice should be applied for the results of medical examinations and tests carried out in prisons with the consent of patients under clinical care."

The Draft Order (the same as the Order in force which shall be replaced by it), however, provides a number of rules which violate these standards. For example, according to the §1.15 of the Draft Order in the case when the prisoner chooses a doctor outside of the penitentiary system, consultation, examination and treatment by chosen doctor shall be carried out in terms of health

institution SPSU in the presence of medical personnel. This may lead to such negative consequences:

- a) Breach of confidentiality of medical information. The advantage of treatment by a doctor from the civil health care institution among other things is that a prisoner may safely trust him/her information about state of health which a prisoner does not want to endanger under disclosure among non-medical personnel, or even worse, disclosure among prisoners (especially HIV status, the presence of which the possibility of treating by doctor from the civil health care institution may be important for the prisoner's wish to be treated, concerning fear of disclosure of their status in the event of applying to the doctors from colonies);
- b) Creates reasons for fears of prisoners when they want to conduct medical fixation of the traces of violence or to show them;
- c) A doctor has to be independent when choosing methods and remedies for treatment, and presence of other doctors may become an obstacle for this. However, this could facilitate improving of quality of treatment, that's why for such a case there should be a possibility of presence of other doctors on condition of obtaining of consent of a prisoner and his/her doctor.

This provision cannot be justified by the requirements of security and, for example, possibility of passing of prohibited items, because each specialist has to undergo mandatory control to determine the presence of prohibited items at the entrance to the penitentiary institution.

According to §2.23 of the Draft Order documents containing information on the state of health of a prisoner and provision of necessary medical care, should be stored in compliance with the conditions that guarantee the confidentiality of this information, however, the procedure for access to medical records by the staff of a penitentiary institution is determined by a separate order of the head of the institution. Therefore, for ensure of the absence of abuse by non-medical personnel there should be legislative guaranties providing that access to medical records by the staff of a penitentiary institution should be the exception and can only be justified by urgent reasons of security and providing the regime of execution and serving of punishments. However, there should be prohibition of access to information about HIV status of a prisoner by the staff of the penitentiary institution, unless his/her written consent.

### **3.2. Confidentiality of medical information of HIV-infected prisoners**

Especially acute is the issue of HIV-infected prisoners. The Management Decision of the World Health Organization and HIV/AIDS Program of the United Nations' "HIV AIDS: prevention, treatment, behavior and support" also contains a similar principle, which requires:

"Prison system should implement rules for...

17. Guarantees of confidentiality of medical information inmate. Such information should be stored in specially protected location that is available only for the medical personnel..."

As it is emphasized in all these standards ensuring confidentiality of HIV-status in penitentiary establishments can sometimes be difficult for implementation, but the prison administration should make efforts in this direction, however, can contribute to the keeping of confidentiality.

Otherwise, the tactic of detection of HIV-infected people with preventive purposes leads to the opposite effect — a real prevention remains aloof, and its task is not achieved.

Moreover, if prisoners are not sure of confidentiality of their HIV status, they simply will not seek medical assistance which, will not contribute to treatment priorities.

However, the administration of the institution may have access to medical information, but with significant restrictions. According to the WHO Guidelines on HIV infection and AIDS in prisons (1993) "Information on the health status and medical treatment of prisoners is confidential (...) Information regarding HIV status may only be disclosed to prison managers if the health personnel consider, with due regard to medical ethics, that this is warranted to ensure the safety and well-being of prisoners and staff, applying to disclosure the same principles as those generally applied in the community."

An important component of confidentiality is the ability of a special confidential application to medical personnel. It is stated in §34 of the 3<sup>rd</sup> General Report of 1993 that prisoners should be able to apply to medical staff in private. As an example, it is pointed to a sealed envelope with a request for confidential examination/treatment. Also paragraph point indicates that the staff should not have access to viewing of these confidential inquiries.

Designated standards are not implemented properly in the Order of the Ministry of Justice of 10.05.2012 (no. 710/5/343) "On the procedure of providing medical assistance for prisoners", as well as in the new Draft Order.

### 3.3. Access to information about own state of health

On the other hand, prisoners should be allowed free access to information on the state of their health. This recommendation is enshrined in the CPT standards, namely in §46 of the 3<sup>rd</sup> General Report. It also requires that prisoners shall be able to send the information (respectively, including copies of medical records) to their families and lawyers. Despite the remoteness and sustainability of this standard of the CPT, profile Order of the Ministry of Justice of 10.05.2012 (no. 710/5/343) concerning provision of medical assistance for prisoners does not affirm the procedure of access to medical records, the removal of these copies, so this procedure is often very difficult in practice. Some colonies in their performances on this occasion often reach absurd and demand from the third party or public organization to send the request about obtaining of following information to the institution, and only after receiving of such a request the consent of the prisoner could be taken. And it could only be provided for that third party.

By the way, the violation of the right of access to the prisoner's own medical documentation is fixed in a recent Special Report on the implementation of the national preventive mechanism (of the Ombudsman) "State of the right to medical care in the detention facilities of the State Penitentiary Service of Ukraine".<sup>7</sup>

Specific absurd practice of interdiction of access to information about own state of health is also enshrined in the regulatory level. Thus, the Draft of Joint Order of the Ministry of Justice and the Ministry of Health Care "On approval of the organization of provision of medical assistance for people sentenced to imprisonment" developed by the SPS of Ukraine includes provision (§1.12) according for which "certificates about release from work, recipes and other **medical records** (*bold font by the Author*) are not given to prisoners".

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<sup>7</sup> State of the right to medical care in detention facilities of the State Penitentiary Service of Ukraine: Special report on the implementation of the national preventive mechanism / Commissioner of the Verkhovna Rada of Ukraine on Human Rights: official publication. — K. 2013. — P. 11 (88 p.) // Access:<http://khisr.kharkov.ua/files/docs/1393856295.pdf>

By the way, similar in meaning and the same unsubstantiated provision is contained in §8.3 of the Order of the Ministry of Justice of Ukraine of 08.06.2012 no. 847/5 "On approval of the Instruction on the work of departments (groups, sectors, senior officers) of control for execution of judgments in penitentiary institutions and detention facilities" which provides: "it is prohibited to open envelopes with personal files of a person who is transited through SIZO without the written order of a court or a prosecutor, who conducts supervision over the SIZOs". "In practice, it leads to serious restrictions of the right to health assistance (up to almost complete deprivation in some cases) for people who are in transit which, in addition, can be time consuming.

These rules contradict the requirements of the impossibility of restriction of the access of prisoners (their relatives under their consent) to information relating to their health (Principles of Legislation on Health Care, Law of Ukraine "On Information", the Constitution of Ukraine).

In this regard, it should be formally enshrined the right of prisoners to receive copies of any medical records related to them, including the right for getting them after release from penitentiary institutions. Copies shall be made at the expense of the prisoners, and in the case of the absence of sufficient funds in their accounts copies shall be made at the expense of the penitentiary institution.

This approach is justified considering the standards of the European Court of Human Rights, in particular those laid down in the judgments regarding the violation of Article 34 of the Convention, which provides the obligation of the states not to hinder in any way the effective exercise of the right of individual petition to the Court, because when a convicted person is not provided with copies of medical records, he/she cannot send them to the Court, which in itself is already considered a violation of the rules on cooperation between national authorities and the Court. The refusal of the administration of penitentiary institutions to provide copies of documents required by the Court itself caused violation of Article 34 of the Convention in the judgment *Ustyantsev v. Ukraine* (3299/05) and in the judgment *Vasyl Ivashchenko v. Ukraine* (760/03) in which the convicted people were denied in obtaining copies of documents, among other things, due to the fact that they were entitled to have only a sentence with them (corresponding provision, by the way, today is enshrined in IR and therefore it should also be amended for implementation of the discussed standard).

In the important judgment *Naydon v. Ukraine* despite the Government's arguments that the applicant had no obligation to make copies of documents, the Court clearly established that Article 34 of the Convention imposes on the States parties a positive obligation not to interfere with the right of individual petition, in particular, to provide the applicants with copy of the documents which are necessary for the proper consideration of their applications.

This obligation follows from the many other judgments of the ECtHR, in which the Court points to the state's duty to provide individuals who are under its responsibility, including convicted people, with the documents necessary for filing an application for the Court (see for example, *Lambor v. Romania* (no. 1), no. 64536/01, §216; *Novinskiy v. Russia*, no. 11982/02, §120; *Gagiu v. Romania*, no. 63258/00, §§93–99).

There is a separate issue of informing of prisoners about functioning of medical units. In §33 of the 3<sup>rd</sup> General Report the CPT noted that it is desirable that a leaflet or booklet be handed to prisoners on their arrival, informing them of the existence and operation of the health care service and reminding them of basic measures of hygiene. Accordingly, it must contain at least the following information: organization and procedure of medical care in the institution as well as outside the institution, on the free choice of doctor; prevention of the most common diseases among prisoners; basic rules of hygiene in the establishment. Side purpose of the brochure is also taking into account in medical practice of the penitentiary institutions prevention and preventive purposes in activity of the medical units of the institutions. In general, mandatory of provision of such a brochure should be provided in the order on medical support, because the current order does not provide any informing on these issues.

### **3.4. Recording traces of physical violence**

The CPT is permanently fighting for professional and proper recording of traces of bodily injury by the medical staff, because it is the key to a comprehensive and objective investigation. It has elaborated standards of recording, which, however, were not adequately reflected in the Ukrainian legislation (see §53 of the 2nd General Report of 1992, §§60–61 of the 3rd General Report of 1993).

In particular, the current Order of interaction between health care institutions of the State Penitentiary Service of Ukraine with the civil health care

institutions on providing medical assistance to prisoners (approved by the Order of the Ministry of Justice of 10.05.2012) at §2.1 provides: "Administration of a penitentiary institution shall inform the prosecutor within one day in writing about the fact of discovery of body injuries of a prisoner within day, and record identified injuries in the Journal for people who come to the penitentiary institution", while this fixation is carried out in the Journal, annexed to this Order, but and it does not exhaust all standards of proper fixation, which has been formulated by the CPT in its old standards: a reference to the statement of a convict related to medical examination (including his description of his state of health and any allegations of ill-treatment). Instead only name of the person who discovered injuries on the prisoner's body should be specified in the Journal; the prosecutor shall be notified in writing about the discovery of injuries, not by a medical professional, but by administration of the penitentiary institution, who can be interested in withholding of such information.

No wonder that this has led to the fact that, according to the CPT's Report on the visit to Ukraine in 2012:

"...the current inaction of health-care staff is aiding and abetting the ill-treatment of prisoners in the correctional colonies" (§30). Because of this, the requirements for fixing of injuries are specified in detail in §30 of the same Report: "(...)to ensure that prisoners are effectively entitled to prompt examinations by health-care professionals while in prison, in particular after a violent episode, and that all relevant staff are provided with further instructions and appropriate training on medical examinations of prisoners. In particular:

- all medical examinations of prisoners should be conducted out of the hearing and — unless the health-care professional concerned requests otherwise in a particular case — out of the sight of non-medical staff;
- the record drawn up following the medical examination of a prisoner should contain: (i) a full account of statements made by the person concerned which are relevant to the medical examination (including his/her description of his/her state of health and any allegations of ill-treatment), (ii) a full account of objective medical findings based on a thorough examination (including appropriate screening for injuries), and (iii) the health-care professional's observations, in the light of (i) and (ii), indicating the consistency between any allegations made and the objective medical findings;
- any statements made by the prisoners concerned in the context of such examinations, the objective medical findings and medical con-

clusions should not be accessible to non-medical penitentiary staff or other inmates (health-care staff examining the prisoners may inform relevant staff members on a need-to-know basis about the state of health of an inmate, including medication being taken and particular health risks);

- whenever injuries are recorded which are consistent with allegations of ill-treatment made by an inmate (or which, even in the absence of allegations, are indicative of ill-treatment), the record should be systematically brought to the attention of the prosecuting authorities, regardless of the wishes of the prisoner concerned. Inmates and their lawyers, if any, should be entitled to receive a copy of that record at the same time. Health-care professionals (and the inmates concerned) should not be exposed to any form of undue pressure or reprisals from management staff when they fulfil that duty.

The CPT must also stress that, whenever a prisoner presents injuries indicative of ill-treatment or makes allegations of ill-treatment to health-care staff, he or she must be promptly seen by a doctor with recognised forensic training.”

This shows that the national legislation does not implement another recommendation of the CPT according to which in case when a prisoner shows injuries which indicate inadequate treatment or makes an application about such treatment to medical personnel, he/she should be immediately examined by a doctor who has formal training for forensic examination, i. e. by a forensic expert.

Moreover, relevant standards were systematized in the 23<sup>rd</sup> General Report of 2012/2013 year devoted to the complex problem of fixing of injuries. It is required in this Report (in addition to the above requirements for the content of information that should be recorded in the report/journal) that in addition to the medical report a map bodily injuries shall be consisted, which affects the location of injuries, as well as photographing of injuries shall be done.

Photos and map of bodily injuries shall be attached to the report. After drafting of the report, its copies and copies of the annexes shall be directed to the appropriate authorities responsible for the investigation, in the Ukrainian context it is the Prosecutor’s Office and the territorial governing body of the SPS of Ukraine (see §78 of the Report, which emphasizes this), which should also carry out official verification, as well as national preventive mechanism and supervisory commissions. This report should be sent **regardless of the**

**willingness of the convicts** (*bold font by the Committee*) (p. 77) or the administration of the institution. This remark is justified for the purpose of prevention of abuse of the administration of the PI control over prisoners and forcing them to abandon the transfer of such evidence.

It is worth recalling the observation of the CPT during a visit of 2009, where it is stated: "As regards in particular the register (of the use of physical force — the Author's remark) kept at Colony No. 89 in Dnipropetrovsk, it contained only 5 entries in 2009. In this context, the delegation was particularly concerned by the fact that the head doctor of the colony's medical unit appeared unaware of the problem of ill-treatment ("no one has ever complained regarding staff using force") and did not seem to consider it his task to report such matters to the competent authorities"<sup>8</sup> (§84 of the relevant Report).

Like in previous standards, the requirement that all medical examinations should be conducted out of the hearing and if the health care worker does not want another in each specific case, beyond the sight of non-medical personnel, is emphasized. This requirement is not observed, for example, in relation to life-sentenced prisoners, as according to the IR mandatory presence of non-medical personnel is required during their examination.

It is important that, according to §78 of this Report convicts (prisoners), their lawyers should have access to the report and its annexes (obviously, it also means ability to take their copies).

### **3.5. Preventive medicine**

The draft order for the organization of medical support as the previous order has conceptual incompleteness—there is no section on preventive medicine. The need to pay special attention to preventive medicine was stressed by the CPT in its 3<sup>rd</sup> General Report. Therefore, given the following guidelines, the separate section should be developed concerning the preventive medicine. This component of health care, unfortunately, has not been a priority for the penitentiary service, which prefers treatment of disease than its prevention.

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<sup>8</sup> In response to these observations the Government noted that almost all of these standards are met and that "demands on compiling medical records regarding bodily injuries of prisoners are increased" However, changing standards of recording at the level of oral instructions and orders can not be considered sufficient. All outlined requirements should be fixed at the regulatory level, otherwise the constant abuse will occur in practice.

It is noted in the 3<sup>rd</sup> General Report:

“52. The task of prison health care services should not be limited to treating sick patients. They should also be entrusted with responsibility for social and preventive medicine.

*i) hygiene*

53. It lies with prison health care services — as appropriate acting in conjunction with other authorities — to supervise catering arrangements (quantity, quality, preparation and distribution of food) and conditions of hygiene (cleanliness of clothing and bedding; access to running water; sanitary installations) as well as the heating, lighting and ventilation of cells. Work and outdoor exercise arrangements should also be taken into consideration.

Insalubrity, overcrowding, prolonged isolation and inactivity may necessitate either medical assistance for an individual prisoner or general medical action vis-a-vis the responsible authority.

*ii) transmittable diseases*

54. A prison health care service should ensure that information about transmittable diseases (in particular hepatitis, AIDS, tuberculosis, dermatological infections) is regularly circulated, both to prisoners and to prison staff. Where appropriate, medical control of those with whom a particular prisoner has regular contact (fellow prisoners, prison staff, frequent visitors) should be carried out.

55. As regards more particularly AIDS, appropriate counselling should be provided both before and, if necessary, after any screening test. Prison staff should be provided with ongoing training in the preventive measures to be taken and the attitudes to be adopted regarding HIV-positivity and given appropriate instructions concerning non-discrimination and confidentiality.

56. The CPT wishes to emphasise that there is no medical justification for the segregation of an HIV+ prisoner who is well.

*iii) suicide prevention*

57. Suicide prevention is another matter falling within the purview of a prison's health care service. It should ensure that there is an adequate awareness of this subject throughout the establishment, and that appropriate procedures are in place.

58. Medical screening on arrival, and the reception process as a whole, has an important role to play in this context; performed properly, it could

identify at least certain of those at risk and relieve some of the anxiety experienced by all newly-arrived prisoners.

Further, prison staff, whatever their particular job, should be made aware of (which implies being trained in recognising) indications of suicidal risk. In this connection it should be noted that the periods immediately before and after trial and, in some cases, the pre-release period, involve an increased risk of suicide.

59. A person identified as a suicide risk should, for as long as necessary, be kept under a special observation scheme. Further, such people should not have easy access to means of killing themselves (cell window bars, broken glass, belts or ties, etc).

Steps should also be taken to ensure a proper flow of information — both within a given establishment and, as appropriate, between establishments (and more specifically between their respective health care services) — about people who have been identified as potentially at risk.”

In our view, it is also advisable to designate such directions as prevention of drug addiction and alcoholism. In general, all the details made by the CPT should be reflected in the new Order, taking into account directions of preventive medicine.

Another very important observation of the CPT is recommendation that someone competent to provide first aid should always be present on prison premises, preferably someone with a recognised nursing qualification (§35 of the 3<sup>rd</sup> General Report). This rule should also be fixed in the Order on medical support to provide greater opportunities for first aid in case of force majeure which are not rare in such specific institutions like prisons, especially at night.

The SPS of Ukraine also should change the legislation to ensure certain steps of combating drug addiction in subordinate institutions instead of showing passivity about this. It is stated in §140 of the CPT's report on the visit to Ukraine of 2009: “The Committee recommends that the Ukrainian authorities develop a comprehensive and coherent prison drug strategy, including the provision of assistance to inmates with drug related problems.” In response to this recommendation the Government noted: “The issue of introduction of substitution therapy programs for drug addicted prisoners is under consideration with participation of governmental bodies and social organizations”. Maybe just one of the consequences of this step was the adoption of a Joint Order of the Ministry of Health Care of Ukraine, the Ministry of Internal Affairs of Ukraine, the Ministry of Justice of Ukraine, the State Service of Ukraine

on Drug Control no. 821/937/1549/5/156 «On approval of the interaction between health care institutions of the Ministry of Internal Affairs, pre-trial detention facilities (SIZOs) and correctional centers in order to ensure continuity of treatment with substitution therapy” of 22.10.2012. As it’s seen from the name, methadone therapy is allowed only in SIZOs and correctional centers, although fulfillment of this by the civil society organizations in many regions of Ukraine, and that fact lots for these projects were allocated by separate financial donors.

Without doubt, the policy in combating drug addiction and treatment by using of substitution maintenance therapy shall not be kept to such institutions as SIZOs and correctional centers. As well as it should not be limited to the prevention of penetration of drugs into the penitentiary institutions that, among other things, according to the analysis of the content in the official site of the SPS of Ukraine is perhaps the most important of its purpose.

### **3.6. The list of diseases that constitute grounds for release from serving the punishment**

During his visit to Ukraine in 2012, the Committee drew attention to certain prisoners who were in a dying condition and not released due to delays by the administration of the institutions. It is stated in §61 of the Reports on the visit: “in respect of prisoners who are the subject of as hort-term fatal prognosis, special medical commissions preparing applications for their early release on medical grounds should intervene promptly, and such applications should be speedily considered by the courts with a presumption in favour of release.”

In fact, the reason for the delays is often not only delay in the administrations of the institutions, but also the list of diseases which are grounds for submission of the court materials for release in connection with a disease is unsatisfactory for the needs of practice and often does not cover serious diseases. This had resulted in the fact that prisoners were released a few days before they had to die, which was done also in order “not to spoil the statistics” of deaths inside the institutions.

It is difficult to imagine what was our surprise when, during the analysis of the new list of diseases in Draft Order we figured out that it is even worse and more repressive than the previous one. The project is planned to replace the current (in fact, it is formally valid legislative act, but not used) Order of

the State Department of Ukraine for Execution of Punishments no. 3 / of June 2000 by including into its content the list of diseases which are grounds for the early release in accordance with the Article 84 of the Criminal Code of Ukraine.

By the way, this rule does not indicate that the list of diseases shall be exhaustive or limited by some document and defines as the ground “any other serious illness that hinders execution of sentences,” such a person “may be released from punishment or from its further serving “. Thus, the reason for the release is formulated as a value concept, which shall be assessed by the trial. At the same time the discussed list could be an obstacle for sending of materials on the person who would have a disease that is not defined in the list to the court. This is an argument for enshrining of the right of prisoners to seek release in court due to serious illness in the Draft Order. Moreover in the last year judgment of the ECtHR *Yermolenko v. Ukraine* (Application no. 49218/10, §61) it is indicated that: “given the absolute prohibition of torture, inhuman and degrading treatment, it is not acceptable that the compatibility of the applicant’s state of health with his detention was assessed solely by reference to **an exclusive list of diseases** and without any appropriate review by national judicial authorities” (*bold font by the Author*). In other words, the Court made strongly objections that the List of diseases which are the grounds for release was harsh and did not take into account the circumstances of the case, as it is done in the national penitentiary practice.<sup>9</sup> When assessing the compatibility of the state of health and conditions of detention of a prisoner the follo-

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<sup>9</sup> However, Resolution of the Plenum of the Supreme Court of Ukraine no. 8 of 09.28.1973. “On the court’s practice on application of legislation about release from serving sentences of prisoners who have got ill of severe disease” (with amendments) recommends that the courts when determining whether the person shall be released or not, shall refer not only to the conclusion of the medical commission, but also take into account the gravity of the offense and the conduct of the convicted person while serving a sentence, attitude to work, the degree of correction, whether he/she deviated from the prescribed treatment, and other circumstances.

But in practice this provision is far from adequate performance, and the courts take into account many other improper conditions and are characterized by excessive formalism, despite even deadly condition on the person (Bocharov-Tuz B. Why did not Ukraine release terminally ill prisoners in 2012? <http://www.civicua.org/news/view.html?q=1962075> (a referring carried on 29.03.2014). Exactly this formalism of courts, delay in supply of materials for the release by the administration and the strict application of the List diseases that are the grounds for the release lead to the fact that even during the consideration of the materials for release by the courts about 10% of prisoners has been dying (M. V. Romanov “Release from serving the punishment by disease: theoretical and practical issues // Theory and Practice of Law: Electronic scientific specialized edition of National University “Yaroslav the Wise Law Academy of Ukraine” — 2013. —

wing circumstances should be taken into account: (a) the medical condition of the prisoner, (b) the adequacy of the medical assistance and care provided in detention and (c) the advisability of maintaining the detention measure in view of the state of health of the applicant (*Melnyk v. Ukraine*, application no. 72286/01, §94). These observations should be taken into account during reforming of the institute of the release from further serving the punishment on the ground of disease.

Returning to the new list as diseases, which are the ground for the release, we should make references to the expert of the KHPG I. Suhorukova who has analyzed this new list and formulated the following comments. Under the old and the modern Order “only patients with progressive bilateral fibrous-cavernous tuberculosis with disorders of the cardiovascular system, which cannot be cured adequate by the chemotherapy could be released from serving punishment. That is the same situation, if the process takes one lung — is not a ground for the release. Progressive destructive tuberculosis of the spine, bilateral renal tuberculosis from cavities — all of these indicators is a prerequisite of incurable lesions. That is, patients are released almost on the verge of life and death.

The situation is even worse with cancer. In fact, patients are released to die, because the reason for release is a cancer of the 4th degree. Such patients in Ukraine usually cannot be cured.

All this was remained in the new Order. Moreover, the Chapter “Diseases of the Nervous System” in the old version included vascular diseases. In particular, the old Order could be applied for release of prisoners suffering from “vascular diseases of the brain and spinal cord: embolic, hemorrhagic, ischemic or mixed acute cerebro-vascular accident, chronic vascular encephalopathy 3rd stage, primary (non-traumatic) subarachnoid hemorrhage, with the diagnosis with severe persistent symptoms of focal brain impression”. In the new order, even this is too strict list is absent. In other words, the release of prisoners suffering from the most difficult vascular disorders is not provided.

The same applies to meningitis, brain abscess, multiple sclerosis, tuberculosis of the nervous system, **leukoencephalitis** of Schilder, brain tumors, kranion spinal tumors etc.

The new list does not even include super heavy diseases such as amyotrophic lateral sclerosis, spinocerebellar ataxia, epilepsy.

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Vol. 2(4) / access:[http://nauka.jur-academy.kharkov.ua/download/el\\_zbirnik/2.2013/36.pdf](http://nauka.jur-academy.kharkov.ua/download/el_zbirnik/2.2013/36.pdf) (a referring carried on 29.03. 2014).

The same thing we see in the list of diseases of the circulatory system. If the old list included: constrictive pericarditis, non-surgical treatment; natural or acquired heart disease; bacterial endocarditis, prolonged duration; cardiomyopathy, ischemic heart disease, hypertension of the 3rd stage, etc., a new list only requires for the release "all heart diseases of the 3rd stage, and threatening ventricular arrhythmias of high grade on a background of myocardial ischemia and reduced left ventricular systolic function. Of course, it is a killing list of diseases.

The article on respiratory diseases has also significantly worsened. The old list provided the release of people suffering from such diseases: chronic obstructive bronchitis, bronchial asthma, bronchiectasis, lung abscess, pleural empyema, sarkoidoz, idiopathic fibrotic alveolitis, pneumoconiosis of different etiology, emphysema. It is mentioned in the new list that the release should be conducted with the presence of all respiratory diseases with pulmonary insufficiency of the 3rd degree, i. e. when the process has become irreversible.

The list of diseases of the digestive system and kidneys is very poor. It provides the release only under liver cirrhosis and malabsorption in the gut at the stage of cachexia and protein deficiency and the presence of chronic kidney disease of the 4–5<sup>th</sup> stages, or circulatory insufficiency of the 3<sup>rd</sup> stage, i. e. when the disease is already incurable.

Among the diseases of the musculoskeletal system and the associated tissue a submission for release was stipulated in a number of diseases: rheumatoid arthritis, hemorrhagic vasculitis, systemic lupus erythematosus, Bechterew's disease, *dermatomyositis*, Polyarteritis nodosa, systemic scleroderma. In the new list only high amputation of upper or lower limbs, or a combination of high amputation of one upper and one lower limb were left.

So this is unapproved list of diseases, in our opinion, should be revised because it does not meet international standards, is cruel and inhuman."

Release from serving the punishment due to illness is known to be divided into two stages: a) consideration of the question about submission of material for release to the court by the administration of the institutions, which is decided by the appropriate medical commission on the basis of a specified list of diseases; b) consideration the submission by the court and establishment feasibility release of a prisoner. The fundamental importance of the list of diseases caused by the fact that the solutions of commissions

for submission material for the release are firmly based on it, and that today the issue whether to release a prisoner or not is often decided at the stage of submission of material for release due to illness by the administration of the institution.

At the same time, the role of the courts shall not be detracted. As it is indicated in the CPT's standard quoted at the beginning of this section, cases of release due to illness should be considered by the courts with presumption of release. The practice of some courts indicates their distance from the idea<sup>10</sup>, that's why it requires changes, perhaps by amending the criminal procedure law.

## **4. Security measures**

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Redundancy of security measures during the execution and serving of sentences is a typical feature of the national criminal executive service that has been repeatedly criticized by the CPT.

Excessive security measures that are applicable to life-sentenced prisoners cause especially many comments. We will begin from their rights.

### **4.1. Solitary confinement**

The legislation clearly indicates the procedure of placing life-sentenced prisoners in penitentiary institution. According to Article 151 of the Penal Code of Ukraine "prisoners serving a sentence of life imprisonment shall be placed in cell-type premises (hereinafter — PKT), usually for two people...". At the same time the practice shows that the phrase "as a rule" means "always."

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<sup>10</sup> For example in 2011 Belozersky District Court of Kherson region considered 41 submissions for the release of prisoners from punishment or from its further serving under disease, during the first half of 2012, it considered 21 submission this category. Among the stated number of submissions for release of people from punishment or its further serving due to illness considered in 2011, 14 submissions were satisfied, 25 were rejected, two were returned, during the first half of 2012 8 submissions were satisfied, 11 were rejected, under 2 submissions the proceedings on the case were closed due to the death of prisoners (Generalization of judicial practice on the law on release from punishment or from further serving of punishment under disease (performer Bugayov S. I.) // <http://bz.ks.court.gov.ua/sud2102/16/5/> (a referring carried on 29.03. 2014)).

It turns out that whether a prisoner killed dozens of people or, for example, made an attempt of the murder of a law enforcement officer, for which he/she also may be sentenced to life imprisonment, he/she will serve the sentence in the PKT. Similarly, the placement does not depend on some other factors such as mental state of a prisoner, intentions regarding compliance with the regime, safety/danger of an individual prisoner etc.

This legislative provision directly contradicts the Recommendation Rec (2003) 23 of the Committee of Ministers to member states on the management by prison administrations of life sentence and other long-term prisoners. In particular, the principle of “non-segregation” is mentioned in the list of principles of such management in the Recommendation (§7): “Consideration should be given to not segregating life sentence and other long-term prisoners on the sole ground of their sentence”. So, it is important not to allow additionally segregation of this category of prisoners, as in the case when they are placed in the CTP, for the sole reason that they have been sentenced to a specific type of punishment, including life imprisonment.

The mentioned provision of the Penal Code of Ukraine simultaneously violates recommendations contained in §20.a. according to which “maximum security units,” which are the analogs of the Ukrainian CTP, should be used only as a last resort; §20.b where it is recommended that within maximum security units, regimes should distinguish between the handling of prisoners who pose an exceptional risk of escape or danger should they succeed, and the handling of those posing risks to other prisoners and/or to those working in or visiting the prison; in §20.c. where it is enshrined that with due regard to prisoner behaviour and security requirements, regimes in maximum security units should aim to have a relaxed atmosphere, allow association between prisoners, freedom of movement within the unit and offer a range of activities, and many other Recommendations.

We should not forget that the national legislative body in 2010 attempted to secure at least a minimal ability to change conditions of placement within the colony. According to Article 151-1 of the Penal Code of Ukraine, life-sentenced prisoners after the actual serving of fifteen years of imprisonment (!) in a CTP for two people in a colony of maximum level of security a prisoner can be transferred to a multi-place CTP, where he/she will be able to communicate with other prisoners and participate in collective cultural mass events, sport activities, educational programs. In turn, from a multi-place CTP a prisoner may be transferred to ordinary living premises of the

colonies of maximum level of security yet after additional five years. However, the formulation “may be translated” leads to complications of such a transfer in practice. It’s getting worse by the fact that there are no criteria for the application of this rule. As a result, at best, for being among the other prisoners a life-sentenced prisoner must serve at least two decades of deprivation of liberty.

It is noteworthy that some amendments of the Penal Code of Ukraine were adopted in 2013 in order to ease the problem of placing of life-sentenced prisoners. The norm was included into Part 6 of Article 92 of the Penal Code of Ukraine according to which that the requirement of separate detention from other prisoners is not applied for this category of prisoners. However, it is only provided under the conditions that they were transferred to ordinary living premises of the colonies of maximum level of security after serving 20 years of sentence in a CTP. That’s why the practical value of this norm is absent, as it only additionally emphasized the status quo.

The CPT has repeatedly pointed to the problem of automatic selection of the level of segregation and the lack of sufficient discretion of the administration of penitentiary institutions in this matter. “The CPT considers that the placement of prisoners in special conditions of high security should not be merely a result of prisoners’ sentences. In the great majority of cases, such a placement should be decided by the prison authorities after a period of accommodation in a normal location and, in all cases, on the basis of a thorough risk and needs assessment, linked to an individualised sentence plan. The prisoners concerned should have the right to contest the decision on placement in conditions of high security before an independent authority (e. g. a court).

**The Committee recommends that the relevant legal provisions be amended accordingly.”** — §95 of the Report on the visit to Ukraine of 2009.

In the Report on the visit to Ukraine of 2012 the CPL repeatedly noted (§54): “In the context of previous visits, the CPT criticised the systematic segregation of life sentenced prisoners provided for in the Ukrainian legislation. After the 2009 visit, changes were made in the Criminal Executive Code in order to allow life-sentenced prisoners, following an assessment of their individual behaviour, to be transferred from double-occupancy to multi occupancy cells as well as to participate in a range of organised activities (educational, cultural, sports and leisure activities) after fifteen years of imprisonment, and from multi-occupancy cells to ordinary prisoner accommodation after five years of imprisonment.

A number of the delegation's interlocutors during the 2012 visit (including staff members) considered that there was no justification for many prisoners serving life sentences to be kept separate from other inmates. Nevertheless, the rule remains the segregation of life-sentenced prisoners, 45 and the new legal provisions offer too little margin of manoeuvre to the State Penitentiary Service. The CPT must reiterate that the segregation of an inmate sentenced to life imprisonment should always be the result of a comprehensive and ongoing risk and needs assessment, based on an individualised sentence plan. **The Committee recommends that the Ukrainian authorities review again the legislation and practice as regards the segregation of life-sentenced prisoners, in the light of these remarks."**

It seems that the only solution to this problem can be amending of penal legislation. It appears that we should adopt the requirement of placing of life-sentenced prisoners immediately to premise in a kind of a division of quarantine, diagnosis and distribution after their arrival at the colony, but in contrast to how it is done for other prisoners (14 days) this should continue for up to several months. Only after studying of personality of a prisoner the decision on placement of a prisoner in certain conditions of isolation (double PKT/multi-place PKT/common room) shall be made. In case of placing of a prisoner into a PKT, such placement should be necessarily reviewed annually in order to determine whether a convict continues to pose a threat for the staff or security of an institution in common living premises. Transfer from these premises in PKTs should be possible at any time, pursuant to a substantiated decision of the administration of an institution, for example, in a case of violent conduct of a prisoner or systematic violations of the regime. In addition, the rule should be fixed that the decision about separate detention of prisoners may be appealed, as recommended in the above paragraph 95 of the Report of the CPT on the visit to Ukraine of 2009.

#### **4.2. The use of force and special means**

The overall position of the CPT on the use of special means to prisoners was expressed in § of the 26 11<sup>th</sup> General Report, in which the CPT stated:

"Regrettably, the CPT often finds that relations between staff and prisoners are of a formal and distant nature, with staff adopting a regimented attitude towards prisoners and regarding verbal communication with them as a marginal aspect of their work. The following practices frequent-

ly witnessed by the CPT are symptomatic of such an approach: obliging prisoners to stand facing a wall whilst waiting for prison staff to attend to them or for visitors to pass by; requiring prisoners to bow their heads and keep their hands clasped behind their back when moving within the establishment; custodial staff carrying their truncheons in a visible and even provocative manner. Such practices are unnecessary from a security standpoint and will do nothing to promote positive relations between staff and prisoners.”

The draft of new IR of PI prepared by the SPS of Ukraine keeps this kind of rule which migrated from §25 of the current IR of PI, namely, it is indicated in 18.1 of the Draft that all prisoners during their movement across penitentiary institutions, accompanied by the staff should keep their hands behind their backs (except for prisoners who are held in correctional centers, correctional colonies of a minimum level of security with light conditions of detention and divisions of social rehabilitation).

This provision should be amended as being clearly contrary to the idea of personalization of the use of any restrictions to people in places of deprivation of liberty.

According to §25 of the IR of PI, in case of taking of life-sentenced from their cells, conveying them in the territory of a colony and outside it, handcuffs are applied for them. During using handcuffs prisoners shall keep their hands behind their backs. Conveying prisoners is carried out by one, with accompaniment of two representatives of the administration and a dog handler with a dog. In case of conveying women prisoners outside the colony handcuffs are applied to them; convoy of every woman (life-sentenced) is accompanied by three representatives of the administration without involving a dog handler with a dog.

This provision contradicts the General standards of the CPT. In is mentioned in §33 of the 11<sup>th</sup> General Report:

“...many such prisoners were subject to special restrictions likely to exacerbate the deleterious effects inherent in long-term imprisonment; examples of such restrictions are ... handcuffing whenever the prisoner is taken out of his cell... The CPT can see no justification for indiscriminately applying restrictions to all prisoners subject to a specific type of sentence, without giving due consideration to the individual risk they may (or may not) present.”

In §102 of the Report on the visit to Ukraine of 2002 the CPT noted:

“The CPT recalls that the practice of routinely handcuffing life-sentenced prisoners when they are outside their cells is highly questionable, all the more so when it is applied in what is already a secure environment. Such a measure can only be seen as disproportionate and punitive. Moreover, to be handcuffed when receiving a visit could certainly be considered as degrading for both the prisoner and his visitor. The CPT recommends that the Ukrainian authorities put an immediate end to the practices described above.” By the way, in its response to this observation the Government pointed to that in all penitentiary establishments Ukraine where people sentenced to life imprisonment are held, the practice of systematically applying of handcuffs for this category prisoners was abolished. Now handcuffs are applied only to those prisoners who, at the exit from their cell, represent a significant danger to staff and other prisoners. This statement, in view of its falsity, again confirms the lack of “change of practice” by orders from “up”, and need of changing the legislation in such cases.

In continuation it is recommended in §91 of the Report on the visit of 2009 that:

“the handcuffing of life-sentenced prisoners when outside their cells is always based on an individual risk assessment”.

It is necessary to point out that the Draft of the IR of PI has changed the requirements on the use of handcuffs to all life-sentenced prisoners when they are outside their cells. According to §33.1 when being of life-sentenced prisoners outside the cells or conveying through the territory of a colony, handcuffs can be applied only to those of them who are prone to escape, taking of hostages, attacks on the administration, and, not least important, given the physical defects and their state of health. However, during conveying outside the territory of a colony, handcuffs are applied to all such prisoners, regardless of any characteristics of their personality.

Simultaneously, this provision has kept a rule, repeatedly criticized by the CPT, that during the conveying service dogs are always involved.

In addition, in the Report on the visit of 2012, the CPT expressed (not at the first time) its opinion about systematic use of service dogs (no. 49):

“The CPT is concerned to note that no review of the grossly excessive security arrangements applicable to male life-sentenced prisoners has been carried out since previous visits. The prisoners concerned continued to be systematically handcuffed when taken out of their cells, with escort staff always required to be accompanied by a member of the dog-support unit

and a guard dog. Guard dogs were allegedly kept unmuzzled and sometimes provoked into barking.

The CPT once again calls upon the Ukrainian authorities to ensure that the routine **handcuffing of male life-sentenced prisoners when taken out of their cells is discontinued at Correctional Colony No. 89 in Dnipropetrovsk, as well as in any other establishments holding men sentenced to life imprisonment. The application of handcuffs should be exceptional, on the basis of an individual and comprehensive risk and needs assessment carried out by appropriately trained staff.**

Further, guard dogs should not be used for routine prison duties involving direct contact with inmates. **The Committee recommends that an end be put to the systematic practice of using guard dogs in the above circumstances. If necessary, the relevant regulations should be amended."**

Similarly, the Draft of the IR of IP has fixed the rule that medical assistance for life-sentenced prisoners shall be provided in a cell in the presence of prison staff. It is stated in §27.3 that such assistance shall be "usually provided directly in the cell in the presence of at least three representatives of the administration of penitentiary institutions." In this regard, it is worth recalling the recommendation of the CPT, which is contrary to this provision and which is enshrined in §50 of the Report on the visit of 2012:

"Security arrangements applicable to male life-sentenced prisoners requiring health care are also of particular concern to the Committee. As a rule, lifers were medically examined by health care staff through the bars of their cells. When a transfer to health-care facilities outside the maximum-security unit was deemed necessary, inmates allegedly experienced significant delays (e. g. for up to several days in a case of medical emergency) due to the requirement to have the inmates concerned escorted by members of special-purpose forces. Further, lifers apparently remained in handcuffs during all medical consultations 41 as well as while receiving dental care. Further, medical confidentiality was not observed during medical examinations or procedures as non-medical staff were routinely present."

Also in this regard, the Committee drew attention to the recommendation expressed in §30 of the same Report that:

“all medical examinations of prisoners should be conducted out of the hearing and — unless the health-care professional concerned requests otherwise in a particular case — out of the sight of non-medical staff”.

Often during the treatment outside penitentiary institutions problems of simultaneous protection and security of others and not impeding the treatment process. Both the current Order of interaction between health care institutions of the State Penitentiary Service of Ukraine with the civil health care institutions on providing medical assistance to prisoners (approved by the Order of the Ministry of Justice of Ukraine, the Ministry of Health of Ukraine of 10.05.2012 no. 710/5/343) and the new draft Order for medical support do not contain specific guidance on this issue, including the use of handcuffs.

At the same time the practice confirms excessive use security measures during the treatment of prisoners outside the penitentiary institutions. For example, the use of handcuffs is practiced even in completely inappropriate circumstances, such as the child's birth by a mother, who was handcuffed to the bed even during childbirth. Therefore, in order to impede abuse certain reservations should be made. Among other things, the recommendation of the CPT provided in §36 of its 3<sup>rd</sup> General Report should be mentioned according to which there shall be ban for handcuffing to a bed and other items during the treatment in institutions at the civil health care institutions. We also offer adoption of a norm, which would set that provision of security should not be excessive and/or interfere with the normal conduct of treatment.

In the report of 2009 the CPT expressed observations on the ***open carrying of truncheons by prison staff***, as well as the use of the tear gas (§85):

“During the 2009 visit, the delegation observed that prison staff in the establishments visited carried truncheons, and sometimes also tear gas canisters and handcuffs, within the prisoner accommodation areas in the full view of inmates. **The CPT recommends that steps be taken to end the practice of prison staff openly carrying such equipment within detention areas. If it is deemed necessary for staff to be armed with truncheons, they should be hidden from view. Further, tear gas canisters should not be part of prison staff's standard equipment and should not be used in a confined area.**”

Neither the first nor the second recommendation has not found its implementation in the IR of PI or other acts of national legislation (including for

official use). Incidentally, the same recommendation is enshrined in the European Prison Rules (§69.2):

“The open carrying of other weapons, including batons, by people in contact with prisoners shall be prohibited within the prison perimeter unless they are required for safety and security in order to deal with a particular incident.”

Absolutely absurd is the response of national authorities to these recommendations: “The given CPT’s requirements contradict with the legal regulations concerning the activities of the State Department. According to the Order no. 205 the service duty shift and the operative group are provided with “special means” and equipment (the tear gas canisters and handcuffs) for each member of the service duty shift, as well as the rubber truncheons for each junior officer. The personnel of the penal establishments visited by the CPT delegation were equipped with the “special means” according to paragraphs 59–61 of the Daily Order Rules of penal establishments.

Any facts of groundless use of “special means” have not been registered.” It turns out that not the penitentiary authorities should implement the recommendations of the CPT, but the CPT rather should follow the national legislation when expressing its recommendations.<sup>11</sup> In general, this statement is indicative of the attitude of the national authorities to implementation of the recommendations of the CPT.

In §31 of the Report on the visit of 2012 the CPT noted:

“The use of physical force, “special means” (e. g. handcuffs, rubber or plastic batons, tear gas) and straight-jackets against prisoners is governed in

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<sup>11</sup> Even more original is the government’s justification to the observations of the CPT on systematic use of handcuffs during getting out of the cells, which were made in the Report on the visit of 2009. The Government (obviously the SPS of Ukraine) stated: as well as the use of the special means “БР” (handcuffs). These measures are implemented in accordance with the requirements of the current national legislation. The corresponding procedure is envisaged by the Order of 22.10.2004 no. 205 and Order of 25.12.2003 no. 275 of the State Department (“Instruction on supervision over sentenced people at the penal establishment” and “Daily Order Rules of penal establishments” are approved by the above mentioned orders). The institutional and legal acts are registered at the Ministry of Justice of Ukraine subject to human rights of the people deprived of liberty according to the court decisions”. Thus, compliance of the regulation with all international standards of human rights from the time they were registered in the Ministry of Justice of Ukraine is summarized, despite the observations of the Committee, which should be accepted and enshrined in legislation.

detail *inter alia* by Section 106 of the Criminal Executive Code and paragraphs 59 to 61 of the Internal Rules of penitentiary establishments (here after “Internal Rules”).

In the CPT’s view, certain provisions leave the door open to abuse (e. g. penitentiary staff are entitled to use physical force, batons and tear gas in the context of “transfers to DIZO/CTP, a single disciplinary (“kartzer”) cell ... when staff *have grounds to believe that the inmates may harm themselves or others*” 26). Further, the Committee considers that the circumstances in which each type of force may be used should be clearly specified in the regulations, which does not appear to be the case as regards physical force, batons and tear gas.”

Thus, at least the reason for use of special means provided in §61 of the IR of PI should be changed, because it not clearly defined. Also, the grounds on which the force can be applied should be clearly defined in the regulations for each type of force. Incidentally, in the above recommendations, the CPT referred to §65 of the European Prison Rules as such that should be taken into account when making changes to the legislation. This paragraph, in turn, points out:

“There shall be detailed procedures about the use of force including stipulations about: *a.* the various types of force that may be used; *b.* the circumstances in which each type of force may be used; *c.* the members of staff who are entitled to use different types of force ((i. e. exactly which individuals can apply every single special mean — *auth.*);<sup>12</sup> *d.* the level of authority required before any force is used; and *e.* the reports that must be completed once force has been used.”

In the same §31 of the Report on the visit of 2012 the CPT noted:

“The CPT recommends that the Ukrainian authorities review the legal framework on the use of physical force, “special means” and straight-jackets, in the light of the delegation’s findings and the above remarks, and provide penitentiary staff with improved training. In particular, it should be made clear that:

- where it is deemed essential to handcuff a given inmate, the handcuffs should under no circumstances be excessively tight and should be applied only for as long as is strictly necessary. Further, a prisoner should

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<sup>12</sup> This interpretation follows from the Comments of the Committee of Ministers on the European Prison Rules, in particular Rule 65.

never be handcuffed to fixed objects; in the event of an inmate acting in a highly agitated or violent manner, the person concerned should rather be kept under close supervision in an appropriate setting. In case of agitation brought about by the state of health of a prisoner, penitentiary officials should request medical assistance and follow the instructions of the health-care professional;

- batons should only be used when there is a risk to life or limb and only to address that threat directly;
- tear gas canisters should not be part of the custodial staff's standard equipment and should not be used in a confined area."

### **4.3. Night lighting in the living premises of the colonies**

A specific feature of the national penitentiary institutions is leaving the light turned on throughout the night in the cells (dormitories). Maybe that's why one of the most frequent complaints of prisoners, especially in SIZO, where they have to deal with the problem of poor sleep due to constant illumination at night at first time. We was able to communicate with former employees of the unit which was convoying prisoners, and on this occasion they mentioned that some of convoyed prisoners after a trip on the train from one institution to another for overnight said that they had not had such a good sleep for so long period of time, because on the train the light was switched off at night. Not wondering about the feasibility of lighting at the night time, we will consider the issue of compliance of this practice with international standards.

In The Internal regulations of penal institutions (governing the execution and serving of punishment in the form of arrest, restriction of liberty, deprivation of liberty for a specific term, life imprisonment) only §17 contains one indication of the night light "light bulbs in general lighting are installed in niches on the ceiling and night lights — in the niches above the door". Any information is not mentioned about when they should be switched on when switched off, what should be the incandescent power, etc.

In the draft of the new IR of the PI the use of lighting is mentioned in a slightly different context. In particular, p. 6.1 states that "at night convicted check carried out on beds visually, without lifting the prisoners at night light." This demonstrates the presumption that the light, as such, should be switched on all night.

In the IR of the SIZOs this issue is defined more clearly. For example, it is stated §2.2. that "Each cell is equipped with a working (full-time) and another (night) lighting and socket for electrical connection. Lighting control is carried out by switches and sockets, established by the corridor near the front door. Sockets are turned on by the administration of a SIZO in time defined by the order of the day. At night time (from 10 p.m. to 6 a.m.) the cells should be illuminated with use of regular (night) lighting". Thus, the requirement for the use of regular lighting in all SIZOs subordinated to the SPS of Ukraine is recognized at the regulatory level.

Also the Order of the State Department for the Execution of Sentences no. 124 of 28.07.2005 "On Approval of Regulations on the sector maximum level of security in the correctional colonies of the medium level of security" (§4.4) provides working and regular lighting in cells. Control over regular lighting is carried out from the room of a duty officer of a unit, and over working by a switcher installed in the corridor near the front door of the cells.

The above mentioned legislative provisions are contrary to international standards.

The CPT is unequivocally against lighting around the clock. Already in the Report on the visit to Ukraine in 2000, it recommended to review the system of permanent lighting at night (§73). The Ukrainian Government responded to this comment that the system of electric lighting was equipped with the device which allows putting it on, if necessary, in order to control the prisoners at night (page 28 of the English version of the Government's response to the Report). Also on page 32 of this response, the Government stated that the assemblage of artificial lighting net from sources of low voltage and constant current has been carried out according to the schedule. That was ensured by the so-called "regular night light."

As a result, in the Report on the visit of 2002, the CPT expressed two concerns about this. First, in the response to the Report of the CPT on the visit of 2000 the Government provided false information on changing the practice of permanent lighting at night in certain institutions (§95):

"In both establishments, the artificial lighting was permanently on in the cells accommodating prisoners serving life sentences, although in Zhytomyr the intensity was reduced at night. This contradicts the Ukrainian authorities' response to the CPT's report on the 2000 visit, which stated that an electric lighting system had been installed in the cells for life-

sentenced prisoners which made it possible to turn on the light at night to control prisoners, if necessary". At second, it was recommended that artificial lighting should not be switched on at night except when necessary (§100).

In the Report of the visit of 2005 the CPT repeated this recommendation (§108):

"The artificial lighting was satisfactory; however, it was left on, albeit at a dimmer level, at night... Given the new unit project (it means creation of a new unit in compliance with international standards — *auth.*) the CPT is not recommending any immediate improvements for these cells, other than to review the practice of leaving the light on at all times in the cells at night. **The lighting should only be switched on at night in case of necessity** (*bold font added by the Author*).

Today there are a number of judgments of the European Court of Human Rights, in which the use of continuous artificial lighting in penitentiary institutions is regarded as one of the conditions that, taken together, constitute a violation of Article 3 of the Convention, which prohibits torture, inhuman or degrading, treatment or punishment. For example, in the judgment *Stepuleac v. Moldova* (application no. 8207/06) the Court considered this condition among those that are contrary to Article 3 of the Convention. In the judgment *Arefyev v. Russia* (application no. 29464/03) the Court found a violation of Article 3 concerning conditions of detention in the SIZO in Ivanovo 37/1, which also included lighting switched on around the clock. In the judgment *Lyubimenko v. Ukraine* (application no. 6270/06) a violation of Article 3 of the Convention was founded. The applicant complained about the poor conditions of detention in SIZO, among which he called permanently switched on lighting, which prevented him from sleep. In the judgment *Gubkin v. Russia* (application no. 36941/02) the applicant also complained, among other things on lighting in SIZO around the clock as something that prevented him from sleeping. Overall, the Court's practice shows that the lighting switched on around the clock in the cells is one of the problems of the former Soviet Union countries.

#### 4.4. Technical means of supervision and control

Article 103 of the Penal Code of Ukraine "Technical means of supervision and control" (TMSC) determines that the administration of the colony may use

audiovisual, electronic and other technical means to prevent escape and other crimes, violations of established by the legislation order of serving of punishment, obtaining the necessary information about the behavior of prisoners. This list of means of supervision and control and procedure of their use are defined by regulations of the Ministry of Justice of Ukraine.

Till 2012 this Article provided that the list should be determined by acts of the central executive body the execution of sentences. However, since the adoption of the Penal Code of Ukraine such an act has not been adopted, leading to complete unsettling of this issue and, consequently, to abuse by personnel of penitentiary institutions. This issue became particularly disclosed when it touched Y. Tymoshenko and excessive video surveillance over her. We then expressed serious concerns regarding the purposes of the application of such funds and the need to justify restrictions on the right to privacy convicted for their use.

However, the expresses observations were not taken into account during developing of the order on the use of both lighting and other technical means of supervision and control. This is confirmed by the recently developed Order of the SPS of Ukraine which, in essence, was aimed at a formal meeting the requirements of Article 103 of the Penal Code of Ukraine on the need of a special act, and not at creating barrier for unjustified restriction of the rights of prisoners<sup>13</sup> and abuses by the administration of institutions. A detailed analysis of this document shows its extremely negative potential.

The fact is that the document allowed almost “spying” over anyone, anytime and anywhere (even in the bathroom!) and when it pleases the administration of a colony. Because of this the draft, in case of its adoption, is a total violation of Article 8 of the European Convention on Human Rights and Fundamental Freedoms.

European Court of Human Rights in its practice has repeatedly found violations of this Article because the rights, prescribed in it, have been unreasonably restricted, including the penitentiary sphere. Criteria of validity of restrictions are embodied in paragraph 2 of Article 8 According to it any restriction of rights (the use of TMSC given the practice of the ECtHR) should meet the following requirements:

A) carried out in accordance with the law (this requirement is obeyed);

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<sup>13</sup> *Chovgan V.* On the use of lighting, and means of supervision and control in penitentiary institutions and SIZOs of the State Penitentiary Service of Ukraine//<http://www.khpg.org/index.php?id=1326711173>

B) be applied in the interests of national security, public safety or the economic well 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. This requirement could be almost literally embodied in the Order, however, with taking into account specificity purposes of restrictions in penitentiary institutions, namely by adding targets with which TMSC can be used as "achieving the interests of internal order and security in the institution." Such specificity was described in detail in the judgment of the Grand Chamber of the ECHR *Hirst v. the UK* and *Dikson v. the UK*, also, in these judgments, it is mentioned that restrictions should be:

X) proportionate (such which meet the objectives for achievement of which they are intended, and do not restrict the right more than it is necessary for their achievement) and "necessary in a democratic society" (this category requires presence of a pressing social need and a "fair balance" between the individual interests of people whose rights are restricted, and society). This point is particularly important, as a previous suggested target of achievement of the interest of internal order and security in the institution in the case of its independent application gives opportunities for abuse.

Also the requirement of "minimality" should be enshrined this which is consistent with the requirements of Rule 3 of the European Prison Rules, which provides that all restrictions placed on people deprived of their liberty shall be "the minimum necessary and proportionate to the legitimate objective for which they are imposed".

Additional procedural guarantees of the right to privacy should be established. Moreover, such guarantees in the case of use of TMSC should be applied only "if it makes interference with the right to privacy." This is connected with the fact that some cases of use of TMSC cannot be regarded as an interference with the right to privacy (installation of alarm systems, means for detection of prohibited items, etc.), and therefore the spread of warranty rules on them would be irrational and unreasonable.

Particular attention is necessary for a standard that requires only restriction of the rights on the basis of individual risk assessment and threats for security of an institutions in each case, which is not reflected in the draft Order.

Need of implementation of such a standard is consistent with the practices and standards of the ECtHR and the CPT. The ECtHR clearly expressed its opinion about the inadmissibility of the use of "automatic" restrictions (without assessment of individual risk), for example, in the judgment *Trosin*

*v. Ukraine* (§§62–74), *Messina v. Italy* (no. 2) (§§62–74). The fact that the “automatic” approach to the application of restrictions against prisoners contradicts the European Convention is confirmed in one of the most significant judgments on the application of restrictions of the rights in the penitentiary sphere *Dikson v. the UK*.

The CPT clearly indicates the impossibility to permit “automatic” restrictions of the rights of prisoners (detainees) without assessment of individual risks in the main form of its standards — the 11<sup>th</sup> General Report 2001, paragraph 30. The same is indicated in the Report on the visit to Ukraine (see. for example, §§91, 92 of the Report on the visit to Ukraine of 2009).

The most specific recommendation was expressed in the Report on the visit of 2012 (§52):

“The placement of all women and men serving life sentences under constant video surveillance in their cells is another matter for concern. At Colony No. 89, the delegation noted that, in one cell, the toilet area was within the scope of the CCTV camera.

The CPT appreciates that video surveillance in cells can be a useful safeguard in particular cases, for example when a person is considered to be at risk of self-harm or suicide or if there is a concrete suspicion that a prisoner is carrying out activities in the cell which could jeopardise security. However, any decision to impose video surveillance on a particular prisoner should always be based on an individual assessment of real risks and should be reviewed on a regular and frequent basis. Steps should also be taken to ensure that prisoners subject to CCTV surveillance are guaranteed reasonable privacy when using the toilet/sanitary annex E.

Video surveillance is a gross intrusion into the privacy of prisoners and renders the whole regime even more oppressive, in particular when applied for prolonged periods. **Accordingly, the Committee is opposed to the routine installation of CCTV cameras in cells and considers that there sources devoted to such schemes can more usefully**<sup>14</sup> (*bold font*

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<sup>14</sup> In 2013, the Cabinet of Ministers of Ukraine adopted the State Program of reforming the State Penitentiary Service for 2013–2017 (Program), which could be a very important and powerful for making positive changes in safeguarding the rights of prisoners. However, its potential has been minimized due to irrationality, in terms of the priority of human rights, the distribution of program funds for the implementation of the planned measures.

In accordance with the Passport of this Program for its implementation more than 6011.73 million UAH should be spent, i. e. slightly more than 6 billion USD, which is approximately 1.6 percent of the planned state budget revenues for 2013.

by the Author) be deployed by having staff interact with prisoners who pose high risks. When CCTV cameras are installed, prisoners must be fully

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About a third of these funds should be spent on the projecting and construction of facilities for transfer of correctional facilities and SIZOs outside the central part of Lviv, Odessa and Kherson (2.0517 billion UAH). Although the task, to which this event belongs is called in the Program "Improving the conditions of detention of prisoners, transition from their detention in barracks of dormitory type to block (chamber) accommodation with increasing standards of living space per prisoner by technical re-equipment and reconstruction of the PI, the construction of new and reconstruction of existing SIZOs" and from its general funding 2.80207 billion UAH should be spent, including the above-mentioned 2051, 7 million UAH. At that time, as the problem of overcrowding in SIZOs and colonies today fades into the background and the related costs, primarily, could and would be aimed at introducing such desirable for the national penitentiary system block detention.

The amount of funds scheduled for implementation of the task of "modernization of engineering and technical means of protection and surveillance of modern technology for creation of a multi-level protection and centralized video monitoring, automated information and telecommunications systems of the SPS" is 1.10701 billion UAH. While only 123.96 million UAH is scheduled for the "Improving of catering of prisoners and detainees, the system of buying food and necessities, and providing them with utility equipment", and for the modernization of engineering infrastructure of facilities (such important areas as heating, water, sanitation facilities, etc.) should be spent 400.52 million UAH., at all 0,64 million UAH is scheduled to increase the effectiveness of the level of executions of punishments other than imprisonment (including probation formation).

The picture is even more sad, if we pay attention to the amount of funds allocated to the health care of prisoners and detained people, improving the quality of health care which were the subject of serious concern of institutions of the Council of Europe, and which are related to priorities of implementation of the agenda of the EU — Ukraine Association. Specifically, this amount is 179 570 000 UAH. That is about 1/33 of the overall funding for the Program, and only 1.4 of the amount what should be spent on modernization of enterprises PI.

All this criticism indicates that **the Program should be changed to the redistribution of resources according to the priorities of human rights and implementation by Ukraine of its international obligations and not proprietary of interests in facilitating provision of rigid framework for ensuring security in the institutions.** However, while working on this publication, **the Program was canceled** by the Order of the Cabinet of Ministers of Ukraine no. 71 of March 5, 2014 "Some aspects of optimization of targeted programs and national projects, budgetary savings and recognition invalid certain acts of the Cabinet of Ministers of Ukraine." Such a step of the present Government confirms its distance from the priority task of ensuring human rights. This is particularly supported by the fact that the first steps of saving have already touched one of the most rotten areas of the law-enforcement system of Ukraine.

We note that international organizations have repeatedly emphasized that the failure of human rights in penitentiary institutions cannot be justified by the lack of funds. The idea is that if the state decides to isolate the individual from the society, it must take responsibility for him/her and ensure his/her rights.

informed of this. In addition, it is important that the recordings are kept for at least 48 hours in all cases and indefinitely when a reportable incident has occurred.

**The CPT recommends that the Ukrainian authorities review the use of video surveillance in cells in penitentiary establishments and adopt detailed regulations, in the light of these remarks”** (*bold font saved*).

Relevant provisions that should be used to develop rules on interference with the right to privacy of prisoners by video surveillance were also expressed about the use of video surveillance to Y. Tymoshenko (§§64, 65): “The delegation also underlined that the security arrangements made in respect of Ms Tymoshenko could be considered disproportionate. These arrangements included the use of constant video surveillance for months on end... Regrettably, the Ukrainian authorities failed to provide information on any individual assessment of real risks which may have justified the use of video surveillance at Colony No. 54 or in hospital”.

In view of the above the Kharkiv Human Rights Group has sent recommendations to the order, which was proposed by the SPS of Ukraine to public debate. It is hoped that these recommendations will be taken into account.

At any case, the draft order shall adopt such provisions related to the standards of the CPT:

1. TMSC should not be applied in a residential area, disciplinary cells, solitary confinement cells (kartzer), cell-type premises (separate cells), dining rooms, baths, toilets and rooms of emotional relax, except for cases where there is reliable information about the threat to security or the rights of prisoners and people taken into custody, or other people.

2. The use of TMSC to individual prisoners and detained people is allowed only on the basis of an individual assessment of risks and threats to the security of an institution, prisoners and other people. In the case of use of TMSC to these prisoners the heads of the institutions or the deputy head shall make a decision with indication of the reasons of such use, detailed justification of its need and determination of the time of using TMSC. Prisoners and people taken into custody shall be additionally informed about such surveillance in time, and they shall sign the notification about such informing.

3. The decision about use of TMSC envisaged in the preceding paragraphs may be appealed in legally established procedure.

## 5. Extra isolation within a prison

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### 5.1. Restriction of rights in disciplinary cells (DISO) and cell-type premises (CTP)

Restriction of the rights of people who are in extra isolation, such as DISO/CTP should be justified with great earnestness. It is stated in §55 of the 21<sup>st</sup> General Report: “Solitary confinement<sup>15</sup> further restricts the already highly limited rights of people deprived of their liberty. The extra restrictions involved are not inherent in the fact of imprisonment and thus have to be separately justified. In order to test whether any particular imposition of the measure is justified, it is appropriate to apply the traditional tests enshrined in the provisions of the European Convention on Human Rights and developed by the case-law of the European Court of Human Rights:<sup>16</sup>

- (a) Proportionate: any further restriction of a prisoner’s rights must be linked to the actual or potential harm the prisoner has caused or will cause by his or her actions (or the potential harm to which he/she is exposed) in the prison setting. Given that solitary confinement is a serious restriction of a prisoner’s rights which involves inherent risks to the prisoner, the level of actual or potential harm must be at least equally serious and uniquely capable of being addressed by this means. This is reflected, for example, in most countries having solitary confinement as a sanction only for the most serious disciplinary offenses, but the principle must be respected in all uses of the measure. The longer the measure is continued, the stronger must be the reason for it and the more must be done to ensure that it achieves its purpose.
- (b) Lawful: provision must be made in domestic law for each kind of solitary confinement which is permitted in a country, and this provision

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<sup>15</sup> Solitary confinement means not only detention by one person but also: “whenever a prisoner is ordered to be held separately from other prisoners, for example, as a result of a court decision, as a disciplinary sanction imposed within the prison system, as a preventative administrative measure or for the protection of the prisoner concerned. A prisoner subject to such a measure will usually be held on his/her own; however, in some States he/she may be accommodated together with one or two other prisoners, and this section applies equally to such situations (§54 of the 21<sup>st</sup> General Report).

<sup>16</sup> It should be noted that the CPT applies these criteria in the context of study of the disciplinary action as a comprehensive measure that includes other restrictions. However, their conceptual component is relevant to other limitations with the clarifications and exceptions, which are caused by the specifics of each individual limitation.

must be reasonable. It must be communicated in a comprehensible form to everyone who may be subject to it. The law should specify the precise circumstances in which each form of solitary confinement can be imposed, the people who may impose it, the procedures to be followed by those people, the right of the prisoner affected to make representations as part of the procedure, the requirement to give the prisoner the fullest possible reasons for the decision (it being understood that there might in certain cases be reasonable justification for withholding specific details on security-related grounds or in order to protect the interests of third parties), the frequency and procedure of reviews of the decision and the procedures for appealing against the decision. The regime for each type of solitary confinement should be established by law, with each of the regimes clearly differentiated from each other.

- (c) **Accountable:** full records should be maintained of all decisions to impose solitary confinement and of all reviews of the decisions. These records should evidence all the factors which have been taken into account and the information on which they were based. There should also be a record of the prisoner's input or refusal to contribute to the decision-making process. Further, full records should be kept of all interactions with staff while the prisoner is in solitary confinement, including attempts by staff to engage with the prisoner and the prisoner's response.
- (d) **Necessary:** the rule that only restrictions necessary for the safe and orderly confinement of the prisoner and the requirements of justice are permitted applies equally to prisoners undergoing solitary confinement. Accordingly, during solitary confinement there should, for example, be no automatic withdrawal of rights to visits, telephone calls and correspondence or of access to resources normally available to prisoners (such as reading materials). Equally, the regime should be flexible enough to permit relaxation of any restriction which is not necessary in individual cases.
- (e) **Non-discriminatory:** not only must all relevant matters be taken into account in deciding to impose solitary confinement, but care must also be taken to ensure that irrelevant matters are not taken into account. Authorities should monitor the use of all forms of solitary confinement to ensure that they are not used disproportionately, without an objective and reasonable justification, against a particular prisoner or particular groups of prisoners".

The requirement of necessity is not embodied in the penitentiary law. As it was already mentioned in the section publication on contact with the outside world, prisoners who are held in DISO and CTP are automatically deprived of the right for visits, phone conversations.

Pursuant to part 11 of Article 134 of the Penal Code of Ukraine they are also prohibited to purchasing food and necessities, receiving parcels (assists) and packets, use board games. According to §38 of the IR of PI parcels received by the prisoners serving a penalty in form of placement into DISO, solitary confinement cell or CTP are given after to them serving their penalties.

In addition, it directly contradicts the above standards, the inadmissibility of this rule was indicated in §143 of the Report on the visit to Ukraine of 2005, it was reminded the recommendation about lifting the ban on assists and parcels for these prisoners, provided in the Report on the visit of 2000 (part 2 of §133 of the relevant Report).

Also, this prohibition may be an indication that defined disciplinary measures are not only the punishment with extra in isolation, but also with harm to health, because prisoners often compensate deficiencies of nutrition in colonies through receiving of parcels and assists. Even more confusing is the norm banning the receiving and sending parcels due to the fact that it makes it impossible to improve the nutrition and maintain the state of health of prisoners by their own means, rather than spending resources of penitentiary institutions which are usually insufficient for proper nutrition of prisoners.

Similarly, the ban for reading in DISO is unjustified. Paragraph 61 of the 21st General Report indicates that such prisoners should be allowed access to the motivated number of reading material (for example, prisoners should not be limited in religious texts).

The history of the implementation of this recommendation of the CPT by the Ukrainian government is especially revealing in the context of implementation of the CPT's recommendations. The CPT reiterates it from year to year, and the penitentiary department ignores it.

Even in §53 of the Report on the visit to Ukraine of 1999 the CPT recommended that prisoners placed in disciplinary cells, should be provided with the ability to read. In the Report of 2002 it recommended that "steps be taken without delay to ensure that prisoners placed in disciplinary cells (SHIZOs)<sup>17</sup>...

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<sup>17</sup> For today the SHIZOs are renamed into DISOs.

be given reading matter" (§131). In the Report on the visit to Ukraine of 2005 the CPT noted the following:

"The CPT reiterates once again its recommendation that reading material be made available to these prisoners" (placed into DISO — *auth.*). In the Report on the visit to Ukraine of 2009 the CPT repeatedly stated this recommendation in §149 and stressed that the relevant amendments of the legislation should be made:

"As regards activities, prisoners placed in the DIZO/*kartzner* were still not allowed reading matter (except for the Bible) and inmates held in PKT cells were not allowed board games. The CPT calls upon the Ukrainian authorities to amend the legislation in order to ensure that prisoners placed in a DIZO/*kartzner* are allowed access to reading matter and that those held in PKT cells are allowed some form of leisure activities".

We should note that the recommendation about board games was also ignored.

It is interesting how straightforwardly and hypocritically the Government (or rather, the former Department for the Execution of Sentences) ignored in its Response to the Report of 2005 the recommendation about access to reading in DISO (page 272 of the Response): "In accordance with paragraph 88 of the IR of the PI, prisoners held in PKT are allowed to read books, magazines and newspapers". Of course, the CPT was aware that it is allowed to read in PKT, as well as the fact that the PKT is not DISO.

For the reasons of necessity of need for each restriction in each particular case the norm fixed in §88 of the IR of PI is not appropriate either: "People who are studying in secondary schools, vocational schools and courses of vocational and technical training, are not taken for classes during their staying in DISO, solitary confinement cells and PKT".

Especially confusing is this provision taking into account that use of disciplinary sanction in the form of placement in DISO could be with the ability of taking for work and study and without such ability. That is, even in the case of the absence of prohibition for taking for work and/or study in DISO the IR of the PI require opposite. Therefore we can say about collision, which shall be overcome by rule making. In these circumstances, we should not deny the possibility of using DISO with simultaneous prohibition of study and/or work as a restriction (ban) in this case is not automatic. However, more clearly defined reasons of use of the prohibitions should be included into the Penal Code of Ukraine, which should be developed in terms of feasibility.

ity to achieve some reasonable goals, not only for the purpose of additional and more repressive disciplinary punishment. Prohibition of participation in educational activities, even for those prisoners who seriously violates regime, may be unjustified if a prisoner fully complies with the rules of conduct in the classroom.

## **5.2. Procedure and duration of placement into DISO/CTP**

First of all we draw the reader's attention to defined in the previous section standards of the use of restrictions, particularly in terms of placement into extra isolation. They are quite relevant for procedures placement into DISO.

The specificity of the legislation that establishes the procedural aspects of placement of prisoners into DISO/CTP contains extremely poor safeguards against improper use of these measures. The CPT has developed standards for quality of guarantees of individual rights who is subjected to such measures. They are enshrined in paragraphs 55 and 57 of its 21<sup>st</sup> General Report.

Among those that have not duly influenced our legislation there are the following: there should also be an effective appeal process which can reexamine the finding of guilt and/or the sentence in time to make a difference to the min practice. A necessary concomitant of this is the ready availability of legal advice for prisoners in this situation (§57). The right for participation of a defense counsel in a disciplinary commission as well as the procedure for holding the commission itself, which, among other things, is not even mentioned in the Penal Code of Ukraine and, as far as we know, in other documents which are in common access, it should be clearly enshrined in the text this Code. It would be desirable to allow the representatives of civil society to participate in the meeting of the disciplinary commission with the deliberative vote of, it is needed that there are several of them in order to be able to develop a schedule that would allow them to attend the meetings of a commission at least once a month.

The right to free defense counsel in the case, if a prisoner does not have any funds to pay for assistance of a lawyer also should be enshrined, as it is done and proved itself from the positive side in the European Union. Likewise the appeal procedure should be established, but superior in relation to the administration of a colony should not be the only possible subject, to whom a decision on placement in DISO or CTP could be appealed. The order of court jurisdiction in the event of appeal should be determined.

Paragraph 55 of the same Report suggests that: “The law should specify the precise circumstances in which each form of solitary confinement can be imposed, the people who may impose it, the procedures to be followed by those people, the right of the prisoner affected to make representations as part of the procedure, the requirement to give the prisoner the fullest possible reasons for the decision (it being understood that there might in certain cases be reasonable justification for withholding specific details on security-related grounds or in order to protect the interests of third parties), the frequency and procedure of reviews of the decision and the procedures for appealing against the decision”.

The Penal Code of Ukraine in Article 132 indicates a common ground for all (!) discipline sanctions: “violation of the order of serving of punishment”, i. e. violation of the regime. Despite the fact that as a result of many years of repetition by both scholars and human rights organizations, in 2013, the list of prohibitions for prisoners was fixed in Article 107 of the Penal Code of Ukraine (before they were fixed in the IR of PI), this has not led to a significant improvement of the situation of a kind “chewing gum” — that’s how we describe the concept of the regime or the procedure of execution and serving of punishments as the ground for use of disciplinary sanctions, as it is uncertain and provides possibilities for endless discretion by the administration of penitentiary institutions. The fact that this list was not adopted as an exhaustive list of violations, as human rights defenders had insisted.<sup>18</sup>

Additionally, it should be noted that placement into DISO and CTP can be used in case of committing any violations and almost the only, albeit insufficient, barrier for this is the requirement of the Penal Code of Ukraine regarding the conformity between the violations and sanctions. But that does not stop the administration of institutions, for example, from putting into DISO a prisoner who smokes in prohibited place. The way out of this situation is that the exhaustive list of violations for which a prisoner may be punished by disciplinary measure for violation of the regime should be included into the Penal Code. Under these conditions, as it has been done in many developed penitentiary systems, legal gradation of these violations on several levels of severity shall be made, so that, for example, DISO/IC could be applied only for certain, the most serious of them.

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<sup>18</sup> See, for example, annual reports of the UHUR about the human rights situation, as well as annual reports of the Donetsk Memorial. They repeatedly mentioned the recommendation in the general list of recommendations to the Ukrainian authorities.

As for placement in PKT (and enhanced control division or, as it is defined by the Committee, administrative detention of preventive purposes), then §57 of the cited Reports found that if “solitary confinement is likely to be required for a longer period of time, a body external to the prison holding the prisoner, for example, a senior member of headquarters staff, should become involved. A right of appeal to an independent authority should also be in place. When an order is confirmed, a full interdisciplinary case conference should be convened and the prisoner invited to make representations to this body. A major task for the review team is to establish a plan for the prisoner with a view to addressing the issues which require the prisoner to be kept in solitary confinement. Among other things, the review should also look at whether some of the restrictions imposed on the prisoner are strictly necessary — thus it may be possible to allow some limited association with selected other prisoners. The prisoner should receive a written, reasoned decision from the review body and an indication of how the decision may be appealed. After an initial decision, there should be a further review at least after the first month and thereafter at least every three months, at which progress against the agreed plan can be assessed and if appropriate a new plan developed. The longer a person remains in this situation, the more thorough the review should be and the more resources, including resources external to the prison, made available to attempt to (re)integrate the prisoner into the main prison community. The prisoner should be entitled to require a review at anytime and to obtain independent reports for such a review”. Some comments similar to this Standard of the CPT were made as in §96 of the Report on the visit to Ukraine of 2009, in which the recommendations were expressed about need to amend the legislation which is not implemented for today, considering previous comments on the use of a disciplinary sanction in the form of placement into the enhanced control division (hereinafter — DPK). In particular, the opinion was expressed that placement of prisoners into such divisions should be made only after they had lived for certain period of time in norm at premises. The decision about such placement should be made on the basis of individual risk assessment and according to the individual program, and there should be possibilities for appeal against such a decision, for example, in the court.

All these requirements should be reflected in the Penal Code of Ukraine. Particular attention should be paid to the recommendation regarding automatic review of placement into CTP/ DPK because was not even mentioned by the specialists, lawyers and human rights activists.

The CPT drew attention to the procedural aspect connected with disciplinary sanctions which constitute extra isolation in its Report of the visit to Ukraine of 2009 (§147):

“The CPT calls upon the Ukrainian authorities to review the procedure for placement in a DIZO/*kartzer* and PKT in order to ensure that the prisoners concerned (i) are informed in writing of the charges against them, (ii) are given sufficient time to prepare for their defence, (iii) have the right to call witnesses on their own behalf and to cross-examine evidence given against them, and (iv) are provided with a copy of the decision which contains the reasons for placement and straightforward information on their rights, including the right to legal assistance and the means available to them to challenge the decision before an independent authority (e.g. a judge)”.

This problem was mentioned in the Report on the visit to Ukraine of 2012. In particular, in §57 the CPT mentioned:

“...the measures consisting of placing an inmate in DIZO, PKT or DPK should always be applied for the shortest possible period of time, after *inter alia* having taken into account the views of the inmate concerned, provided him with a copy of the decision which contains the reasons for placement and straightforward information on his rights, including the means available to him to challenge the decision before an independent authority”. From this several obligations follow: a) securing the need for choosing the shortest possible period when making a decision on imposing of disciplinary sanction or transferring to the DPK, which by nature is not a legal sanction, but changing the conditions of detention; b) obligatory providing a copy of the decision, without which it is obviously not possible to appeal against the decision, because for appealing against any decision it is necessary at least to know its contents. Moreover, this decision must be substantiated and accessible for external independent controlling agencies (§57 of the 21<sup>st</sup> General Report).

It is also mentioned in this paragraph: “in the case of a prisoner who is subjected to successive sanctions of disciplinary confinement totalling in excess of 15 days (10 days for women), there should be an appropriate interruption in the disciplinary confinement regime at the 15/10-daypoint; a plan should be established for every prisoner placed in PKT or DPK<sup>19</sup> with a view to

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<sup>19</sup> We should emphasize that this requirement about DPK seems formally fulfilled, though not completely. In particular, it is stated in part 3 of Article 97 of the Penal Code of

addressing the issues which require the inmate concerned to be kept in such conditions". The criminal executive legislation does not contain any dispositions on the first, on the second or the third of these recommendations.

### 5.3. Duration of placement into DISO

Duration of placement in DISO does not meet the standards. According to §56 of the 21<sup>st</sup> General Report the maximum period shall not exceed 14 days for a particular offense and it is desirable that it was even shorter for minors. Penal Code of Ukraine in Article 132 sets the maximum period for one day longer than it is required by this standard. But we should emphasize that 14 days in the standard the CPT is a maximum.

More serious problem is the difference between the standards and domestic legislation concerning the length of the sanction for minors. For now, the maximum duration of placement in DISO for them is 10 days. But it is a significant contrast, if we take, for example, the recommendations made by the CPT in its 18<sup>th</sup> General Report of 2008 (§26) that such a sanction for minors should not exceed 3 days.

Unimplemented standard is the requirement about visiting prisoners, who are kept in extra isolation as a result of a disciplinary sanction, by the chief of the institution or another representative of the administration of the institution. It is recommended that the decision should be taken to stop solitary confinement, if it is required by the state of health of prisoners and allowed by their behavior (§57 of the 21<sup>st</sup> General Report). Such visits and appropriate decisions should also be properly logged.

According to §3 of the Annex 41 to the §91 of the IR of PI: «assistants of a chief of a colony on duty, heads of medical units shall make records every day, and other officials — at least once a week," but it does not specify anything regarding the need of considering the possibility of early release. In practice, these visits take place on the main algorithm: "came — "put a tick" in a special log — went away", which is especially unacceptable with respect to medical

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Ukraine that a special individual program shall be developed for prisoners placed into DPK. The development of individual programs of serving of punishment is not mentioned in the current regulations or the draft of the IR of PI, but, among other things, another special program — for juveniles was added to the pre-existing individual program of sentence added. This problem should be resolved by the ending the draft of the IR of Planned fixing typical individual program of serving of punishment for these people.

personnel who have a special function, and therefore should be immediately informed of the placement of a person into DIZO/PKT and take measures for the treatment, if it is required (§63 of the 21st General Report). Therefore it will be right to secure the position of the need for mandatory consideration of the aforementioned requirements during a visit of prisoners who are placed in DISO, by both medical and other staff.

#### **5.4. Equipment of cells used for securing the personal safety of prisoners**

According to §60 of the 21<sup>st</sup> General Report:

“It is common practice for cells accommodating prisoners undergoing solitary confinement as a punishment to have a limited amount of furniture, which is often secured to the floor. Nevertheless, such cells should be equipped, as a minimum, with a table, adequate seating for the daytime (i. e. a chair or bench), and a proper bed and bedding at night.

As regards the cells used to accommodate prisoners undergoing other types of solitary confinement, the CPT considers that they should be furnished in the same manner as cells used by prisoners on normal location”. In the case of application of isolation under Article 10 of the Penal Code of Ukraine, i. e. for guarantee of the personal safety of prisoners, they are usually placed in cells of DISO/CTP, which is just as well equipped as it is required by the regulation for their equipment — Annex 5, to §17 of the IR of PI.

Moreover, the recommendation of the CPT (§61d of the 21<sup>st</sup> General Report) on application of measures for securing the personal safety of prisoners should be implemented:

“As regards prisoners placed in solitary confinement for protection purposes, there is a balance to be struck between on the one hand the need to avoid making this kind of solitary confinement too attractive to prisoners and on the other hand minimising the restrictions put on people to whom the measure is applied. Certainly, at the outset of such a period of solitary confinement, steps should be taken to reintegrate the person as soon as possible; if it becomes clear that there is a need for long-term protection, and no other response is possible, regime enhancement should be pursued. Special efforts should be made to identify other prisoners with whom the prisoner concerned could safely associate and situations where it would be possible to bring the person out of cell”. All these requirements

are not mentioned in the current Penal Code of Ukraine, which actually “gives at the mercy of” of law enforcers solving of the most part of issues concerning application of this measures.

## **6. Construction of the cells**

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### **6.1. Installation of shutters**

The common spread practice for Ukrainian penitentiary institutions is installation of metal shutters in the prevailing number of premises and on the all windows of DISOs and cell-type premises. In many cases such an approach leads to lack of day light to such extent that prisoners have to stay in half-darkness even during good weather conditions.

In its 11<sup>th</sup> General Report of 2001 the CPT provided its unequivocal view on this problem (§30):

“The CPT frequently encounters devices, such as metal shutters, slats, or plates fitted to cell windows, which deprive prisoners of access to natural light and prevent fresh air from entering the accommodation. They are a particularly common feature of establishments holding pre-trial prisoners. The CPT fully accepts that specific security measures designed to prevent the risk of collusion and/or criminal activities may well be required in respect of certain prisoners. However, the imposition of measures of this kind should be the exception rather than the rule. This implies that the relevant authorities must examine the case of each prisoner in order to ascertain whether specific security measures are really justified in his/her case. Further, even when such measures are required, they should never involve depriving the prisoners concerned of natural light and fresh air. The latter are basic elements of life which every prisoner is entitled to enjoy; moreover, the absence of these elements generates conditions favorable to the spread of diseases and in particular tuberculosis.

The CPT recognizes that the delivery of decent living conditions in penitentiary establishments can be very costly and improvements are hampered in many countries by lack of funds. However, removing devices blocking the windows of prisoner accommodation (and fitting, in those exceptional cases where this is necessary, alternative security devices of an appropriate design) should not involve considerable investment and, at the same time, would be of great benefit for all concerned”.

In §30 of the Report on the visit to Ukraine of 1999 the CPT noted:

“Another major progress has been the removal of the devices from most cell windows in buildings no.no. 1, 2 and 5 In addition to significantly improvement of the naturally lighting of the mentioned cells, this has had a significant positive impact on quality of aeration. Unfortunately, about 10% of the windows were provided with such a device allegedly for security reasons (cells facing the street, cells allowing prisoners to communicate with each other, etc.). The CPT recognizes that in some specific cases, security measures may be required. However, such measures should never be used to deprive prisoners with access to natural light and fresh air”.

At the same time the Ukrainian penitentiary service periodically causes a stir with the reluctance not implement the mentioned standard. The example of this is numerous observations of the CPT during its visits to Ukraine. It is interesting that very often the reaction for these observations have been the orders of the administration of penitentiary institutions and SIZOs about remove of the shutters. At the same time these orders have been unlawful due to the fact that the IR of PI contain norms which provides mandatory installation of shutters on the windows of cell-type premises (§16), DIZOs, kartzers (§17), on the windows of dormitories for other prisoners (Annex 2 to §§6, 17 of the IR of PI), kartzers of SIZOs (Annex 30 the OR of SIZO). In contradiction to the fact that both IR of PI and the IR of SIZO provide mandatory installation of metal shutters they do not contain any provisions on the inadmissibility of interfering in the access to day light in premises in which they shall be installed.

In the light of this, it is special that the SPS of Ukraine even boasts of installation of new shutters in premises for detention of prisoners<sup>20</sup>, moreover, some of them are installed in several lines which lead to the problems with access of day light. We should add that for today usual matter is the equipment of windows of premises in CTP and SIZO with at least, three lines of shutters of the wire of big diameter which leads to serious problems with access of daylight for the specific cells.

Initially, the CPT advanced its observations about installation of shutters to Ukrainian authorities during the visit in 2000. During this visit the CPT appreciated that circumstance that the shutters were removed before the visit

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<sup>20</sup> Modernization of pre-trial detention facilities (SIZO) (Part 3) — for 20.02.2014//<http://www.kvs.gov.ua/peniten/control/main/uk/publish/article/709631>

which helped not only to provide access of daylight, but also to provide access of fresh air to the visited premises.

During the visit of 2009 the CPT also pointed to the need to remove metal shutters from the windows of the arrest house of the Kyiv SIZO. In reply to these observations the national authorities persuaded the CPT in their letter that metal shutters were removed from the windows of the arrest house (102). In the Report on the same visit the CPT welcomed the immediate steps taken by the administration of the Dnipropetrovsk SIZO to remove metal shutters from the windows after the CPT's observations (§110). The CPT also pointed to the problem of access of fresh air at the result of equipment of windows in its Report on the visit to Ukraine of 2012 (§46).

As we can see, the administration of penitentiary institutions and the SPS of Ukraine prefer to put up with making single decisions on this problem as it was revealed by the CPT instead of amending the legislation. Repeatedly, to meet the requirements, the following measures were taken as removal or beginning of removal of shutters in the presence of the delegation of the CPT. It was done despite the opposite requirements of the legislative acts which, in fact, should be amended, which was the capability of the penitentiary authorities. However, the fact that for today this norm is provided in the IR of PI and SIZO without amending its content for adopting the guaranties, confirms intentional ignoring of the recommendations of the CPT by the national authorities.

It happened that in their response to the observations of the CPT about the shutters provided in §110 of the Report on the visit to Ukraine of 2009 the Government of Ukraine reported about mass removal of shutters: "With the purpose of the adequate natural light to access to the cells in the Kyiv SIZO, all metal shutters have been removed from seven cell windows of the "arrest house". In Dnipropetrovsk SIZO all metal shutters (156) have been removed in cells of the unit no. 9 and the unit no. 10". In spite of this, the national authorities were not able to change the legislation requirement about mandatory installation of shutters and, most likely, there is no will of the high administration of the SPS of Ukraine for this.

Proposal of the Kharkiv Human Rights Protection Group about amending the norms of the regulations of the SPS of Ukraine for changing the situation were categorically rejected by the deputy chief of the SPS of Ukraine Kislov O. I. We should stress that this provision is absent in the new IR of PI, but according to the above mentioned official, all issues, concerning construction

of the penitentiary institutions (including the need of mandatory installation of shutters) are planned to be consolidated in the specific legislative act which will adopt building norms for such institutions, and that's why we should not rely on the changing the principle of installation of shutters.

The problem of installation of wire "cages" in the penitentiary institutions for specific categories of prisoners during communication with other people should be assessed in different context. At the result of the visit to Ukraine in 2005 the CPT recommended that the prisoners should not be kept in wire cages during interviews with staff of the Temnivska colony no. 100 (§§113, 114). The Ukrainian Government replied to this:

"The wire cage (metal bars) in the staff office is installed in accordance with paragraph 8 of Daily Order Prison Rules, and Department's Order no. 275, December 12, 2003 "On DISO/CTP cell equipment. The maintenance of this wire cage should provide the personal security of staff and others (lawyer, psychologist and so on) during their meeting with people sentenced to life imprisonment".

So, the response, as it often happens, is hypocritical and is restricted with referring to the national legislation, although this legislation should be amended according to the recommendations.

The relation of the staff of the Temnivska colony no. 100 to this "cage" (just so, it is still installed despite recommendations of the CPT) in 2013 is interesting. According to the chief of the colony: "Europe (European human rights organizations) is against this cage. But if it is not installed, both my colleagues and I will not work here"<sup>21</sup>. It is not a secret that application of such a kind of "a cage" is the systematic practice for life-sentenced prisoner despite the fact that the IR of PI do not point to its mandatory installation, but to a "special premise for conduction of social-educational and psychological work with life-sentenced prisoners, visits of their defense lawyers, other people and for personal reception of prisoners". In general, the norm about this premise also should be amended with indication on the possibility of application of it only in those cases when it is required by the individual risk assessment.

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<sup>21</sup> Bereza A. Back door parole. Under what conditions prisoners are serving life sentences in Ukraine // <http://korrespondent.net/ukraine/3206834-vek-svobody-ne-vydat-v-kakykh-uslovyakh-otbyvaut-pozhyznennyi-strok-prestupnyky-v-ukrayne>

We should separately mention the recommendation provided in §51 of the Report on the visit to Ukraine of 2012. In it the CPT expressed its opinion about keeping in a cell (“cage”) of this category of prisoners during the visits of a defense lawyer:

**“Such an approach could be considered as inhuman and degrading for both prisoners and professionals concerned. The CPT call upon the Ukrainian authorities to fundamentally review this approach”** (*bold font is saved*). The mentioned negotiation should be included to the draft of the new IR of PI.

## 6.2. Size of cells

Ukrainian legislation provides the area of living space per one prisoner — 4 square meters (Article 115 of the Penal Code of Ukraine). However, the formal approach to implementation of the mentioned norm sometimes leads to unexpected negative results. For example, placement of a prisoner into a cell, the area of which is 4 m<sup>2</sup> means that its size is a bit bigger than an ordinary bed. Of course, the life in such conditions can be considered as treatment which violates Article 3 of the Convention for protection of human rights and fundamental freedoms.

Not without reason, the CPT directly points that cell smaller than 6 m<sup>2</sup> should not be used at all (§59 of the 21<sup>st</sup> General Report). Long ago, in §112 of its Report on the visit to Ukraine of 1998 the CPT recommended Ukrainian authorities that cells smaller than 6 m<sup>2</sup> should not be used for keeping one person. At the same time the State Department on the Execution of Sentences replied that they did not have financial possibility for implementation of this requirement.

During the same visit the CPT emphasized on several other standards, in particular, that cells area of which is 8–10 m<sup>2</sup> should not be used for keeping more than two people; cell with the area 11 m<sup>2</sup> — for more than 3 people and cells with the area of 15–17 m<sup>2</sup> — for more than 4–5 people.

Later this problem was solved, which is confirmed by the following visits. For instance, it is mentioned in §148 of the Report on the visit to Ukraine of 2009: “some disciplinary cells were unsuited for use as inmate accommodation due to their limited size (e.g. 4.5 to 5 m<sup>2</sup>). Further, certain cells were very narrow (1.3. m<sup>2</sup>)...”, according to this it was recommended that cells measuring less than 6 m<sup>2</sup> were withdrawn from service or enlarged. It was also recom-

mended in §89 that all cells should have at least 2 meters between the walls. The same observations (minimum area of the cell for one person 6 m<sup>2</sup> and minimum 2 meters between the walls) were mentioned in §45 of the Report on the visit to Ukraine of 2012. Moreover, it was specified that the area of toilets should not be included into this calculation.

All these requirements should be included into Article 115 of the Penal Code of Ukraine, as we can see that the problem remains from year to year, despite the fact that formally there is no violation of penal legislation.

Simultaneously, Article 11 of the Law of Ukraine “On pre-trial detention” still enshrines the standard of the area for one detainee in a cell measuring not less than 2.5 m<sup>2</sup>. This provision should be amended in the light of the standard of the CPT — minimum 4 m<sup>2</sup> for one person, because during its last visits to Ukraine the CPT made recommendations concerning SIZO.

We should also mention another issue related to the issue of the size of cells — keeping in the block-type premises, which is developing in Ukraine today and is coming to replace collective dormitories in which about one hundred people can be simultaneously kept in one premise. In §113 of the Report on the visit to Ukraine of 2009 the CPT recommended that it should be done all necessary for “transforming of large-capacity dormitories into smaller living units, the objective being to offer 4 m<sup>2</sup> of living space for one prisoner”. Nevertheless, in the view of economic factors, provision of keeping in block-type premises in the national legislation as it was made for the minimum living space for one detainee could be only faraway perspective.

### **6.3. Fitting of toilets**

According to the IR of PI sanitary units shall be equipped in the cells of CTP (solitary confinement cells), DISO, kartzers and sectors of the maximum level of security with their mandatory fitting by solid partition not less than 1 m high (a 17). The same norm is provided for the toilets in the enhanced control divisions.

In §46 of the Report on the visit to Ukraine of 2012 the CPT recommended that toilets in the prison no. 89 should be with a full partition (i. e. up to the ceiling). Such a standard should become the reason for amending mentioned provisions of the IR of PI in §§16 and 17 or Building norms which are elaborated by the SPS of Ukraine to include such provisions.

## **7. Other issues**

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### **7.1. Separate detention of juvenile prisoners and adult prisoners**

Despite the fact that the rule of mandatory separate detention adults and juveniles is as old as the Universe, it is not fully implemented in the national legislation. According to the CPT: “to accommodate juveniles and unrelated adults together inevitably brings with it the possibility of domination and exploitation” (§25 of the 9<sup>th</sup> General Report).

Pursuant to Part 1 of Article 148 of the Penal Code of Ukraine in order to fix the results of correction, finishing secondary or professional technical education, prisoners who are eighteen years old could be left in educational colonies before serving the term of punishment, but not longer than they are 22 years old. We should note that this practice recommended itself positively from pedagogic point of view, and that’s why it should be left in the legislation. However, the Penal Code of Ukraine should be supplemented with the provision according to which adult prisoners shall be placed (kept) separate from juveniles even in a case when they are left in an educational colony. Although, it should not hinder common educational process or other kinds of activity. Such implementation of the standard will be the proper way to handle the situation.

By the way, recently the Law of Ukraine “On Pre-trial Detention” has been amended in its part which allowed common detention of adults and juveniles in SIZOs in certain cases.

### **7.2. Performing controlling functions by a duty prisoner (dnevalniy)**

The use of duty officers by the administration of penitentiary institution, as a rule, is determined by the reasons of better performing of their own duties and easing their work. We should point to the excessive working load of the staff who works in direct contact with prisoners. It happens that one officer; a chief of a division of social-philology service has to deal with more than one hundred of prisoners.

Nevertheless, lack of human resources and traditional shifting own functions on representatives of prisoners cannot justify such use of duty officers, as it causes many negative consequences such as encouraging and supporting prison subculture, abuse of certain prisoners etc.

The position of the CPT on this occasion is clear and principal. It was expressed during the first visits to Ukraine. For instance, in §92 of the Report on the visit to Ukraine of 2002 the CPT noted:

“By letter of 15 April 2003, the Ukrainian authorities contested the fact that the “Dnevalny” were assigned duties which involved keeping order and control. The CPT does not share this view. Indeed, many of the duties listed in the aforementioned Rules of Internal Procedure fall well within this definition.

The partial abrogation of the responsibility for order and security — which properly falls within the ambit of custodial staff — is unacceptable. It exposes weaker prisoners to the risk of exploitation by fellow inmates and could lead to inter-prisoner violence and intimidation. **The CPT recommends that the Ukrainian authorities amend the Rules of Internal Procedure in Correctional Labour Establishments with an aim to ensure that no prisoner is entrusted with tasks relating to the maintenance of good order and control.”**

We should emphasize that the list of duties of a duty prisoner was contained in the Annex 22 to §52.3 of the Internal regulations of labor-correctional institutions and it has been remained almost unchanged in the Annex 26 to the §66 of the IR of PI, although it consolidates duties of a duty prisoner and a senior duty prisoner instead of an ordinary duty prisoner as it was before. Their status has not been essentially changed in the draft of the new IR of PI (Annex 23 to the IR).

However, in their response to the observations on the shifting of functions of the administration on the duty prisoners the Ukrainian authorities replied:

“New Rules on the internal prison regulations were introduced by Decree no. 275 of 25.12.2003 of the State Department for the Execution of Punishments. These Rules were officially registered at the Ministry of Justice of Ukraine under no. 1277/8598 on 31.12.2003. The new Rules exclude the possibility for prisoners to carry out duties which are the competence of prison staff responsible for supervision and security in penitentiary establishments”.

We should stress that in fact the new IR of PI (at that time — the IR of 2003) has not had significant distinguishes in the legal status of a duty prisoner.

In the Report on the visit to Ukraine of 2005 (§148) the CPT stated:

“In its report on the 2002 visit (paragraph 92), the CPT recommended that the Ukrainian authorities ensure that no duty prisoner (dnevalniy)

was entrusted with tasks relating to the maintenance of good order and control. However, this was still the case in 2005, notably in Colony No. 61 where, in addition, duty prisoners also had a say as regards the disciplinary sanctions to be imposed". In the same Report there was a referring to the new European Prison Rules, paragraph 62 of which provides that "no prisoner shall be employed or given authority in the prison in any disciplinary capacity".

By the way, both the acting IR of PI and the draft of the new IR of PI contain the rule according to which for ensuring proper internal order in the dormitories the penitentiary authorities may further impose other duties on those people which do not contradict the law. However, Ukrainian legislation does not contain a direct prohibition for reliance of certain functions of the staff of the SPS of Ukraine on convicted people, so this rule leads and will lead to abuses.

Thus, the Annex to the PVR, which determines the duties of duty officers should be revised in view of the above observations, in order to exclude the inappropriate powers of prisoners, and shall fix the norm according to which such obligations cannot put a certain prisoner in the position that he/she will have power over other prisoners. Kharkiv Human Rights Group expressed this proposal in their comments on the draft of the new IR of PI. Unfortunately, all our observations based mainly on the standards of the CPT were rejected as "inappropriate" by the First Deputy of the Head of the SPS of Ukraine Sydorenko S. M.

### **7.3. Initial classification of prisoners**

In the Report on the visit of 2012 the CPT pointed to the problem of low level of admittance of penitentiary authorities during determining the type of colony, where prisoners should be kept (§55): "The admittance of the penitentiary authorities is unduly restricted by law. Several categories of inmate are automatically held in conditions of maximum security and placed on segregation for preventative purposes for a prolonged period following a court sentence, on the sole basis of their crimes. The CPT must recall its position of principle that decisions concerning the security level to be applied to a given prisoner as well as the measure of segregation for preventative purposes should not be pronounced — or imposed at the discretion of the court — as part of the sentence. The decision whether or not to impose a particular se-

curity level or whether segregation for preventative purposes is necessary should lie with the penitentiary authorities, on the basis of an individual risk assessment, and should not be part of the catalogue of criminal sanctions. **The Committee reiterates its recommendation that the relevant legal provisions be amended accordingly**” (*bold font by the CPT*). The fact that the distribution into institutions should not be the part of the punishment means that the penitentiary authorities should be able to place prisoners, for example, in a lower (and, if necessary, on the contrary) level of security on the basis of assessment of individual risk in oppose to the existing order, which does not allow any flexibility in this regard.

#### **7.4. Use of special-purpose units**

We should pay significant attention to the special purpose units, subordinated to the State Penitentiary Service. The practice of their functioning has been the subject of much criticism from human rights groups for a long time. This led to that under the pressure of society, the decision on state registration of the Order regulating their activity in the past was canceled, and it was excluded from the State Register of legal acts in 14.01.2008. However this did not prevent their use Penitentiary Office in practice without any legal regulation until 3/7/2013, when, finally, the appropriate order of the Ministry of Justice no. 1325 / 5 “On approval of the regional (inter-regional) paramilitary forces of the State penitentiary Service of Ukraine” was issued.

Despite the positive fact of adoption of the legal act regulating activity of the unit which is potentially dangerous in terms of human rights, it still contains rules-vestiges, through which, among other things, its registration was canceled. For example, the following functions of the staff of penitentiary institutions were left for performing by special-purpose units: searches of residential and industrial zones, personal belongings of prisoners, etc. (§3.7); law enforcement, maintaining provided by statutory and other legal acts order of execution and serving sentences in penal institutions and SIZOs and the adjacent areas (§3.9).

In fact, the world practice shows that such special-purpose units can and should be used only in urgent cases of committing mass actions which disrupt the work of these institutions, group disobedience, hostage-taking and other urgent cases. The current version of this act also allows to attract these units almost everywhere and every day to “restore order” and intimidation of

prisoners in order to establish military discipline, which is not acceptable in terms of the establishment of normal relations between the staff and prisoners and in accordance with the recommendations of the CPT during the visit to Ukraine in 2012, but, however, it remains systematic practice to this day.

We must pay attention to the fact that the Order no. 1325/5 has not reflected major CPT's recommendations of that year (§21):

"The CPT also wishes to emphasize that it is opposed to the wearing of balaclavas by special purpose forces within penitentiary establishments. The Committee recognizes that, for operational and/or security reasons, the wearing of protective helmets may be necessary. However, it should be ensured that subsequent identification of the officers concerned is always possible by the relevant authorities and by prisoners, though not only a clearly distinctive badge but also a prominent identification number on each uniform/helmet. In addition, interventions of this type should be video-recorded (e.g. with tactical cameras as part of the equipment of the penitentiary officers concerned)".

Instead, the Order also stipulates that video recording shall be applied only to "document the illegal actions of convicted people and people taken into custody, and others", those are, obviously, not actions of fighters and it does not fix the execution of the rule that every soldier during the raid should have a sign, which would made it possible to identify him in the future and, if necessary, to file a complaint on his illegal actions. In §4.4 the Order mentions only the special uniforms with insignia and symbols.

### **7.5. Having bath, shower**

Even it is Report on the visit to Ukraine of 1999 the CPT recommended (§41): "...ensure that prisoners can have hot shower once a week. This also means the increasing number of showering".

In the Report on the visit of 2009 (89) the CPT recommended the Ukrainian authorities to consider the possibility of increasing the frequency of prisoners' access to a shower in the establishments visited, as well as in other penitentiary establishments in Ukraine, taking into consideration Rule 19.4 of the European Prison Rules (this Rule provides the standard of a number of showers: "that every prisoner may have a bath or shower, at a temperature suitable to the climate, **if possible daily but at least twice a week (or more frequently if necessary)** (bold font by the Author) in the interest of general hygiene").

In §135 of the mentioned Report it is recommended to provide more frequent access to showers (preferably on a daily basis) for prisoners with tuberculosis.

Current legislation also provides the right to have shower at least once (!) a week (§22 of the IR of PI). Not supposed to change this rule and the draft new PVR. Moreover, an indication of “at least once, is usually interpreted as “once”. We cannot deny that prisoners who work are usually allowed to have shower after each shift. But the fact that other prisoners may have shower once a week, especially ill for tuberculosis is, to say the least, surprising in modern times. In addition it has a negative impact on hygienic conditions in the institution. Considering all above, the number of showering provided in the IR of PI should be increased to at least two times a week and daily for ill prisoners.

### **7.6. Physical exercises**

Both the IR of PI and the draft of the new IR of PI provide time for physical exercises in the standard daily routine. The practice of individual institutions shows the interpretation of this paragraph as compulsory, and therefore prisoners are subjected to disciplinary measures for failure to take physical exercises.

In §57 of the Report on the visit of 2012 the CPT unequivocally spoke against this practice: “the prisoner’s choice to exercise or not to exercise his rights should not be subjected to a disciplinary sanction. In particular, there should be no question of considering a refusal to take outdoor exercise on a given day or a complaint about conditions of detention as a disciplinary offense”. Therefore, the guarantee of the possibility of prisoners to refuse taking physical exercises should be fixed in the IR of PI.

### **7.7. Parole for life-sentenced prisoners**

Ukraine is a European record-holder for the number of people sentenced to life imprisonment.<sup>22</sup> Most of them are former prisoners sentenced to death

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<sup>22</sup> As of August 2013 the highest number of people sentenced for life imprisonment among European countries were held in Ukraine (with the exception of the United Kingdom, where this number even more, but in most cases initially punishment is only conditionally life imprisonment with a minimum mandatory term for serving — so-called “tariff”) — 1845 people sentenced for life imprisonment (life prisoners). Even in Russia

who had to be executed, but the abolition of the death penalty in Ukraine led to the need for the emergence of criminal law punishment, by which it would be replaced. This was the ultimatum faced by all countries that have gone through this stage. It is worth to say that most people, even in developed countries have always thought that capital punishment is fair, and its popularity is not falling today, as it is evidenced by the permanent social polls. Perhaps that is why its abolition, which was based not only on the ideas of humanism, but also on serious researches about its ineffectiveness to prevent future crimes inevitably required offering a sufficiently severe punishment to satisfy critics of abolitionism and people's attitude. This is explained by the fact that the cruelty of society, which supported and still supports the death penalty, obviously, could not disappear so quickly and thus it has transformed into requirements for the application of continuing murder to criminals — life imprisonment (LI).

As we know, the abolition of the death penalty in Ukraine and in many European countries was caused by the requirements of international law. In particular, it was the Protocol 6 to the European Convention on Human Rights and Fundamental Freedoms (adopted in 1985), which still left the possibility of its application in individual cases, and then the Protocol 13 (adopted in 2003), prohibited its application under any circumstances. However, the Convention has not clearly pointed out which punishment should take place instead of death penalty, and each state has decided itself how it should punish the gravest crimes. This led to significant differences of severity of the sword of criminal justice for the most dangerous criminals in different countries. That has become, in our opinion, one of the factors of appearing in Ukraine life imprisonment with a very elusive prospect of release. At the same time in all countries with developed systems of criminal justice such release is absolutely normal practice, which confirmed their justification and safety, as we will discuss below.

Ukrainian legislation provides that a person sentenced to LI may be pardoned after serving at least 20 years of punishment with replacement of life imprisonment with a certain term of imprisonment which may not be less than 25 years (Part 2 of Article 87 of the Criminal Code of Ukraine of 2001). According to section 2 of §4 of the Decree of the President of Ukraine "On Regulations on providing pardon" of September 16, 2010 no. 902/2010, in the case

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where there are a much larger number of prisoners as well as the population in general, 1841 life-sentenced prisoners were held in the same month.

of sentencing to life imprisonment petition about pardon may be filed after serving at least twenty years of a punishment. Repeated application for a pardon in the case of refuse in its satisfaction may be filed by a life-sentenced prisoner only after 5 years from the previous try (§15 of the Regulations). Thus, before serving 20 years of imprisonment such prisoners are deprived of any opportunity to review their sentences for early release. Parole is not applied to life-sentenced prisoners.

In addition, the rules of the Criminal Code of Ukraine are unclear for understanding the following: a) whether the term, which shall replace life imprisonment (minimum 25 years), should be counted from the beginning of sentence or after the approval of the act of pardon; b) whether the possibility of parole shall be distributed for this replaced period for people for whom life imprisonment was replaced by the act of pardon. Because of the various answers to these two questions minimum period which life-sentenced prisoners have serve for the elusive possibility of parole can vary from 18.5 years (which is unlikely given the current scientific position on this issue) to 45 years of imprisonment. Hardly anyone has any doubts that this uncertainty is unbearable for any human being. It does not contribute to the motivation for good behavior while serving a sentence, the necessity to create conditions for correction and re-socialization.

The case law of the European Court of Human Rights is going the way of review of compliance of existing mechanism for the release from life imprisonment for with Article 3 of the European Convention on Human Rights and Fundamental Freedoms. In this context, the Court finds no violation of Article 3 of the Convention is in the case where the hope for the future release of life-sentenced prisoners is real. For example, in the case of *Kafkaris versus Cyprus* (*Kafkaris v. Cyprus*, the Grand Chamber, application no. 21906/04) the Court found that irreducible life imprisonment and lack of progress in correction of prisoners may raise a questions of compliance with Article 3 of the Convention. It is enough for the purposes of Article 3 that a life sentence is *de jure* and *de facto* reducible (*Kafkaris*, §98).

In another judgment of the Grand Chamber the Court reiterated its position and found a violation of Article 3 in connection with the illusory perspectives of release from life imprisonment. According to §119 of the judgment in the case *Vinter and others versus the UK* (*Vinter v. The UK*, the application no.no. 66069/09, 130/10 and 3896/10) the Court considered that in the context of a life sentence, Article 3 must be interpreted as requiring

reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds. However, as follows from the meaning of the Regulations on provision a pardon, the most important criterion for a decision on the application of a pardon is only “circumstances that require very humane treatment.” (§6), but not penological, i. e. criminal, criminological criteria, including safety of a prisoner for society, the degree of correction, behavior, work, etc.

As for the prospects of release from life imprisonment by pardon in Ukraine in the future, they are unlikely to satisfy the requirements of “realness” of perspectives of release in such a kind that it will not violate Article 3 of the Convention. Statistics of pardons of prisoners sentenced to imprisonment for a specific period of time for a much softer types of crimes shows that from 1584 petitions about pardon, which were submitted for the first 10 months of 2013, the Commission on Pardon satisfied only 8, which is 0.43% of total number. Taking into consideration the above even if life-sentenced prisoners have a formal opportunity to apply for a pardon and send petitions about pardon together at the same time, only eight of them (0.43% of 1845) can expect for reducing the term of punishment. But it would be naive to hope that the life-sentenced prisoners the Commission on Pardon will treat as well as other prisoners. In contrast, the approach will be even more hopeless in two aspects: psychological –because life-sentenced prisoners have committed the most serious crimes (quoting the former Head of Service on the issues of pardons V. M. Moiseenko: “Unfortunately, about 80 percent of all complaints are dealt with serious crimes — murder, rape, robbery. Such people we cannot pardon”<sup>23</sup>); and formal — according to §6 of the Regulations on provision of pardon petitions of prisoners sentenced for grave or especially grave crimes can be satisfied only if the circumstances require particularly humane treatment. Obviously, we are also not talking about the correction criteria or public danger of a prisoner, which would be taken into account in the first place, given the focus of rehabilitation direction of the European penal policy (§75 of the judgment of the ECtHR *Dickson*

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<sup>23</sup> Tkachuk M. Pardon me, Mr President! // <http://umoloda.kiev.ua/regions/0/176/0/17057/> referring done on 30.03.2014.

v. *The United Kingdom* [GC], no. 44362/04), especially the definite position of the Court in the case *Vinter v. the UK*).

Life imprisonment without real possibility of release violates a number of other international standards, including the standards of the CPT.

A) For instance, in §4a of the Recommendation of the Committee of Ministers of the Council of Europe to member states on conditions of release (pardon) no. 22 (2003) it pointed out that: “in order to reduce the harmful effects of imprisonment and to promote the resettlement of prisoners under conditions that seek to guarantee safety of the outside community, the law should make conditional release available to all sentenced prisoners, including life-sentence prisoners”. This should draw attention to the fact that according to the same Recommendation of parole in its understanding does not consider amnesty and pardon (Rec (2003) 22-Appendix §1).

In the Report on the visit to Switzerland from 10 to 20 October 2011 the CPT, when analyzing this recommendation noted that “it clearly indicates that the legislation should provide the opportunity for all sentenced prisoners, including those subject to a criminal penalty for life imprisonment, benefit of parole. The preamble of the latter insists that lifers should not be deprived of the hope of being released” (§118). The Swiss Government in its response to this observation of the CPT stated that the Federal Council and the Parliament had adopted new legislation which allows early release from life imprisonment (§33)<sup>24</sup>.

In addition, the possible release under the decision about pardon (at first, replacement of a sentence to a minimum of 20 years) remains unconditional, i. e., certain duties are not relied on a person after release. This contradicts the idea of combating recidivism, on which the institute parole is directed to (see Recommendation cited above), as the gradual reintegration of prisoners into society is fully offset.

B) Also, this Recommendation contains an indication that the national authorities should ensure the availability of legislative parole where it is absent (Rec. 1). In Ukraine, as it is mentioned above, parole for life-sentenced prisoners is still absent, in return there is the institute of pardon.

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<sup>24</sup> Réponse du Conseil fédéral suisse au rapport du Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) relatif à sa visite effectuée en Suisse du 10 au 20 octobre 2011 // <http://www.cpt.coe.int/documents/che/2012-27-inf-fra.pdf> (a referring carried on 30.03. 2014).

C) Similarly, the existing mechanism violates the European Prison Rules, namely §107.2, which establish that: “in the case of those prisoners with longer sentences in particular, steps shall be taken to ensure a gradual return to life in free society”.

Paragraph 12 of the Resolution (76) 2 on the treatment of long-term prisoners on 17 February 1976 (at the 254th meeting of the Ministers’ Deputies) which points out that it should be ensured that a review, as referred to in 9, of the life sentence should take place, if not done before, after eight to fourteen years of detention and be repeated at regular intervals. Under current procedures, a pardon for these people may be considered only after serving a 20-year period, but only after their petitions as regular review of their sentences is not expected. Apparently, it simultaneously violates two requirements of this Resolution –on regularity of intervals of view (because life-sentenced prisoners have to apply for pardon in personal, and once in 5 years) and for the term that is necessary to serve for such review (20 years instead of from 8 to 14). The need for regular period was indicated in §92 of the ECtHR’s judgment *Leger versus France*, in which the Court found that a prisoner, among other things, was able to rely on regular review of his case, and therefore, he was not de-jure and de-facto deprived of hope for release, and had adequate procedural safeguards (*Léger c. France*, application no. 19324/02). He also repeatedly noted that the assessment of criminological and other requirements and risks made in one period of time may not be suitable for another period and therefore assessment of risk should be performed at regular intervals, and if it is required by the particular case, because the danger is not necessarily a permanent feature of prisoners (*X v. the United Kingdom* of 5 November 1981; Judgment *Weeks v. the United Kingdom* of 2 March 1987; Judgment *Thynne, Wilson and Gunnell v. the United Kingdom* of 25 October 1990).

Recommendation of the Council of Europe No. R (99) 22 concerning prison overcrowding and prison population inflation establishes in §26 that effective programs of treatment during detention should be devised and implemented in order to facilitate the resettlement of offenders, to reduce recidivism and provide public safety and protection. Nevertheless, the existing order of serving the sentences for life-sentenced prisoners does not account these targets as well as the possibility of release of such prisoners in general. Namely, they are not prepared for release due to the absence of a mechanism of parole. However, the prevention of repeated committing crimes is a “core function” of criminal punishments (*Mastromatteo v. Italy* [GC], no. 37703/97, §72, ECHR

2002-VIII; *Maiorano and Others v. Italy*, no. 28634/06, §108, 15 December 2009; *i, mutatis mutandis, Choreftakis and Choreftaki v. Greece*, no. 46846/08, §45, 17 January 2012).

D) The CPT also expressed its position on parole for life-sentenced prisoners in its Report on the visit to Hungary of 2007, where it specified in §33:

“Firstly, no one can reasonably argue that all lifers will always remain dangerous to society. Secondly, the detention of people who have no hope of release poses severe management problems in terms of creating incentives to co-operate and address disruptive behavior, the delivery of personal development programs, the organization of sentence plans and security.

...The CPT invites the Hungarian authorities to introduce a regular review of the threat to society posed by “actual lifers”, on the basis of an individual risk assessment, with a view to establishing whether they can serve the remainder of their sentence in the community and under what conditions and supervision measures”.

The same, in the mentioned Report on the visit to Switzerland of 2011 the CPT noted (§118):

“The CPT therefore considers it inhumane to imprison a person for life with no real hope for release...”

E) In the Memorandum of the CPT prepared by J. W. Rasmussen “Actual/real life sentences” (CPT (2007) 55) it is pointed out:

“As actual life sentences have damaging effects on the individual prisoner it may as well be detrimental for a human prison regime. Life sentences without hope of release give little space for “dynamic security”.

This document also points to the unreasonableness of existence of the practice of deprivation of real hope for release from LI, including for those people who were previously released on parole and then committed a crime again.

An interesting argument against LI without the possibility of parole in terms of criminal law also is a low probability of reaching proportionality between a crime and a punishment in the form of life imprisonment. The Criminal Code of Ukraine in Article 65 provides that a person who committed a crime should be subjected to a punishment, which is necessary and sufficient for his/her correction and prevention of new crimes. Actually, this rule is the expression of the idea of proportionality. However, illusory possibility of release from LI and the lack of clear mandatory criteria for application of

pardon a priori deprive of certainty that the punishment will be the same as it is required of this Article. This can be related to the inability to determine how long a certain person will live when serving the sentence, because for someone serving a sentence can last a year, and for another one dozens years, depending on the length of life of each individual.

It might therefore happen that one prisoner who has been serving the punishment for decades, had committed a crime of definitely lower severity (for example, assault on the life of a judge under Article 379 of the Criminal Code of Ukraine), and another prisoner who had been convicted for killing dozens of people served only one day of punishment and died. It turns out that proportionality of punishment without a realistic possibility of parole from life imprisonment is even less attainable. Especially, despite the fact what type of a crime has been committed — an aggravated murder of one man or a murder of 50 people under the same circumstances, the penalty will be the same — life imprisonment.

Considering all these legal arguments, in our opinion, the mechanism of parole from LI should be developed and enshrined in the Criminal Code of Ukraine. At the same time, there should be a kind of gradation of punishment — with the ability to consider an issue about parole after a certain period (which does not interfere continuing keeping of a special dangerous person in a colony in a certain case), which should be set by the judge. The term could vary, for example, from 15 to 25 years.

On the other hand, we should not forget that after such a long period of serving a punishment a significant social dis adaptation of a prisoner takes place, and therefore implementation of the possibility of replacement of this type of punishment by another milder punishment could be an important step. We believe that this approach is even more justified especially because it is a possible solution to a problem of the risk of mistake of the Commission on parole and allows conducting initial test of the behavior of the convicted person in the half-open conditions. Some special researches generally indicate that the replacement of punishment should be the only possible option for life-sentenced prisoners<sup>25</sup>, which, in our opinion, is reasonable only in terms of providing great importance to the need for proper social adaptation. National courts should also be given a great margin of appreciation when

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<sup>25</sup> *Yerokhina E. L.* Criminal law and penal aspects of execution a sentence of life imprisonment. Author. Dis . PhD. — Moscow, 2008 — page 9.

setting the minimum term of serving the punishment before consideration of the issue of possible replacement of the punishment. At the same time, this replacement should not be made by imprisonment for a certain period of time, but only by another milder punishment. In this context, it seems appropriate consolidation of the possibility of transfer to the division of social rehabilitation.

First of all, we should emphasize on the fact that the implementation of the mechanism of parole and replacement by milder punishment does not mean that all prisoners shall be released at once. This is not required by the international standards mentioned above either, as they only contain indication of the necessity of the real possibility of release under certain conditions.

Officers of penitentiary institutions in which life-sentenced prisoners are held during personal conversations, have told us that among them are people who deserve not to serve their sentences for life, and moreover, for a long time of serving a punishment they have confirmed their safety for society.

We cannot avoid mentioning that life imprisonment can be applied not only for cruel murders, but also for the attempted murder of a police officer, or other law enforcement officer (Article 348 of the Criminal Code of Ukraine), assault on the life of the President of Ukraine, the Speaker of the Verkhovna Rada of Ukraine, a MP of Ukraine, the Prime Minister of Ukraine, a member of the Cabinet of Ministers of Ukraine, the Chairman or a judge of the Constitutional Court of Ukraine and the Supreme Court of Ukraine, or high specialized courts of Ukraine, the Prosecutor General of Ukraine, the Commissioner of the Verkhovna Rada of Ukraine on Human Rights, the Chairman of the Accounting Chamber, the Chairman of the National Bank of Ukraine, a leader of a political party, committed in connection with their public or social activities (Article 112 of the Criminal Code of Ukraine); assault on the life of a judge, assessor or juror in connection with their activities related to the provision of justice (Article 379 of the Criminal Code of Ukraine); attempted murder of a defense attorney of a person or his/her close relatives in connection with activities related to the provision of legal aid (Article 400 of the Criminal Code of Ukraine); attempted murder of a representative of a foreign state or any other person who has an international protection, in order to influence the nature of their activities or the activities of their states or organizations which they represent, or to provoke a war or international complications (Article 443 of the Criminal Code of Ukraine).

### ***Section 3***

## **Analysis of the Report of the European Committee for the Prevention of Torture and ill-treatment after the visit to Ukraine in 2013<sup>1</sup>**

Recently the State Penitentiary Service of Ukraine has published an article on its website entitled “We provide the recommendations of the European Committee against Torture”<sup>2</sup> following the recent publication of the Report of the European Committee for the Prevention of Torture and Inhuman and other cruel or degrading treatment in which they have attempted to demonstrate commitment. Foreseeing before hand criticism of the public, the article states the following:

“...the State Penitentiary Service of Ukraine encourages participants of the representatives of non-government sector to be in balance in the comments regarding the conditions and manner of execution of criminal penalties, holding people in SIZOs. This will ensure quality and continuity of the decisions taken by the government sector in the field of strengthening guarantees for the protection of the rights of prisoners and people taken into custody. At the same time, we must consider the interests of all parties of this process: the penitentiary staff, prisoners, people taken into custody, and their families and relatives”.

On this occasion we would like to assure the SPS of Ukraine that criticism of civil society is aimed only at improving the situation with the protection of human rights in the institution under their control, and counter-criticism and hints on dishonesty of non-government representatives additionally indicate the presence of the not real, but demonstrative willingness of the Service to respect human rights standards in their work. Here is a desire to

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<sup>1</sup> The author of the Section — Vadym Chovgan.

<sup>2</sup> <http://www.kvs.gov.ua/peniten/control/main/uk/publish/article/720897>

be white and fluffy in the eyes of people. This criticism does not make sense as long as every word, for example, of our organization in its publications, is confirmed. Moreover, both this and previous articles that described the problems of cooperation between the SPS of Ukraine and the CPT were reasonable, in fact, in the view of the CPT's reports, honesty of which, not depending on the willingness of the Service, should be presumed and recommendations of which, sooner or later, should be implemented. Therefore, we encourage the new leadership of the SPS of Ukraine, instead of fighting with windmills, use criticism as their favor — for observing human rights in their work and changing its problematic aspects noted by human rights activists.

We should recall in a few words the story of the previous visit. It was unprecedented in its “explosiveness” not only in the history of the CPT's visits to Ukraine, but also in the history of its existence, and it is almost 25 visits to 47 countries of the Council of Europe (which also include almost all former members of the USSR).

As a result of this visit even the procedure of public statements was established, which is provided by paragraph 2 of Article 10 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in the case when national authorities refuse to cooperate or refuse to improve the situation with regard to the recommendations of the Committee. In fact, these actions were committed by Ukrainian authorities at that time.

Importantly, for the entire period of its existence, the CPT has made the decision to make a public statement concerning only three countries. The first was Turkey (1996) due to the omission of the authorities to combat ill-treatment in police stations, the second — Russia (2001) in connection with the situation in Chechnya, where mass tortures in detention centers due to Russian Chechen armed conflict were practiced, and the third, relatively recently, Greece (2011) due to the appalling conditions of detention in special centers for migrants (duration of detention, common detention of men and women, and so on).

Thus, Ukraine has become the first state in the history of the CPT, which was the subject of a public statement procedure of the Committee due to poor cooperation for improving the situation in prisons. In this our country was truly exceptional. In particular, the special concern of the CPT was caused by a brazen intimidation of prisoners by penitentiary administration (or by

other prisoners with their motivation) before, after and even during its visit. These actions were carried out in order to prevent communication between prisoners and the delegation “in the wrong direction” (in Oleksiivska colony no. 25 colonies and the Stryzhavska colony no. 81).

However, this was not the only motive. As it is seen from the previous Report, it raised a lot of other serious systemic problems of national penitentiary system. Conditions of detention in prisons, torture and unacceptable treatment of prisoners by the staff, their working conditions, corruption, situation with life-sentenced women and men and even unsatisfactory procedure and terms of service of the penitentiary staff — all this was then a matter of concern of the Committee<sup>3</sup>.

It should be said that as a result of dissatisfaction of the CPT with measures taken by the authorities to restore normal level of cooperation with it was decided that the procedure of public statements of the Report is continuing. That is why the current leadership of the SPS of Ukraine should be especially careful to demonstrate sufficient political will for real changes both regulations and practices in penitentiary institutions.

The difference of the Report, which is the subject of this article, from other Reports is that for the first time in the history of cooperation between Ukraine and the Committee the permission for its publication without the Government’s observations was given (we hope that comment-report on the implementation of the recommendations will be provided by the Government later). The explanation here is one — the political conjuncture. The Ministry of Justice of Ukraine wanted to demonstrate the mistakes of the previous Government as soon as possible. The speed was so that the Ministry not only repeatedly confused the name of the Committee and called it the Commission in official reports, indicating that for the first time in history such a permission to publish the report was given (which is not true because permissions for publication were given on the previous Reports), but immediately created a Special Commission for Supervision of human rights in the penitentiary institutions, which allegedly had the opportunity to visit penitentiary institution and pre-trial detention facilities for the first time in the history of Ukraine, which is absurd given the existence of the National preventive mechanism, supervisory commissions etc.

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<sup>3</sup> More details: *Chovgan V. Shame for the state* // <http://www.khpg.org/index.php?id=1379843571>

At the same time really, for the first time in the history of the publication of Reports of the CPT, state authorities took such actions as dismissal from execution of duties the heads of institutions to which serious concerns relative to abuse had been expressed. This practice should be welcomed and encouraged.

In this context, we should note that another person is continuing to perform professional duties when he fully deserves to be removed from office due to the relationship between the institution under his control and the CPT, and the criticism of him by the public.

During its visit to this institution in 2012, the CPT confirmed that for more than a year human rights organizations and the press have alleged: tortures in this institution were common practice. The KHPG does not stop to receive information about what is happening in this institution until now. One released prisoner from the institution, for example, has recently pointed out that after the visit of the CPT nothing has changed in its daily practice. According to him, instead of beating practiced before, the bullying such as squats 100–200 times, forcing to the continued walking with a 50-kilos sack on the back, running in front of local areas with cloth in hands, pushups from the floor, transfer to the penalty work “brigade no. 22» are practiced now. Work in two shifts without salary (except “barter” in the best case — tea, tobacco and hygiene products at the end of the month) are also normal practice of the institution. We are speaking about the Head of Oleksiyivska correctional colony no. 25 (Kharkiv region) Hyrnyy V. G.

Assuming, as usual, criticism of the SPS of Ukraine that these are all fabrications of prisoners, we should emphasize that extraordinary concern about this institution was expressed by the CPT in its Report on the visit of 2012. Information about the Kharkov torture chambers or the factory or death, as it had already been named by people, was provided in detail on our website<sup>4</sup>. The same massive “slander” by former prisoners of this institution, which, according to penitentiary officials, is just caused by too strict regime and requests for fulfillment of the legislation in it, is not practiced in any other prison institutions. It was held at her rallies against lawlessness is happening behind the walls. There’s even a public on this theme in the social network “Vkon-takte” named “Destroy the factory of death!<sup>5</sup>”.

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<sup>4</sup> <http://www.khpg.org/en/index.php?id=1382718737>

<sup>5</sup> [http://vk.com/fabrika\\_smerti](http://vk.com/fabrika_smerti)

The information about what is happening in it has undergone even more publicity, due to the serving of punishment there by famous a “prisoner” S. Pavlichenko who cut his veins upon arrival at the institution as a result of reaction to what is happening there. The same, some other prisoners, who after a final judgment learn that they are distributed to this institution, prefer cutting veins and all sorts of other “tricks” for only not be directed to it.

Such popularity is due to the policy of moral bullying and intimidation of prisoners by other prisoners — informal leaders of this institution, which has been built of its senior management for many years.

After the visit to Oleksiyivska colony no. 25 and other prison facilities in 2012, the CPT carried out a final meeting with the senior management of the SPS of Ukraine, which was attended by its former Chairman O. Lisitskov. When delegation shared its observations on Oleksiyivska colony no. 25 Mr. Lisitskov could not believe his ears, because he believed that this is the best institution in the country! His reaction should not be surprising. Behind the demonstrative premises and other features of “paradise”, which had been seen by the senior management, quite different negative side — tortures, was hidden. Therefore, the SPS of Ukraine should be cautioned from repeating mistakes of predecessors and fire all management of this institution. Should be encouraged to do this, and leadership of the Ministry of Justice of Ukraine and especially recently when it created the Commission to deal with the reform of the prison sector.

No, we shall actually consider the Report of the Committee of 2013.

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### **Systemic problems described in the Report. Treatment of people taken into custody and convicted people**

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Despite some positive developments in this area in some institutions (prisoners expressed positively about treatment of them by the staff of the Kyiv and Simferopol SIZOs), other problems are disturbing.

The greatest concern was caused by the institution visited by the CPT for the first time — Krivorizka penal colony no. 3 (“donut» as it is called among the people due to the rounded shape of the territory of the institution). Conclusions of the delegation directly reinforced observations of negative treatment

of prisoners in this institution, about which a well-known defender of prisoners' rights Andrey Didenko wrote in his article<sup>6</sup> long ago.

The delegation heard numerous allegations and gathered other evidence (including of a medical nature<sup>7</sup>) that the establishment's operational staff used a group of inmates (so-called "pressovshchiki") to physically ill-treat other prisoners 104 and consequently install a climate of fear and intimidation. In some instances, the alleged ill-treatment was of such severity that it could be considered as torture (e.g. deprivation of sleep for up to several days; extensive beatings whilst being tied up with adhesive tape, suspended or after having being placed in a bag). The purpose of this ill-treatment was apparently not only to maintain strict order and discipline, but also to obtain from the inmates concerned confessions to (additional) crimes they were suspected of having committed before imprisonment. In this context, a few prisoners also alleged that the "pressovshchiki" had ill-treated them in order to extort money from them and their relatives.

There were numerous registered acts of self-harm in the prison. The delegation spoke with several inmates who had committed such acts recently, and at least some of them acknowledged that the reason for self-harming had been that they could no longer bear the ill-treatment and intimidation by other prisoners, and had hoped that by committing self-harm they would (at least for some time) be taken to the relative safety of the health-care unit (§113).

The national authorities responded to previous observations of the delegation during the visit of the Committee by letter, in which they pointed to internal "checks" carried out with public participation through "questioning". Of course, such an investigation was not founded effective and independent in the Report of the CPT (§115). Moreover, the "checks" of the type of questioning have been already conducted by prosecutors after discovery of egregious problems in Oleksiyivska colony no. 25 (Kharkiv region) during the visit of the CPT in 2012 and were recognized by the Committee as such, that does not

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<sup>6</sup> <http://khpg.org.ua/index.php?id=1282640898>

<sup>7</sup> I.e. lesions directly observed by the delegation's forensic medical member, which were fully consistent with the allegations made by prisoners, as well as information on lesions sustained by prisoners — described in the medical documentation of the establishment — which were highly unlikely to have originated in the manner stated in those records (e.g. fractured ribs or haematomas under both eyes, allegedly resulting from "falling from the bed" or "slipping in the toilet").

make sense, since checks must be carried out by comprehensive investigation of the circumstances of the case, in particular, with the assistance of the victims of ill-treatment.

Management of the Colony no. 3 after the visit was allegedly suspended from their duties, but the official site of the management of the SPS of Ukraine in the Dnipropetrovsk region with a schedule of receptions of officials of this institution indicates opposite<sup>8</sup>.

The Report sets out other facts of ill-treatment of prisoners. For instance, in the Odessa SIZO several prisoners (including women) alleged that they had recently been the subject of deliberate physical ill-treatment by custodial officers (mainly slaps, punches, kicks and baton blows). Further, the delegation received allegations of verbal abuse by several members of custodial staff, in particular when dealing with women or juveniles (§104). Also, in this institution there was a general tendency to partly delegate authority to a criminal subculture. In this connection, in both establishments, the delegation came across instances of violence between inmates. In each of these two establishments, a prisoner "leader" was clearly in charge of order among prisoners and, to assist him in his task, he or inmates directly subordinated to him reportedly moved freely in the establishments in question. Giving a reasonable degree of authority to prisoner "leaders" in order to ensure security appeared to be an acceptable practice for staff, who were in limited number in detention areas (§108).

In this regard we should welcome the initiative of the Ministry of Justice to eliminate the head of this institution of the duty. However, we shall note that, as in the case of Kryviy Rig colony, according to the site of the territorial authority of the SPS of Ukraine in Odessa region Mastytskyy V. is continuing to perform his duties of the head of the Odessa SIZO.

In the Dnipropetrovsk SIZO "the delegation heard a few accounts of severe beatings of male inmates who were or had been held in that establishment. In most cases, the alleged ill-treatment was said to have been inflicted by fellow prisoners at the instigation of the establishment's operational staff. More specifically, the inmates concerned had apparently been allocated to "press-khata" cells where a couple of other prisoners were allegedly tasked with beating them until they provided self-incriminating statements or statements incriminating others in relation to criminal offenses presumed to have

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<sup>8</sup> <http://www.kvs.gov.ua/peniten/control/dnp/uk/publish/article/80101>

been committed before their apprehension. In at least one case, the alleged ill-treatment was of such severity that it could well amount to torture (e.g. extensive beatings for some 24 hours whilst being tied up with adhesive tape; asphyxiation with a plastic bag; strangulation with a rope to the point of losing consciousness).

Also in Stryzhavska correctional colony, in which the daily practice of ill-treatment, was denounced by the CPT denounced during its visit in 2012, despite some positive changes, the new management has continued the use of certain groups of prisoners to maintain discipline through intimidation and other methods of ill-treatment of people who are held in that institution. Moreover, extortions were practiced in the institution: the delegation received several allegations according to which those not willing to give informal financial or other contributions (through their jobs in the workshops in particular) in exchange for protection were at heightened risk of intimidation/ill-treatment.

As regard demanding confession in commitment of crimes and other offenses, the CPT noted (§117) that it is to say the least a highly questionable state of affairs that prison officers are involved in the investigation of criminal offenses — and the collection of related evidence such as confessions of prisoners — in particular, when the offense in question has been committed prior to imprisonment. Such a situation is clearly detrimental to the protection of prisoners against ill-treatment (including inter-prisoner violence) and lends itself to abuse.

It recommended the Ukrainian authorities take steps, including at the legislative level, to ensure that officers of operational divisions no longer investigate criminal offenses committed by prisoners outside the prison and no longer take statements from prisoners in relation to such offenses.

### **Systematic organizational and regulatory problems**

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Despite the fact that senior officials of the Ministry of Justice of Ukraine reported to the delegation about elimination of overcrowding in at a result of adoption of the new Code of Criminal Procedure of Ukraine, the CPT noted that it is too early to speak about the elimination of overcrowding. The fact is, according to the CPT, that overcrowding was eliminated only in pursuant to national standards (2.5 ml per person) while overcrowding of pre-trial deten-

tion facilities and prison continues to be in a state of non-compliance with the standards of the Council of Europe (at least 4 ml). Moreover, the Report dispelled confidence of Ukrainian officials about compliance with a national standard, it was stated that according to the observations of the CPT, even this standard is not complied and in some institutions the figure was only 1,5 ml of living space per person (§§98–100, 119).

Also the fact that arithmetic index of occupancy of each individual institution could be recognized as satisfactory, it did not mean that this is the indicator of the area in each section of a facility. That is why it was recommended that “Ukrainian authorities check actual living space per prisoner in the cells in each SIZO/correctional colony of a closed type on a regular basis (in addition to checking the average living space per inmate in each institution)”.

The formal approach to implementation of the mentioned norm sometimes leads to unexpected negative results. For example, placement of a prisoner into a cell, the area of which is 4 m<sup>2</sup> means that its size is a bit bigger than an ordinary bed. Of course, the life in such conditions can be considered as treatment which violates Article 3 of the Convention for protection of human rights and fundamental freedoms.

Not without reason, the CPT directly points that cell smaller than 6 m<sup>2</sup> should not be used at all (§59 of the 21<sup>st</sup> General Report). Long ago, in §112 of its Report on the visit to Ukraine of 1998 the CPT recommended Ukrainian authorities that cells smaller than 6 m<sup>2</sup> should not be used for keeping one person.

During the same visit the CPT emphasized on several other standards, in particular, that cells area of which is 8–10 m<sup>2</sup> should not be used for keeping more than two people; cell with the area 11 m<sup>2</sup> — for more than 3 people and cells with the area of 15–17 m<sup>2</sup> — for more than 4–5 people.

Later this problem was solved, which is confirmed by the following visits. For instance, it is mentioned in §148 of the Report on the visit to Ukraine of 2009: “some disciplinary cells were unsuited for use as inmate accommodation due to their limited size (e.g. 4.5 to 5 m<sup>2</sup>). Further, certain cells were very narrow (1.3. m<sup>2</sup>)...”, according to this it was recommended that cells measuring less than 6 m<sup>2</sup> were withdrawn from service or enlarged. It was also recommended in §89 that all cells should have at least 2 meters between the walls. The same observations (minimum area of the cell for one person 6 m<sup>2</sup> and minimum 2 meters between the walls) were mentioned in §45 of the Report

on the visit to Ukraine of 2012. Moreover, it was specified that the area of toilets should not be included into this calculation.

Quite a shame is that for today the SPS of Ukraine has failed to remove those shutters and partitions from the windows of most institutions pre-trial detention facilities and prisons, which wholly or substantially restrict access to natural light or do not allow the opportunity to look beyond the cell (§134). This recommendation was repeated almost a dozen times and still is not implemented by the SPS of Ukraine, especially with regard to semi basement premises of disciplinary cells and cell-type premises (perhaps this is why the penitentiary staff and prisoners call the building in which the premises are, “the pit”?), and sometimes enhanced control divisions.

Concerns about the excessive use of video cameras in prisons expressed in the Report on the visit to Ukraine in 2012 were again repeated, and with the time they are more and more urgent. Recently developed act of the SPS of Ukraine which would have resolve this issue, on the contrary, has the aim to provide the administration of institutions with such extensive powers to intervene in the private life through video recording that in case of rejection of our proposals on changing<sup>9</sup> this act, it theoretically allows video surveillance of prisoners even while they are doing their natural deeds in the toilets of penitentiary institutions!

The Report points out: “Naturally, the CPT fully understands that the installation of CCTV cameras may be an important additional means to ensure security in common detention areas (corridors, sports rooms, etc.), special cells (e.g. special observation cells, disciplinary cells) and exercise yards. This is, however, a significant intrusion into the privacy of prisoners when such cameras are installed in their own cells, in particular when the inmates remain there for prolonged periods. Accordingly, the Committee reiterates that it is opposed to the routine installation of CCTV cameras in cells and considers that the resources devoted to such schemes can more usefully be deployed by having staff interact with the prisoners concerned. More generally, reference should be made to paragraph 18 of Recommendation Rec (2003) 23 of the Committee of Ministers of the Council of Europe on the management by prison administrations of life sentence and other long-term prisoners, which makes it clear that technical means cannot be a substitute for dynamic secu-

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<sup>9</sup> <http://www.kvs.gov.ua/peniten/control/main/uk/publish/article/703902>

ity”<sup>10</sup>. Earlier, we pointed to the definition of dynamic security that should be used in the future by the SPS of Ukraine<sup>11</sup>.

Similarly methods related to maximum isolation life-sentenced prisoners should be replaced by dynamic ways of security. Every year these observations of the CPT are repeated. This time the recommendation is:

“138. As regards systematic segregation of prisoners facing/sentenced to a life sentence, the CPT’s delegation was informed that, following a recent legislative amendment, 152 life-sentenced prisoners should not be segregated from other inmates once they have served 20 years of their sentence. However, the Committee regrets that the rule remains that inmates facing/sentenced to life imprisonment must be system-

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<sup>10</sup> Paragraph 18.b. of the Committee of Ministers’ Recommendation, adopted on 9 October 2003, reads as follows: “Where technical devices, such as alarms and CCTV, are used, these should always be an adjunct to dynamic security methods.”

<sup>11</sup> Famous theoretical ideologists of dynamic danger quite deeply studied this type of security and compared it with other types of security. There are the following security types:

A) physical, which includes all the elements of the environment, developed to deal with the movement and prevent the escape of prisoners (walls, fences, checkpoints, locks, shutters);

B) procedural, consisting of a wide range of measures aimed at strengthening control, including searches, telephone tapping, testing for drug use;

C) dynamic. The term dynamic security (dynamic security) was coined (as a result of riots of 70–80s in prisons in the UK) in 1985, by Ian Dunbar, former director of the Prison Administration of Great Britain, who became very famous through the introduction of advanced ideas in the work of subordinate service.

From his point of view, dynamic security is when “relationships and individualism are combined in a planned (and useful) activity in an institution of both maximum and minimum level of security, the result of which is flexible and better order in the prison.” It is stressed that the main attention should be directed on attitude to the staff and inmates as individuals, on just and respectful relations “staff-inmate.” This is not a physical or procedural limitations, but relations with prisoners, their useful activity, establishing trust and effective communication and therefore “knowledge of what is happening” (Dynamic Security: The Democratic Therapeutic Community in Prison / Edited by Michael Parker. — London: Jessica Kingsley Publishers, 2006. — P. 233–234 (288 p.). In practice, this leads to the fact that prisoners eventually tell themselves about all the problems that threaten the security or staff is very good “feeling the smell” when “something is wrong” in their institution.

Of course, the western theorists discussed and possible extremes of good relations. It is indicated that members of staff should be “friendly, but not friends”, because otherwise there is a risk of falling into what we call the “unofficial relations” which in Ukraine is often wrongly interpreted and perceived as a need to maintain a minimum of relations. This is just a barrier to the establishment of dynamic security in our institutions, the need for which is more than once pointed out by the CPT.

atically segregated. The law still offers too little margin of manoeuvre to the penitentiary authorities.

139. The CPT must insist once more on the need to put into place a comprehensive and ongoing risk and needs assessment for each and every prisoner facing/sentenced to life imprisonment from the very outset of their detention in penitentiary establishments. For all inmates falling under this category to be held in the above conditions is clearly unacceptable and, as regards in particular prisoners facing life imprisonment at Dnipropetrovsk SIZO, could well amount to inhuman and degrading treatment”.

It is about the need for individualization and unacceptability of restriction of prisoners’ rights, which is consistent with the CPT and the European Court of Human Rights which consider this idea as a principle that is applied when determining the presence of an element of necessary in a democratic society, that is a basis component for the recognition of restriction Conventional rights justified by the European Court of Human Rights<sup>12</sup>.

The comments were expressed about the extremely sensitive issue of national prison system — the unavailability of parole for life life-sentenced prisoners. This need is not surprising, because the documents of the Council of Europe fix the standard, according to which the parole should be accessible to all including life-sentenced prisoners what, of course, does not mean that people should be released, who are dangerous for society<sup>13</sup>.

A number of observations concern the insufficient resource support of medical care institutions, including, special attention to the lack of complete medical staff in the institutions, lack of medicines (§§144–150). The standards for fixing injuries by medical personnel were again repeated (§§153–155). By the way, they were almost literally stated by our in the proposals to the draft of the new Internal regulations of penal institutions, but the SPS of Ukraine simply has not wished to take these standards into account that is once again confirmed its reluctance to implement international standards of human rights. Proposals were made in the form of additional rules (specialists

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<sup>12</sup> *Chovgan V. O.* Standards of restrictions on the rights of convicted people in the practice of the European Court of Human Rights [text] // *Chovgan V. O.* Problems of legality: collection of scientific papers. / Edit. by V. Ya Tatsiy — Kh.: Nat. Univ. “Yaroslav the Wise Law Academy of Ukraine” — 2013. — Vol. 122. — pp. 279–287.

<sup>13</sup> *Chovgan V. A.* Serving life or life after death in Ukraine // <http://khpg.org.ua.index.php?id=1392728858>

have immediately noticed that they are almost literally copy of the General standards of the CPT):

“In the event of revealing physical injuries of a prisoner a medical report shall be made, the contents of which shall include:

- 1) statements of a prisoner concerning the medical examination (including description of his/her state of health and any allegations of ill-treatment);
- 2) a comprehensive description of objective health indicators;
- 3) consideration of medical worker due to allegations of a prisoner and objective health indicators, as well as justification, whether they are in a state of conformity with each other.

In addition to the medical report a map of body injuries which indicates the location of injuries shall be made, as well as photographing of injuries shall be taken. Photographs and a map of injuries shall be added to the report.

After making a report its copy and copies of annexes in three days shall be sent to the relevant prosecution bodies and territorial governing body of the SPS of Ukraine regardless of the wishes or a prisoner or penitentiary officials.

All medical examinations should be conducted out of the hearing and if the health care worker does not want another in each case, beyond the sight of non-medical personnel.

A prisoner should have access to the report and its annexes, as well as be able to make copies”.

The CPT showed its concern “by the lack of systematic screening and treatment for blood-borne viral hepatitis in the Ukrainian prison system. The delegation was informed that, currently, there was no National Programme for detecting and treating hepatitis in Ukraine (and no national standard for treatment), and that penitentiary establishments were not provided with any specific hepatitis medication. The Committee recommends that measures be taken to remedy this regrettable state of affairs” (§161).

It was also emphasized on the inadequacy of provision of psychological and psychiatric medical assistance in institutions where this type of medical assistance has particular importance due to significant mental problems of people who are held in these institutions (in particular, it was stressed on the lack of qualified medical staff) (§§163, 164). Similarly, the observations concerned low level of state policy on the prevention and treatment of drug ad-

diction in penitentiary institutions, detoxification, rehabilitation and risk reduction (§164).

In the context of a total lack of full-time employees in the institutions subordinated to the SPS of Ukraine, the CPT recommended to solve finally this problem, improve their working conditions (§165). For example, it was stressed (as in the Report on the visit of 2012) that it should be brought to the end to use the system of 24-hour shift for officers.

One of the recommendations concerns the need to reduce the maximum period of detention of minors in DISO up to three days. It was stressed on necessity to change the procedure of placing into DISO for all prisoners, including the need of amending the regulatory framework to ensure conduction of oral hearings when deciding on the use of disciplinary penalties. Additional safeguards in this regard were expressed in the recommendations of the CPT (§174):

- “ — revise the procedure for placement in disciplinary solitary confinement in SIZOs and Closed-Type Prisons in order to ensure that the prisoners concerned(i) are promptly informed in writing of the charges against them, (ii) have the right to legal assistance, iii) are given reasonable time to prepare their defence, (iv) have the right to call witnesses on their own behalf and to cross-examine evidence given against them, and (v) are provided with a copy of the decision which contains the reasons for placement and information on the means available to them to challenge the decision before an independent authority;
- ensure, including through regulatory measures, that, in the case of a prisoner who is being subjected to successive sanctions of disciplinary confinement totalling in excess of 15/10 days, there should be an appropriate interruption in the disciplinary confinement regime at the 15/10-day point”.

These recommendations have not equally be heard by both the SPS of Ukraine and other government agencies, although they were expressed by the Committee before<sup>14</sup>.

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<sup>14</sup> The CPT paid attention to the procedural aspect of processes related to disciplinary sanctions, which are further isolation, in their Report after the visit to Ukraine in 2009 (§147): “The CPT calls upon the Ukrainian authorities to review the procedure for placement in a DIZO/*kartzer* and CTP in order to ensure that the prisoners concerned (i) are informed in writing of the charges against them, (ii) are given sufficient time to prepare for their defence, (iii) have the right to call witnesses on their own behalf and to cross-examine evidence given against them, and (iv) are provided with a copy of the decision which contains the reasons for placement and straightforward information on

Likewise repeated recommendation that measure of detention in DISO should not include the complete prohibition on family contacts during this measure, any restrictions on contacts with the family as a form of punishment should be used only where the breach relates to previous experience of appearing problems during such contacts (the CPT referred appropriate rule 60.4. of the European Prison Rules). Experience shows that the SPS of Ukraine not only does not want to implement this kind of recommendation, but it rather is inclined to deterioration of the current situation. In particular, the Law of 05.09.2013 “On Amendments to the Code of Criminal Procedure of Ukraine regarding the manner and conditions of serving the criminal sentences” (which had been mainly developed by the Services) has fixed even the worse that the previous provision in paragraph 11 of Article 134 of the Penal Code of Ukraine, which is completely divorced from good to prison practices:

“During the detention in a disciplinary cell (DISO), a punishment cell (kartzler) or cell-type premises (solitary confinement), the convicts are prohibited to have visits, phone calls, buy food and necessities, receiving parcels (assists) and packages, use board games”.

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their rights, including the right to legal assistance and the means available to them to challenge the decision before an independent authority (e.g. a judge)”.

This problem was also mentioned in the Report on the visit to Ukraine of 2012. In particular, the CPT noted in §57: “the measures consisting of placing an inmate in DIZO, PKT or DPK should always be applied for the shortest possible period of time, after *inter alia* having taken into account the views of the inmate concerned, provided him with a copy of the decision which contains the reasons for placement and straightforward information on his rights, including the means available to him to challenge the decision before an independent authority”. From this several obligations follows: a) fixing necessity of application of the shortest possible period when deciding on disciplinary action or transfer to the DPK, which by nature are not legal charges, but changing the conditions of detention; b) mandatory providing a copy of the decision to a prisoner, without which obviously it is not possible to appeal properly against this measure, because in order to appeal against any decision we should at least know its contents. Moreover, this decision shall be motivated and accessible to external independent regulatory agencies (§57b of the 21st General Report).

Also, in this paragraph it is pointed out: “in the case of a prisoner who is subjected to successive sanctions of disciplinary confinement totalling in excess of 15 days (10 days for women), there should be an appropriate interruption in the disciplinary confinement regime at the 15/10-day point; a plan should be established for every prisoner placed in PKT or DPK with a view to addressing the issues which require the inmate concerned to be kept in such conditions. Steps must also be taken to ensure that, after an initial decision on placement in PKT or DPK, there is a further review at least after the first month”.

Before the convicts were also prohibited to have visits, receive parcels (assists) and packages, but phone calls were not prohibited. However, even in such a version, this provision was incompatible with the standards of the CPT.

There is a recommendation in the General Standards (§61 of the 21<sup>st</sup> General Report of 2011):

“As with all other regimes applied to prisoners, the principle that prisoners placed in solitary confinement should be subject to no more restrictions than are necessary for their safe and orderly confinement must be followed. Further, special efforts should be made to enhance the regime of those kept in long-term solitary confinement, who need particular attention to minimise the damage that this measure can do to them. It is not necessary to have an “all or nothing” approach to the question. Each particular restriction should only be applied as appropriate to the assessed risk of the individual prisoner”. In this case, the approach “all or nothing” refers to an approach in which all convicts are forbidden to perform or not to perform some action, have some items without any previous procedure of their individualization, i. e., without the possibility of the imposition of such restrictions when they are really needed. Instead, the automatic limit is applied for the rights of all prisoners with a particular status (in this case, for example, the placement into a disciplinary cell, a punishment cell or cell-type premises).

Considering the above, the prohibition of phone calls all people who are placed into a disciplinary cell, a punishment cell or cell-type premises, contradicts General Standards of the CPT. Similarly, the prohibition of visits prisoners who are placed to a disciplinary cell, a punishment cell or cell-type premises contradicts these Standards, given the absence of any justification for such restrictions, and their automatic nature.

This is additionally confirmed by the CPT’s Standards, namely, the need of the principle of necessary limitations while serving a disciplinary penalty is emphasized in §55 of the General Report of 2011:

“(The) rule that only restrictions necessary for the safe and orderly confinement of the prisoner and the requirements of justice are permitted applies equally to prisoners undergoing solitary confinement<sup>15</sup>. Accordingly,

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<sup>15</sup> In context it means not only solitary, but also other types of disciplinary cells as it is noted by the CPT. It should be noted that “solitary confinement” under §54 of the 11th General Report should not be interpreted literally and can mean retaining more than 1 person in extra isolation, the main feature of which is that it is used “as a result of the

during solitary confinement there should, for example, be no automatic withdrawal of rights to visits, telephone calls and correspondence or of access to resources normally available to prisoners (such as reading materials). Equally, the regime should be flexible enough to permit relaxation of any restriction which is not necessary in individual cases”.

The same thing was emphasized in the Report on the visit to Ukraine of 2009 (§150):

“It should be added that inmates placed in DIZO/kartzner and PKTV cells are, as a rule, automatically deprived of contact with the outside world (i. e. visits, letters and phone calls). **The CPT recommends that the Ukrainian authorities take steps to ensure that placement of prisoners in a DIZO/kartzner and PKT does not include a total prohibition on family contacts** (see also Rule 60 (4) of the European Prison Rules). **Any restrictions on family contacts as a form of punishment should be used only where the offense relates to such contacts**” (bold of font is unchanged). It is said in the last sentence that if disciplinary action is imposed due to violations of procedure of visits, the person can be reasonably limited in visits.

However, the Law of Ukraine “On Amendments to the Penal Code of Ukraine concerning adaptation of legal status of the convicted people to European standards” of 24.04.2014 has improved in some way the situation of convicts by amending Article 134 of the Penal Code of Ukraine and providing permission to have visits while staying in DISO, punishment cell or solitary confinement cell with lawyers or other experts in law, who are entitled to provide legal assistance in person or on behalf of legal entity.

For similar reasons, the unreasonable restriction is prohibition of visits for convicts during detention in the division of quarantine, diagnostic and distribution (except for visits from a lawyer). This provision was included in the recent repressive legislation bill of 05.09.2013 “On Amendments to the Criminal Procedure Code of Ukraine regarding the manner and conditions of serving of sentences”.

Again and again the State Penitentiary Service is reminded of recommendation of the CPT repeated in its every (!) preliminary Report on its visit to Ukraine (these Reports are exactly ten!), except the Report of 2007, when the

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judgment, as disciplinary sanctions, as a preventive measure, administrative measure, or for protection of a specific the convict.”

penitentiary institutions were not visited at all. This is a total inactivity and unemployment of certain categories of prisoners (sentenced to life imprisonment and other people who are in conditions of high security or control, detainees in SIZO). These individuals spend 23 to 24 hours in their cells without any possibilities of useful activity (one hour is a daily walk). Because of this, the Committee again recommended that they should “spend as many hours outside their cells each day as it is possible (preferably eight o’clock or more) and participate in active, purposeful and various activities (work, education, sports, etc).” It is also recommended to develop a special program for the employment of problematic prisoners (§131).

The negative practice of maximum restrictions of contact with the outside world for people taken into custody still remains. The delegation once again reiterated its recommendation on the need to change the philosophy of limiting physical contact with the outside world for this category of prisoners who, moreover, are *de jure* considered innocent: “prisoners may benefit from at least three visits of one to four hours per month. However, such visits can only take place on the basis of a written authorisation from the investigator or court. It should be recalled that similar authorisation must also be obtained as regards correspondence. Further, as in the past, phone calls are still not allowed by law.

It emerged during the 2013 visit that the above amendment brought little progress in practice. Investigators/judges rarely authorised visits (or the possibility to send letters). Further, many inmates with whom the delegation spoke considered that they were not allowed contacts with the outside world in retaliation for their refusal to make self-incriminating statements or provide other information to investigators. As regards the small number of remand prisoners authorised to receive visits, they were as a rule not allowed physical contact with their visitors” (§125).

In this regard, the Committee recommended clear proposals for changing the legislation:

“...amend the current legislation to ensure that remand prisoners are as a rule entitled to receive visits, make/receive phone calls and send/receive letters. Any restriction/prohibition placed on them as regards visits, phone calls or correspondence must be specifically substantiated by the needs of the investigation, always require the approval of a judicial authority, and be applied for a specified period of time, with reasons stated. In the meantime, investigators and judges should be reminded that the starting

point for considering requests for visits and for sending letters must be the presumption of innocence and the principle that **remand prisoners should be subject to no more restrictions than are strictly necessary for the interests of justice and that, unless there are clearly defined reasons for not allowing visits/correspondence or for imposing certain restrictions (e.g. organisation of visits through a partition) for a specified period in an individual case** (*bold font by the Author*), remand prisoners should be authorised to receive at least three visits of up to four hours a month, and send/receive letters, as provided for by the law”.

These comments are a logical continuation of old unfulfilled recommendations of the CPT of previous years. Even in §168 of the Report after visiting to Ukraine in 1998, the CPT states:

“The CPT recognises that it may sometimes be necessary, in the interests of justice, to place certain restrictions on visits for particular remand prisoners. However, these restrictions should be strictly limited to the requirements of the case and should apply for the shortest possible period. On no account should visits between a remand prisoner and his/her family be banned for a prolonged period. If there is considered to be an ongoing risk of collusion, it is preferable to authorise visits but under strict supervision. This approach should also cover correspondence with relatives.

**The CPT recommends that the question of remand prisoners’ visits and correspondence be reviewed, in the light of the above remarks...”** (*bold font saved*).

In §106 of the Report on the visit of 2002 the CPT noted:

“The CPT considers that the time has also come for the Ukrainian authorities to review **the regimes applicable to remand prisoners and to prisoners awaiting final sentencing** (having appealed against their sentences). These regimes have certain unacceptable features in that prisoners were, depending on the stage of the proceedings, required to obtain authorisation from the investigator, prosecutor or court in order to work and keep in contact with the outside world (visits, correspondence). The delegation met a considerable number of such prisoners, both adults and minors, who spent months in succession languishing in their cells for 23 hours a day, without any occupation worthy of the name, deprived of contact with their families.

The CPT recalls that it recognises that in certain cases it will be necessary, in the interests of an investigation, to limit the contacts of remand

prisoners with fellow inmates or with the outside world. However, such restrictions should be decided according to the circumstances of each individual case and applied for the shortest possible time. Further, the need to impose restrictions on certain prisoners cannot justify the blanket imposition of a restrictive regime on the remand population as a whole. Finally, the CPT sees no reason why those awaiting final sentencing should be kept under such a regime solely on the grounds that they have appealed against their sentence.

**The CPT recommends that the Ukrainian authorities take steps without delay — including, if necessary, the removal of any existing legal obstacles — to put an end to the restrictive regime applicable to remand prisoners and prisoners awaiting final sentencing** (*bold font is saved*).

In continuation of these recommendations and due to non-compliance of them, the Committee has not stopped repeating the same comments and insisting on its recommendations about the contacts. In §152 of the Report on the visit of 2009 it noted:

“Despite previous recommendations by the CPT, the situation as regards remand prisoners’ contact with the outside world remained unchanged. It was rare for such people, including juveniles, to be authorised to receive visits and even to be authorised to send/receive letters, and no telephone calls were allowed. In some instances, the ban on visits continued even after the criminal investigation had been terminated. The delegation met prisoners who had not had any visits for up to 21 months.

**The CPT calls upon the Ukrainian authorities to take measures in order to ensure that remand prisoners are entitled to receive visits and send/receive letters as a matter of principle. Any refusal to permit visits or send/receive letters should be specifically substantiated by the needs of the investigation, require the approval of a body unconnected with the case in hand and be applied for a specified period of time, with reasons stated. If necessary, the relevant legislation and regulations should be amended.**

Further, **the CPT recommends that access to a telephone be guaranteed for remand prisoners; any decision to prohibit or impose restrictions on a given prisoner’s access to a telephone should be based on a substantiated risk of collusion, intimidation or another illegal activity and be for a specified period. The law should be amended accordingly”** (*bold font saved*).

The answer to this comment on the visit in 2009 shows that the national authorities have also recognized that such restrictions lead to deprivation detainees in SIZO of distance education.

At last, in §50 of the Report on the visit to Ukraine of 2011 the CPT noted:

“...despite the specific recommendations made by the Committee after all previous visits to Ukraine, severe restrictions were still frequently being imposed regarding remand prisoners’ contacts with the outside world. Many remand prisoners were not allowed to receive any visits from people other than their lawyer (or legal representative) nor make telephone calls, for prolonged periods; in a number of cases, this situation had been ongoing for more than a year. Such a state of affairs is not acceptable.

**The CPT once again calls upon the Ukrainian authorities to take measures in order to ensure that remand prisoners are, as a matter of principle, entitled to receive visits and send/receive letters. Any refusal to permit visits or send/receive letters should be specifically substantiated by the needs of the investigation, require the approval of a body unconnected with the case in hand and be applied for a specified period of time, with reasons stated. If necessary, the relevant legislation and regulations should be amended.**

Further, **the Committee reiterates its recommendation that steps be taken to ensure that remand prisoners are, as a rule, granted regular access to a telephone.** If there is a perceived risk of collusion in an individual case, a particular phone call could always be monitored. **Any decision to prohibit or impose restrictions on a given prisoner’s access to a telephone should be based on a substantiated risk of collusion, intimidation or another illegal activity and be for a specified period”** (*bold font saved*).

In continuation the recommendation was repeated according to which prisoners shall receive visits under reasonably open conditions. Restrictions on the right for receiving visits (including appearing in the procedure of conducting visits) shall be imposed only on the basis of an individual assessment of the potential risk associated with a certain prisoner (§132).

This recommendation is not expressed at the first time<sup>16</sup>, but despite the fact that its implementation can be done by making small changes to the leg-

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<sup>16</sup> In particular, in §137 of the Report on the visit to Ukraine of 2002 the CPT pointed out: “The CPT regrets the fact that short visits generally took place in glass booths, and prisoners and visitors had to use a telephone (which, as in SIZO No. 21, often failed to work

islative act of the SPS of Ukraine — Internal Regulations, it still remains unemployments including in the draft of the new Internal Regulations.

The previous position of the CPT was reminded that the decision whether or not to impose a particular security level or whether segregation for preventative purposes is necessary should lie with the penitentiary authorities, on the basis of an individual risk assessment, and should not be part of the catalogue of criminal sanctions. The relevant legal provisions should accordingly be amended (§129). Thus the recommendation expressed before was again repeated<sup>17</sup>. It means the undesirability of definition at the level of the

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properly), in uncomfortable conditions. ... A welcome exception was the room set aside in SIZO No. 21 for visits at a table for minors and economic prisoners. This is an example to be followed. ... The CPT appreciate the Ukrainian authorities' plans ... to review the conditions under which visits take place in order to ensure that, as far as possible, both sentenced and remand prisoners receive visits in more open conditions". In their Response on these comments the Ukrainian authorities said: "With the purpose of improving conditions of direct contact during short-term visits, at Romny correctional colony no. 56 and Shostka correctional colony no. 66 the glass barriers separating prisoners from their visitors were removed as an experiment. If the experiment is successful, recommendations will be given to other penal establishments to this effect".

In the Report on the visit to Ukraine of 2005 the CPT noted (§145): "As in the past, short visits took place in glass booths, with prisoners and visitors speaking to each other by telephone (some of which, at Colony No. 65 for example, were not in service). The Ukrainian authorities stated in this connection that the installation of visit facilities without a glass separation was envisaged as part of major renovation work of the visiting areas".

This recommendation was changed and repeated in the Report on the visit to Ukraine of 2009 (§153): to modify the facilities for short-term visits in order to enable prisoners to receive visits under reasonably open conditions. Open visiting arrangements should be the rule and closed ones the exception, such exceptions to be based on well founded and reasoned decisions following individual assessment of the potential risk posed by a particular prisoner. Further, the capacity of the short term visiting facilities should be increased to meet the prison population's needs".

<sup>17</sup> In the Report on the visit of 2012 the CPT pointed to the problem of low level of the admittance of the penitentiary authorities during determining the type of colony, where prisoners should be kept (§55): "The admittance of the penitentiary authorities is unduly restricted by law. Several categories of inmate are automatically held in conditions of maximum security and placed on segregation for preventative purposes for a prolonged period following a court sentence, on the sole basis of their crimes. The CPT must recall its position of principle that decisions concerning the security level to be applied to a given prisoner as well as the measure of segregation for preventative purposes should not be pronounced — or imposed at the discretion of the court — as part of the sentence. The decision whether or not to impose a particular security level or whether segregation for preventative purposes is necessary should lie with the penitentiary authorities, on the basis of an individual risk assessment, and should not be part of the catalogue of criminal sanctions. **The Committee reiterates its recommendation**

Penal Code of Ukraine the list of articles of the Criminal Code of Ukraine, under which prisoners shall be obliged to be delivered to a particular type of institution; this issue should be referred to the discretion of prison administration.

Also this time the CPT added that there was no systematic oral hearing (specifically on the

subject of the placement) before the imposition of the measure, and the prisoners concerned were not informed in a sufficiently detailed manner of the reasons behind the decision, which negatively influenced the exercise of their right to appeal (§129). This, in its opinion, should be fixed at the level of the regulatory framework in the case of necessity, which certainly is.

In view of the above, it should be recommended to the State Penitentiary Service of Ukraine and other bodies responsible for the reform of penitentiary sphere of Ukraine do not treat with customary negligence to the recommendations of the Committee. The Kharkiv Human Rights Group is working closely with this body of the Council of Europe and will report on the implementation of its recommendations by the national authorities.

<http://khpg.org/index.php?id=1400424873>

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**that the relevant legal provisions be amended accordingly" (bold font by the CPT).**

The fact that the distribution into institutions should not be the part of the punishment means that the penitentiary authorities should be able to place prisoners, for example, in a lower (and, if necessary, on the contrary) level of security on the basis of assessment of individual risk in oppose to the existing order, which does not allow any flexibility in this regard.

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**Olena Ashchenko, Vadym Chovgan**

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OF THE UN AND COUNCIL OF EUROPE  
ANTI-TORTURE COMMITTEES**

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