

# National mechanisms for the prevention of torture in Eastern Europe

Belarus, Russia and Ukraine





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## **National mechanisms for the prevention of torture in Eastern Europe: Belarus, Russia and Ukraine**

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# Belarus (as of 2012)

## Introduction

Belarus is a state which became independent following the dissolution of the Soviet Union. Its population is just under 10 million people. It is a unitary state divided in 7 regions, including the city of Minsk which has the same status as that of a region. The country is governed by the President Aleksandr Lukashenko who abolished the constitutional limits on presidential power and on the number of presidential terms of office by two referenda in 1996 and 2003.

Belarus is the only state in Europe which carries out death penalty. Even though the numbers of those sentenced to death and executed dropped from around 10 in the late 1990s to 2-4 in the late 2000s, there has never been a year without executions.<sup>1</sup> The statistics on the death penalty are an official secret (see below).

After a brief discussion of the applicable legal framework this study will examine the known problems of Belarusian penitentiary system. No analysis of mechanisms of prevention of torture will be provided for the lack thereof, even though a mention of the local oversight commissions will be made.

## Legal framework

### International treaties

The Republic of Belarus is party, inter alia, to the International Covenant on Civil and Political Rights (hereinafter, 'the ICCPR'), the First Optional Protocol to the ICCPR, and to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter, 'the CAT').<sup>2</sup> However, no declarations are made

under Articles 21 and 22 of the CAT accepting the competence of the UN Committee Against Torture to receive interstate complaints and individual communications respectively, and the Optional Protocol has been neither signed nor ratified. Belarus is not a signatory to either the Rome Statute of the International Criminal Court nor the UN Convention for the Protection of All Persons from Enforced Disappearances. Furthermore, Belarus is the only European state (except Vatican City State) which is not a member of the Council of Europe and, thus, not a party to the European Convention on Human Rights. The consideration of its application for membership has been suspended since 1996 and the Parliamentary Assembly of the Council of Europe denied the restoration of Special Guest status to the Belarusian Parliament in 2004 until the introduction of a moratorium on executions.<sup>3</sup>

Very few international monitoring bodies have visited Belarus: the UN Working Group on Arbitrary Detention has been the only one so far, invited by the government in August 2004. Reflecting concerns about the human rights situation in the country a UN Special Rapporteur on Human Rights in Belarus was established in 2004 and his mandate has been extended.<sup>4</sup> However, neither this Special Rapporteur nor any other have been permitted to visit the state and, as evidence provided before the Universal Periodic Review (UPR) notes, the authorities have failed to cooperate with these special procedures.<sup>5</sup> Furthermore, most recommendations made by the Special Rapporteurs, Working Group on Arbitrary Detention and treaty bodies have been ignored.<sup>6</sup>

### Prohibition of torture

The prohibition on torture and other ill-treatment is enshrined in article 25 of the Constitution of Belarus, where it is established that no one may be subjected to torture or cruel or inhuman or degrading treatment or punishment.

<sup>1</sup> See the section on death penalty, below.

<sup>2</sup> ICCPR ratified on 12 November 1973, First Optional Protocol on 30 September 1992, CAT ratified on 13 March 1987.

<sup>3</sup> *Situation in Belarus*, PACE Res. 1671(2009), 23.06.2009, para. 19.1.

<sup>4</sup> Resolution 2004/14 UN Commission on Human Rights, Resolution 2005/13, Human Rights Council Decision 1/102, 30 June 2006.

<sup>5</sup> A/HRC/WG.6/8/BLR/3.

<sup>6</sup> E/CN.4/2006/36, 16 January 2006, para 82; A/HRC/5/16, 15 January 2007, paras 53 and 56. See further, A/HRC/WG.6/8/BLR/3.



The Criminal Code of Belarus contains no definition of torture,<sup>7</sup> but cases are dealt with under a number of provisions. Article 394 of the Code makes it a crime for an investigator, a prosecutor or a judge to force criminal defendants, witnesses or experts to give evidence refers in para. 3 to torture as an aggravating circumstance (punishment may vary from three to seven years in prison). Article 126 ('crimes against the security of the mankind') criminalises deportation, illegal detention, enslavement, summary executions, enforced disappearances followed by torture and committed on discriminatory basis and on a large scale (this can be described as a crime against humanity of persecution). Further, Article 426 makes reference to acts 'exceeding official authority'.<sup>8</sup>

Nowhere is it explained what torture means. The case-law of the Supreme Court, or indeed, any other courts of Belarus, is not publicly available, and the publicly available case-law reviews do not provide any guidance as to how these provisions of the Criminal Code may be understood. The government has refused to provide a definition in the Criminal Code, despite various calls to do so.<sup>9</sup>

Article 88 of the Code of Criminal Procedure provides that all evidence must be collected in accordance with law. This implies that evidence obtained under torture is inadmissible in criminal proceedings; however, given the unavailability of the case-law it is impossible to establish how this rule is enforced.

## Places of detention

The Ministry of Justice manages the judiciary and legal profession, including appointments and dismissals of judges and lawyers. The Department of Execution of Punishments in Belarus is managed

by the Ministry of Interior and recommendations have been made that this should be transferred to the Ministry of Justice.<sup>10</sup> This is in part because the Ministry of the Interior is also involved in the investigation of most cases. It has been alleged, for example, by the Working Group on Arbitrary Detention, that pre-trial detention conditions were deliberately rendered difficult in order to facilitate any investigation.

The Ministry of Interior's departments in six regions oversee 94 penitentiary institutions, which include: 28 correctional colonies (including two colonies for women and two colonies for juveniles), seven pre-trial detention centres, 51 open penitentiary institutions (those who are sentenced to correctional labour are housed there), two prisons and six arrest houses. There are 155 criminal-executive inspections responsible for the management of non-custodial sanctions.<sup>11</sup>

Women are kept in the same pre-trial detention centres as male detainees, albeit in different cells.<sup>12</sup> Moreover, the supervision is conducted by male guards, which violates the right to intimacy as well as other rights. Concerns are expressed about the incommunicado nature of the detention places, which creates a breach of family bonds, especially with children.<sup>13</sup> The situation in female prison colonies, although clearly better in terms of visits and overall conditions, is still too restrictive in terms of communication especially regarding detainees' children who are too old to stay in the colonies with their mothers.<sup>14</sup>

Belarus does not have a specialised system for juvenile offenders.<sup>15</sup> There has been a draft Presidential Decree on the concept of juvenile justice,

7 Amnesty International, Public Statement. The Human Rights Situation in Belarus, to 18th session of the UN Human Rights Council, EUR 49/017/2011, 5 September 2011.

8 Amnesty International, Public Statement. The Human Rights Situation in Belarus, to 18th session of the UN Human Rights Council, EUR 49/017/2011, 5 September 2011.

9 Amnesty International, Public Statement. The Human Rights Situation in Belarus, to 18th session of the UN Human Rights Council, EUR 49/017/2011, 5 September 2011.

10 E/CN.4/2005/6/Add.3 p15 ss50.

11 Code on Execution of Criminal Sentences, article 14(4).

12 E/CN.4/2005/6/Add.3 p19 ss72

13 E/CN.4/2005/6/Add.3 p19 ss72

14 Ibid

15 E/CN.4/2005/6/Add.3 p11 ss28

but the State still has not undertaken to set up a comprehensive system for juvenile justice.<sup>16</sup> Children are kept in the same pre-trial detention centres (SIZOs) as adults and their detention is submitted to the same regime.<sup>17</sup> The harsh conditions and the flaws in the legislation do not take into account the special nature and the vulnerability of minors and hence, these have negative consequences.<sup>18</sup> When minors are convicted, though conditions have improved, limitations on visits continue to apply.<sup>19</sup> The UN Working Group on Arbitrary Detention found that detention is the rule rather than the exception.<sup>20</sup> In addition, although the Committee on the Rights of the Child welcomed the reduction in crimes committed by children, the corresponding reduction in the number of children serving prison sentences, and the increased use of alternatives to prison sentences, such as community service, it also expressed serious concerns about the long sentences of deprivation of liberty imposed on juvenile offenders, the high level of recidivism and the absence of post-release programmes.<sup>21</sup>

## Areas of concern

Whilst Belarus is unfortunately not unique in its practice of torture, there are various issues occurring within the state which are particularly concerning.<sup>22</sup>

### Death Penalty

Belarus is the only country in Europe and the former USSR where the death penalty is still being used. The issue of the death penalty was included in the agenda

of the 1996 referendum organized by President Lukashenko, and 80.4% of citizens voted for the use of capital punishment.<sup>23</sup> The referendum did not observe all democratic procedures. For example, during the referendum campaign a sample of the 'properly' filled-in ballot was publicised, the one against the abolition of the death penalty.<sup>24</sup> Results of the referendum allowed the authorities to use 'people's will' as a pretext for continuing the use of the death penalty and not introducing a moratorium on death penalty sentences.<sup>25</sup> Even though the death penalty was declared contrary to the Constitution of Belarus by a 2004 opinion of the Constitutional Court, its decision had no effect (and could not have had, for the reason that no judgment of that Court is binding under article 116 of the Constitution): rather than striking down the impugned provisions of the Criminal Code it could only invite the President to enact a moratorium on executions – something which the President has refused to do since.<sup>26</sup>

Reports on the number of capital sentences are published. From the beginning of 2000 there have been no more than 10 death sentences per year. For example, in 2006, the court issued nine death sentences and in 2007 – four.<sup>27</sup> However, the number of actual executions and information about Belarusian President exercising his right to pardon is still classified.

The death penalty is executed by firing squad immediately after it is announced to the convict that his motion for pardon was rejected by the President of the Republic of Belarus. Neither the convict nor his relatives are informed about the date of execution in advance, and the body is not given to the convict's

<sup>16</sup> CRC/C/BRL/3-4 p12 ss70

<sup>17</sup> E/CN.4/2005/6/Add.3 p19 ss70

<sup>18</sup> Ibid, Special Rapporteur on the situation of human rights in Belarus, E/CN.4/2006/36 p8 ss21

<sup>19</sup> Ibid

<sup>20</sup> E/CN.4/2005/6/Add.3 p19 ss71

<sup>21</sup> Committee on the Rights of the Child, Fifty-sixth Session (17 January- 4 February 2011). Concluding observations: Belarus (CRC/C/BLR/CO/3-4) p12 ss70

<sup>22</sup> E/CN.4/2005/35.

<sup>23</sup> FIDH and Human Rights Centre "Viasna", *Conditions of Detention in Belarus*, Report available at <http://www.fidh.org/IMG/pdf/Belarus500ang2008.pdf> (last accessed on 12 October 2011), p. 31.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Conclusions of the Constitutional Court of Belarus, 11 March 2004, no. Z-171/2004, available at <http://www.kc.gov.by/main.aspx?guid=10213> (last accessed on 16 October 2011).

<sup>27</sup> Statement of the Chairmen of the Supreme Court, Valentin Sukalo, on press-conference, February 12, 2007.

relatives after the execution.<sup>28</sup> The UN Human Rights Committee has twice condemned Belarus for secrecy surrounding the execution of death sentences, which violates Article 7 of the ICCPR.<sup>29</sup> Until approximately 2003, non-governmental organizations were able to investigate issues related to the death penalty cases. Recently, however, despite the decrease in using the death penalty, access to information regarding executions became much more difficult. All capital convicts are kept in the basement of the Minsk pre-trial detention facility on Volodarskogo street. They stay in the death ward for a period of six months to a year and a half.<sup>30</sup>

Conditions in the death wards are harsh: according to the Chairman of NGO 'Pravovaia Initsiativa' (Legal Initiative), Dr. Philippov, who visited two death wards during 1990–2000, the size of one of them was two by 3 meters, the other one was a little bigger. Each of the cells had two bunk beds, a bed-side chest for personal belongings, and a hole in the ground for a toilet that was not in any way separated from the rest of the cell. No daylight penetrates the death cell, but a lamp bulb is on 24 hours a day. Capital convicts are taken for a walk once a week, they do not work on the territory of the detention facility. Capital convicts are not allowed to have any correspondence (they are prohibited from writing anything at all), to receive parcels, or to have access to TV.<sup>31</sup> Thus, they are fully cut off from the world.

## Allegations of torture

In April 2008, the Human Rights Centre 'Viasna' and FIDH issued a report which concluded that numerous acts of torture and other inhuman treatment were currently practised in the Republic of Belarus, often as a means of extracting confessions,<sup>32</sup> and that prosecution bodies and other State organs failed to adequately respond to acts of torture and refused to initiate criminal proceedings.<sup>33</sup> These practices violate Article 2 of the CAT. Ill-treatment continues in prisons.<sup>34</sup> The Human Rights Centre "Viasna" denounced the situation of prisoners in Mazyr colony, where torture and beatings were said to be common.<sup>35</sup> However, abuses reportedly take place in most Belarusian prisons and their authors enjoy substantial impunity.<sup>36</sup> Serious concerns about the living conditions in medical institutions and hospitals are also expressed in connection with the continuous hunger-strikes and protests of detainees.<sup>37</sup> Furthermore, political opponents and peaceful demonstrators have been particularly affected.<sup>38</sup>

## Pre-trial detention and penal institutions for convicts

Conditions of pre-trial detention are considered to violate international standards<sup>39</sup> and have been considered as significantly worse than those of convicted prisoners.<sup>40</sup> There are allegations of detainees being put under pressure to incriminate themselves.<sup>41</sup> There were particular concerns where individuals were detained by the KGB.<sup>42</sup>

28 Article 175(5) of the Code on Execution of Criminal Sentences.

29 UN HRC, *Lyashkevich v. Belarus*, Comm. no. 887/1999, 03.04.2003; *Bondarenko v. Belarus*, Comm. no. 886/1999, 03.04.2003.

30 FIDH and Human Rights Centre "Viasna", *Conditions of Detention in Belarus*, Report available at <http://www.fidh.org/IMG/pdf/Belarus500ang2008.pdf> (last accessed on 12 October 2011), p. 31.

31 *Ibid.*, p. 13

32 Special Rapporteur on Human Rights in Belarus, E/CN.4/2005/35, 18 March 2005, para 22.

33 FIDH and Human Rights Centre "Viasna", *Conditions of Detention in Belarus*, Report available at <http://www.fidh.org/IMG/pdf/Belarus500ang2008.pdf> (last accessed on 12 October 2011), p. 13

34 *Ibid* p9 ss26

35 *Ibid*

36 *Ibid*

37 Alternative Report of Belarusian NGOs to UN Human Rights Committee about Implementation of International Covenant on Civil and Political Rights (Minsk 2010) p7. Accessed at: [http://spring96.org/files/book/doklad\\_en.pdf](http://spring96.org/files/book/doklad_en.pdf)

38 Committee Against Torture, Concluding Observations on third report, CAT/A/56/44, 2001, 20 November 2000, para 45.

39 Human Rights Watch, 14 March 2011, [www.hrw.org/en/reports/2011/03/14/shattering-hopes](http://www.hrw.org/en/reports/2011/03/14/shattering-hopes), pp.18-19; and FIDH and Viasna, 30 June 2011, *Conditions of Detention in Belarus*, [www.fidh.org/IMG/pdf/Belarus500ang2008.pdf](http://www.fidh.org/IMG/pdf/Belarus500ang2008.pdf), pp.37-38.

40 UN Working Group on Arbitrary Detention, E/CN.4/2005/6/Add.3, 25 November 2004.

41 *Ibid.*

42 *Ibid.*



The Criminal Code of Belarus (article 411) makes it a crime to violate the internal rules of penal institutions for convicts. If the penitentiary administration issues three sanctions for such violations against the convict, this allows to open criminal proceedings against him or her. However, such sanctions cannot realistically be appealed at by the convict concerned (even if the appeal reaches the court, the convict is not present at the hearing; and he is often not represented if indigent a legal aid is not provided for these type of cases).

### Administrative detention

Conditions of detention have been raised as a serious issue across a range of places of detention, in particular with respect to overcrowding.<sup>43</sup> The conditions of detention for administrative detainees are the worst found in Belarus and only comparable with those of the capital convicts (even though the latter have beds and bedding).<sup>44</sup> Cells have no beds or bedding and are poorly heated; in winter time the temperature in cells is close to zero. A detainee may have only one set of clothing. Given the length of time in anti-sanitary conditions and permission to shower only once a week (sometimes detainees have no opportunity to shower during the entire 15 day period, as described below), it can lead to various skin diseases. All this is a form of degrading treatment. There is no daylight in the cells, but a bulb which is on 24 hours a day. Detainees have no outdoor exercise. Furthermore, since 2007 the detainees may not receive food parcels from outside the detention facilities (explicitly prohibited by the amendments to the Code on Administrative Proceedings and Execution of Administrative Sentences) and are forced to eat the food offered by the facility staff, which is often of very poor quality.<sup>45</sup>

Conditions deteriorate significantly at the times of mass arrests (for example, during the presidential

elections of March 2006 or December 2010), when cells become extremely over-crowded. The detention facility on Okrestina street in Minsk, where police normally take people arrested during mass actions, introduced “a new form of psychological pressure for administrative detainees—a personal search. Several times a week the Center’s officers come to the cells and examine personal belongings and clothes of the detainees”.<sup>46</sup>

### Lack of effective investigations

Many, including the UN Human Rights Committee, have pointed out that there are low rates of prosecutions and convictions in case of allegations of torture, particularly against the police and other law enforcement officials.<sup>47</sup> Furthermore, ‘the pattern of failure of officials to conduct prompt, impartial and full investigations into the many allegations of torture reported to the authorities’.<sup>48</sup>

This is particularly challenging when both investigations and supervision of detention was placed under the Prosecutor’s office.<sup>49</sup>

## Prevention mechanisms

Belarus is a country where individuals cannot complain to the Constitutional Court, cannot seek judicial review of regulatory acts adopted by the executive, and where the Ombudsman institution does not exist. There are two forms of monitoring places of detention, although neither could be said to be effective or independent.

### The Office of the Prosecutor

Under Article 125 of the Constitution the Office of the Prosecutor is responsible for the supervision over the correct application of all laws by all persons, public

<sup>43</sup> Human Rights Committee Concluding Observations, 6 November 1997; CAT Concluding Observations on third periodic report, CAT/A/56/44, 2001, 20 November 2000, para 45.

<sup>44</sup> *Conditions of Detention...*, cited above, p. 31.

<sup>45</sup> *Ibid.*, p. 17.

<sup>46</sup> A prison on Okrestina street in Minsk – a place where political prisoners are tortured, November 16, 2007, <http://news.akavita.by/en/belarus/286027.html> (last accessed on 12 October 2011)

<sup>47</sup> Human Rights Committee Concluding Observations of 6 November 1997, on Belarus’ 4th periodic report (its most recent).

<sup>48</sup> Committee Against Torture, CAT/A/56/44, 2001, 20 November 2000, para 45.

<sup>49</sup> Human Rights Committee, CCPR/A/53/40 (1998), 6 November 1997.

and private. In particular, the Office exercises oversight over criminal investigations, investigates a number of crimes itself, prosecutes criminal defendants in courts. Furthermore, the 2007 *Prokuratura* Act grants the prosecutors the powers to supervise the places of detention, including the right of uninhibited entry to all detention facilities, right of access to documents, right to question the officials of the detention facilities (article 35(1)) and to order them to undertake specific measures. The prosecutors are further authorised to quash the illegal decisions taken by the officials of the detention facilities and institute disciplinary or criminal proceedings against them (article 35(2)). Finally, the prosecutors are under an obligation to release any person illegally detained (article 35(3)).

However, the prosecutors are utterly dependent on the executive and the President in particular. The Prosecutor-General is appointed by the President of Belarus; even though the Constitution (article 126) and the *Prokuratura* Act (article 18) provide for the need of approval of the appointment by the Council of the Republic (the upper house of the “Parliament”), these very norms specify that the Prosecutor-General is answerable to the President only. Regional prosecutors are appointed by the Prosecutor-General (without the need of any prior approval); local prosecutors (of districts and towns) are again appointed by the Prosecutor-General, this time upon the proposals of the relevant regional prosecutors (article 23(2) of the 2007 Act).

The Working Group on Arbitrary Detention was concerned about the excessive powers granted to the Prosecutor’s office and investigators during the pre-trial detention phase in particular. It noted the decision to keep a person in detention or to extend the period of his or her detention should be one that is taken not by a judge, not by the public prosecutor.<sup>50</sup>

More recent reports from NGOs based in the country allege that the Prosecutor’s office fails regularly to

properly investigate allegations of torture,<sup>51</sup> and fails to take proper account of the testimony of victims.<sup>52</sup>

## Executive Oversight Commissions (EOCs)

A Presidential Decree of 28 August 2001 No. 460<sup>53</sup> established Executive Oversight Commissions (EOCs) in charge of monitoring the situation in the penitentiary system. Their mandate covers the institutions for the convicts: penal colonies, institutions for those sentenced to compulsory labour, but not pre-trial detention facilities or administrative detention facilities. Even though the substance of their mandate comprises the monitoring of the respect for human rights of convicts by the penitentiary administration, the EOCs are rather focused on the other limb of the mandate, that is, assisting the administration in carrying out of its functions (participation in the decision-making on the transfer of prisoners from one institution to another, from one regime to another, advice on release on parole etc.<sup>54</sup>). It cannot therefore be said to have a preventive mandate as such.

Nevertheless, the EOC members may enter penal facilities without prior authorization,<sup>55</sup> but there is no express provision for them to meet with detainees in private.

The EOCs are composed of 4-8 members appointed by the regional and local executive bodies from public servants, local councilors, trade union members and “members of other organisations”.<sup>56</sup> The mention of “other organisations” does not imply that those can be human rights NGOs – almost all of them are denied registration (with the exception of the Belarusian Helsinki Committee which is constantly under a threat of forced dissolution) – but rather public associations of the law-enforcement veterans. Only one member of an independent human rights NGO (Belarusian Helsinki Committee) is a member of an EOC in Mahilyou region.

50 UN Working Group on Arbitrary Detention, E/CN.4/2005/6/Add.3, 25 November 2004.

51 Report of Belarusian non-governmental organizations and human rights defenders on implementation by the Republic of Belarus of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, <http://humanrightshouse.org/Articles/15392.html>.

52 Ibid.

53 Available at <http://www.pravo.by/WEBNPA/text.asp?RN=P30100460> (last accessed on 12 October 2011).

54 See para. 4 of the Statute of the Commissions attached to the 2001 Presidential Decree.

55 article 22(1)(5) of the Code on Execution of Criminal Sentences.

56 2001 Statute, para 5.

Regional departments of Ministry of Justice enjoy unlimited discretion in the selection and appointment of the members of the EOCs and their chairpersons. The latter have the right to determine the agenda of the meetings of the Commissions and to assign tasks to its members, they also have casting vote in the case of a tie (paras. 6 and 7 of the 2001 Statute). The EOC's therefore are unlikely to engender credibility and legitimacy as independent monitoring bodies. Furthermore, any decisions they do make lack weight as they are not binding.

## Conclusions and recommendations

Because of the difficulties that international monitoring bodies have had in gaining access to the country and because of the lack of any credible and independent monitoring mechanism, it is extremely difficult to make any meaningful recommendations with respect to the current mechanisms available, namely the Prosecutor's Office and the EOCs as the likelihood of them being amended or their powers or independence enhanced in a way which will render monitoring of places of detention any more likely to prevent torture is minimal. Furthermore, so few human rights NGOs are permitted to operate in the country that there is no opportunity for civil society organisations to fill this gap of monitoring places of detention. For more than 10 years the members of independent human rights NGOs could only visit places of detention as detainees. The criminal prosecutions which followed the elections of 19 December 2010 only confirm that the direction in which the Belarusian penitentiary is moving takes it away from the respect of basic rights of detainees.

It has been suggested by the national experts that regardless of the difficult situation with the status of civil society organisations, it is realistically possible to raise issues relating to placement in custody, conditions of pre-trial detention and in penal institutions for convicts (unless there are calls for strengthening of civil society organisations or independence of legal profession or release of political prisoners) with the relevant executive agencies (especially, the Ministry of Interior) and making the communications to the executive public, in particular, via the independent news agencies, web-sites of other independent mass media and human right NGOs, thus ensuring the widest coverage possible.

In this context, a number of broader recommendations are worth making:

- A definition of torture should be provided for in the domestic law, in compliance with Article 1 of UN CAT, it should be made a serious crime;
- Belarus should sign and ratify OP CAT;
- Instances of the use of force and firearms by the law-enforcement bodies against detainees should be clearly set out in the legislation (which is currently not the case);
- Use of alternatives to pre-trial detention should be encouraged, while the detention based on the gravity of charges only should be prohibited;
- Lawyers should be given uninhibited access to their clients in detention;
- Attempts should be made to ensure communication is maintained with family members for detainees, particularly with respect to children and women.
- Supervision of the detention of female prisoners should be conducted by female not male guards;
- Belarus should consider creating the ombudsman institution;
- The authorities should establish an independent mechanism to receive and investigate complaints by detainees and monitor all places of detention;
- Pending the above, the mandate of the EOCs should be extended to pre-trial detention and administrative detention facilities;
- EOC members should be trained in human rights;
- EOCs should be permitted to meet detainees in private;
- Greater opportunities should be provided for human rights organisations or individuals to sit on EOCs.

## Russia (as of 2012)

### Introduction

The Russian Federation is a country located geographically both in Europe and Asia, with a population of over 140 million. It is a federation composed of 83 constituent entities (republics, oblasts, krais, autonomous okrugs, autonomous regions, cities of federal importance, commonly referred to as 'subjects of federation' or simply 'regions'). Its political regime, functioning under the 1993 Constitution, may be described as ranging from semi-presidential (or even parliamentary) to a super-presidential republic, depending on the political affiliations of the President and the majority of Parliament. The President of the Russian Federation is the head of State, he or she is elected by popular vote for a renewable term of six years.<sup>57</sup> The President appoints the Chairman of the Government (Prime-Minister), subject to approval by the State Duma, lower house of the bicameral Parliament – the Federal Assembly. The State Duma is elected for five years<sup>58</sup> at a general election, while the members of the upper house – the Council of Federation – are appointed by regional governors and regional legislative assemblies (each governor and legislative assembly appoints one member of the Council of Federation for the duration of its own legislature).

The Russian judiciary is organised in three distinct branches. The courts of common jurisdiction are the most numerous and are the only which hear criminal cases. This sub-system includes more than 7,000 justices of the peace who consider minor criminal and civil cases. Justices of the peace are appointed according to the procedures set out in regional legislation, but apply federal, as well as regional law. More than 2,000 district courts are the lower tier of federal courts, they hear the majority of civil, criminal and administrative cases in the first instance, as well as appeals against the judgments of the justices of the peace. 83 regional courts represent the intermediate tier of the federal courts of common jurisdiction, hearing appeals on points of law against the judgments and criminal (but not civil) appeal judgments of district courts, as well as serious criminal cases (like aggravated murder) and some administrative cases (e.g., judicial review of regional legislation) in the first instance. The Chairmen

of regional courts also exercise supervisory review (discretionary extraordinary appeal procedure) over their own judgments and those of lower courts. Under the reform that will gradually enter into force in 2012-2013 the civil and criminal divisions of regional courts will start to hear full appeals against the judgments of the district courts, while the Presidia will be in charge of the appeals on points of law. The Supreme Court is the highest court of common jurisdiction of the Russian Federation. Composed of more than 90 judges, most of whom belong to the criminal division, it hears cases in the first instance (e.g., judicial review of federal secondary legislation and criminal cases against a number of high-ranked officials, like judges, MPs, etc.), appeals on points of law against the first-instance judgments of regional courts, and applications for supervisory review of all judgments of lower courts (provided that all other appeals have been exhausted). Military courts operate within the system of federal courts of common jurisdiction and are composed of career military officers, try military servicemen not only for military crimes, but for all criminal offences, and rule on civil cases involving military servicemen. 100 military garrison courts occupy the tier of district courts, nine courts of military circuits – that of regional courts and the Supreme Court comprises a Military Division composed of military judges.

Commercial courts represent a sub-system of the judiciary. Eighty-two regional commercial courts<sup>59</sup> hear cases in the first instance, 20 commercial courts of appeal hear full appeals, 10 commercial courts of federal circuits hear appeals on points of law, while the High Commercial Court is a supervisory review instance (it also has limited first-instance jurisdiction covering judicial review of federal secondary legislation in a number of field related to commercial activities). The third sub-system of the federal judiciary is the Russian Constitutional Court which hears applications for judicial review of federal primary and secondary legislation from a number of political bodies (President of the Russian Federation.) Individuals may complain to the Constitutional Court if a federal or a regional statute, applied in a court case, violates their constitutional rights (if the application is well-founded, the statute is struck down and the individual may request a

<sup>57</sup> Under the original text of the Constitution the presidential term was limited to four years, but it was extended following the initiative of President Medvedev in 2008.

<sup>58</sup> Four years before the 2008 constitutional amendments.



re-hearing of his or her case by the relevant ordinary court). All courts may refer questions for preliminary ruling to the Constitutional Court if they consider that the statute they are bound to apply violates the Constitution (or merely there is a doubt over its constitutionality). Constitutional Courts also exist in a number of regions (Saint Petersburg, Sverdlovsk region, Republic of Sakha-Yakutiya, Republic of Karelia etc.) and can review the compatibility of regional legislation with regional constitutions, but they are not in any way related to the Constitutional Court of the Russian Federation.

The Russian Federation has not shied away from the ratification of international and regional human rights treaties, being party to many of the key instruments, including the International Covenant on Civil and Political Rights (ICCPR) and its First Optional Protocol, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the UN Convention against Torture (UN CAT), the UN Convention on the Rights of the Child (UN CRC), UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the European Convention on Human Rights (ECHR), the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT), the European Social Charter (ESC) etc. However, as will be seen below, its attitude towards international human rights organs along with an unwillingness to ratify some important treaties,<sup>60</sup> is crucial to consider when examining the implementation of human rights and in particular prevention of torture in the state. In this context, therefore, a focus on national monitoring mechanisms (as opposed to international mechanisms) may be a more attractive option for the state.

This report will firstly outline the range of places of detention and numbers of detainees, before moving to consider the current monitoring mechanisms in

place in the country. This will form the bulk of the report. The third section of the report will then place these issues in context looking more broadly at legislation relating to torture prevention and current trends in the human rights situation in the state. This will enable some recommendations and conclusions to be reached with respect to improvement of the effectiveness and credibility of the national monitoring mechanisms to prevent torture in the Russian Federation.

## Relevant facts and figures regarding places of detention

### Different types of places of detention

Different types of places of detention fall under different ministerial authorities. These will be outlined below under the respective ministries.

Most penal institutions, including both pre-trial detention centres and various types of facilities for criminal convicts, fall under the authority of the Ministry of Justice within which the Federal Service for the Execution of Criminal Sentences (FSIN) administers them. As of 1 September 2011 just over 780,000 persons were detained in the FSIN-administered institutions. These include:<sup>61</sup>

- approx. 112,700 persons in 230 pre-trial detention centres (SIZO) and 165 pre-trial detention wings of penal colonies;<sup>62</sup>
- approx. 46,500 convicts in 150 penal settlements (*koloniya-poseleniye*);
- approx. 662,900 convicts in 760 penal colonies of different regimes (from the least to the most severe: 'general', 'strict' and 'special');

59 1 per region, but the city of Saint Petersburg and Leningrad region have one commercial court for 2 separate constituent entities of the Federation.

60 - Rome Statute of the International Criminal Court (signed on 13 September 2000);  
 - Convention on the Rights of Persons with Disabilities (signed on 24 September 2008);  
 - a number of important conventions of the International Labour Organisation, including #102 ("Minimum Standards of Social Security") and #128 ("Disability, Old Age and Loss of Benefits")  
 Optional Protocol to the UN CAT (not signed);  
 Convention for the Protection of All Persons from Enforced Disappearances (not signed);  
 - Protocols nos. 6 (signed on 16 April 1997), 13 (not signed), and 12 (signed on 4 November 2000) to the ECHR (prohibition of death penalty in peacetime, prohibition of death penalty in all circumstances, freestanding prohibition of discrimination respectively);  
 - Provisions of the European Social Charter allowing collective complaints.

61 FSIN web-site, <http://www.fsin.su/structure/inspector/iao/statistika/Kratkaya%20har-ka%20UIS/> (accessed on 25 September 2011).

62 These are regulated by the 1995 Custody of Suspects and Accused Act and by the Rules of Internal Regime of Pre-trial Detention Centers.



- approx. 1,200 convicts in 7 prisons;
- 1,780 life prisoners in 5 penal colonies for life prisoners and in separate quarters for life prisoners in the penal colonies of 'special' regime;
- approx. 3,200 juvenile offenders in 46 correctional facilities for minors.<sup>63</sup>

Women serve their criminal sentences in penal colonies under the general regime. There are 47 penal colonies for women (with approx. 50,900 women serving their sentences), including 13 which comprise special units for babies (currently, 842). A further 10,200 women are in pre-trial detention.<sup>64</sup>

Currently, all pre-trial detention facilities are under the authority of the FSIN of the Ministry of Justice. The Federal Security Service (the FSB) which had had authority over a number of SIZOs had to relinquish its authority in favour of the FSIN. However, it has been constantly alleged that the FSB kept its informal control over the SIZOs in question and conducts its operative (that is, unrelated to criminal investigations) activities there.<sup>65</sup>

There is a range of other places of detention which fall under different ministerial authorities. The Ministry of Internal Affairs has responsibility for police detention facilities, administrative detention and sobering up stations and temporary detention for juveniles. More specifically:

- Temporary detention isolators (IVS, approximate total number in Russia is 2200) – these are for those persons suspected or accused of committing crimes.<sup>66</sup> Individuals can be detained

for up to 48 hours, during which time they must be brought before a judge, who may then extend the period of detention for a further 72 hours more (to a maximum of five days).

- Special admission centres (*spetsial'niy priemnik*) for those sentenced to administrative arrest<sup>67</sup> – individuals can be detained for up to 15 days. Those found guilty of violation of the state of emergency or legal regime of counter-terrorism operation can be sentenced to administrative arrest for up to 30 days (respectively, articles 20.5 and 20.27(3) of the Code on Administrative Offences).
- Temporary custody centres for juvenile delinquents. These centres (of which there are at least 93) are for children and adolescents aged from seven to 16 years who have committed crimes, either before the age of criminal responsibility,<sup>68</sup> or administrative offences. They are placed in these institutions on the basis of a ruling by a judge. Detention is for a maximum of 30 days, although this can be extended for a further 15 days.

Medical sobering-up stations existed under the authority of the Ministry of Interior until October 2011 as facilities where the police could detain drunken individuals without any prior or posterior authorisation until sobering-up. The only legal basis for their existence and for the relevant police powers was an order of the USSR Ministry of Interior.<sup>69</sup> On 27 September 2011 the Ministry of Interior announced imminent closure of the 12 remaining sobering-up stations.<sup>70</sup>

63 All of the above is regulated by the Code on Execution of Criminal Sentences, by the 1993 Penal Institutions and Bodies Act, Rules of Internal Regime of Correctional Institutions and Rules of Internal Regime of Juvenile Colonies.

64 Note 6 above.

65 See, e.g., <http://www.kommersant.ru/doc/581049> (accessed on 30 September 2011).

66 These are regulated by the 2011 Police Act, the 1995 Custody of Suspects and Accused Act, the Rules of Internal Regime of Temporary Detention Isolators.

67 Governed by article 32.8 of the Code on Administrative Offences and 2002 Administrative Arrest Regulations, adopted by the federal Government.

68 The age of criminal responsibility in Russia is as set out in Criminal Code of Russian Federation Article 20: namely under 16. There are specific provisions relating to those who are between 14 and 16 in relation to particular offences.

69 Order of the Ministry of Interior of the USSR of 30 May 1985 no. 106, unreported, available in private law-reporting databases. It was adopted following (but without any reference to and without such powers having been mentioned in) the Decree of the Presidium of the Supreme Soviet of the USSR of 16 May 1985 no. 2458-XI «On the reinforcement of struggle with alcoholism» (*Vedomosti VS SSSR* 1985, no. 21, item 369). On the same date the Presidium of the Supreme Soviet of the RSFSR adopted the Decree no. 398-XI with the same name (*Vedomosti VS RSFSR* 1985, no. 21, item 738) which briefly mentioned the sobering-up stations, but as an act of a constituent republic it could not bind the USSR authorities.

70 <http://www.newsru.com/arch/russia/27sep2011/medvytr.html> (last accessed on 27 September 2011).

Administrative detention cells<sup>71</sup> – those who are detained for the commission of offences provided for in the Code on Administrative Offences can be detained for up to three hours pending the decision on the offence, and those who risk punishment in the form of administrative arrest (up to 15 days) or expulsion from Russia may be detained for up to 48 hours pending court judgment on the offence. The bodies which are authorised to place suspected administrative offenders in detention (and thus must create administrative detention cells in their offices) are:

- police;
- police and military guards;
- military road traffic police (for detentions of military officers involved in road traffic offences);
- Border Guards' Service (for detentions at the border);
- Customs Service (for customs-related offences);
- FSIN;
- Drug Control Service (for drug-related offences);
- Bailiffs' Service;
- Officers involved in counter-terrorist operations (for the violation of counter-terrorist operations).

Those sentenced to administrative expulsion from Russia are detained pending expulsion in centres for temporary accommodation of migrants which have the status of administrative detention cells (article 32.10(5) of the Code on Administrative Offences).

Detention facilities for juveniles fall under the authority of different executive agencies. Thus, the closed-type educational institutions are administered by the Ministry of Education, juveniles of between 11 and 18 years of age can be held there for up to three years if they committed crimes but did not reach the age of criminal responsibility or are

mentally or psychologically disabled or if they were convicted of a serious or medium-gravity crime, but the judge decided on their placement to a closed-type educational institution rather than sentencing them to prison (article 15(4) of the 1999 Prevention of Juvenile Homelessness and Criminality Act). However, as these fall under federal rather than regional administration, this leads to lengthy transfers of minors across the country: those from Kazan may be placed in the closed-type educational institutions in Astrakhan, while the institutions in Murmansk host minors even from Vladivostok (the national experts were involved in such cases).

Temporary detention centres for juvenile offenders are under the authority of the Ministry of Interior. They are designed for the detention of juveniles pending their placement in or return to open-type or closed-type educational institutions, or if they committed a crime or an administrative offence before the age of criminal or administrative responsibility in order to prevent reoffending or if they have no place of residence (article 22(2) of the 1999 Act). The time-limit for the placement in the temporary detention centres is 48 hours except for those detained pending placement to other institutions. Other institutions (open-type educational institutions, shelters, rehabilitation centres etc.) are designed for minors not involved in criminal activities (article 13 of the 1999 Act).

The Ministry of Defence is responsible for military detention facilities which include guardhouses and disciplinary military units. In respect of the former, these are designed to hold soldiers suspected or accused of a crime<sup>72</sup> and who are subjected to disciplinary detention. In the latter case they can be held for up to 45 days (this was abolished by a ministerial order in 2002,<sup>73</sup> but reinstated in 2007<sup>74</sup>). Disciplinary military units are for those who have been convicted of crimes against military service. They can be detained for periods of 3 months up to a maximum of two years.<sup>75</sup> There are 5 such units.<sup>76</sup>

71 Conditions of detention in these cells are governed by the 2003 Administrative Detention Regulations, adopted by the federal Government.

72 Article 7(1) of the 1995 Custody of Suspects and Accused Act

73 <http://www.gazeta.ru/2002/07/05/na1025881920.shtml> (last accessed on 16 October 2011).

74 Under the 2006 Proceedings on Gross Military Offences and Disciplinary Arrest Act.

75 Article 55 of the Criminal Code.

76 FSIN official website: <http://fsin.su>, as at 1st May 2011.

While those detained with TB and drug users are treated in prison hospitals administered by the FSIN, psychiatric hospitals all fall under the Ministry of Health and Social Development. There are eight psychiatric hospitals<sup>77</sup> with intensive supervision.<sup>78</sup> These detain those who have committed crimes of insanity and those individuals who have become mentally disordered after committing a crime. In addition, there are 133 hospitals, 59 correctional institutions for those with TB, and nine medical correction institutions for drug addicts.<sup>79</sup>

In addition to these, there are also reports of the existence of unofficial places of detention, particularly in relation to drug users, although these are denied.<sup>80</sup>

There are also a number of credible reports of the existence of places of secret detention, particularly in Chechnya and other parts of the North Caucasus,<sup>81</sup> although the exact number of these is not known. The situation in respect of two of them, both located in Chechnya, has been examined by the European Court of Human Rights: in *Bitiyeva and X v. Russia*<sup>82</sup> the court confirmed that the detention facility in Chernokozovo was illegal and torture was practiced there; and in *Gisayev v. Russia*<sup>83</sup> it held that the applicant had been arbitrarily detained and tortured in the ORB-2 (*operativno-rozysknoe byuro*, operative-search bureau) detention facility in Grozny.

## Conditions of detention

Overall, the above data and figures suggest a number of things. Firstly, there are a considerable number of ministries that are responsible for various places of detention and a broad range of different types of detention facilities and institutions. The grounds on which individuals can be detained vary on the type of institution being considered, and the length of detention also varies depending on the context.

Despite the attempts at reform and some financial investment, overcrowding in pre-trial detention centres remains an unresolved issue. Detention conditions in 25 pre-trial detention centres have been recognized by the European Court on Human Rights as inhuman or degrading treatment.<sup>84</sup>

Women's colonies are often overcrowded with as many as 60 women in the same large dorm style room. Bunk beds are situated in two rows and each woman has a bed, chair and a half of a small bed-side table. Women have access to sinks and toilets at all times but only have one 'wash day' per week where they can shower. This limit on personal hygiene is one of the main complaints of women prisoners. Women in prison colonies have no opportunity to spend time alone, which is also a major complaint. Women also have less medical care, with less access to substance abuse programmes and tuberculosis treatment in comparison with male prisoners and less maternity care in comparison with women outside the prisons. It is common practice for female prisoners to live in separate quarters to their baby or young child, with the exception of two colonies where joint accommodation is provided. Mothers in prison do not receive sufficient support from prison personnel because the personnel have not been trained specifically to deal with female prisoners incarcerated with their children.<sup>85</sup> Even less suitable for women with children are SIZOs where after giving birth mothers are held in the cells while their children are in a hospital.

There are allegations that persons under 18 continue to be subjected to torture and cruel treatment, in many cases when in police custody or during the pre-trial stage of legal proceedings. Access to legal counsel and/or medical services and to their families also seems to be limited for young persons in police custody. The procedures for complaining about these

77 <http://www.fsin.su/structure/inspector/iao/statistika/Kratkaya%20har-ka%20UIS/> (last accessed on 26 October 2006).

78 These are regulated by the 1992 Psychiatric Assistance and Citizens' Rights Guarantees Act and the 2009 Intensive Supervision Psychiatric Hospitals Act.

79 FSIN official website: <http://fsin.su>, as at 1st May 2011.

80 See national expert report.

81 (<http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf>)

82 No. 57953/00 and 37392/03, 21.06.2007.

83 No. 14811/04, 20.01.2011.

84 For a list of cases see Annex I to the Interim Resolution CM/ResDH(2010)35 of 9 March 2010 Execution of the judgment of the European Court of Human Rights in 31 cases against the Russian Federation mainly concerning conditions of detention in remand prisons (adopted by the Committee of Ministers on 4 March 2010 at the 1078th meeting of the Ministers' Deputies).

85 Russia: Women in prison. Penal Reform International. Available at <http://www.penalreform.org/publications/russia-women-prison>

abuses may not be child sensitive, do not allow children to file complaints without the consent of their parent/legal representative, and have not proven to be efficient.<sup>86</sup>

There are also concerns about the use of torture and other cruel, inhuman or degrading treatment or punishment in boarding and other educational institutions.<sup>87</sup> Also of concern is that corporal punishment of children remains socially acceptable and is still practiced in families and in places where it has been formally prohibited, such as schools.<sup>88</sup> There are a large number of children in institutions who are subjected to abuse by their teachers.<sup>89</sup>

Secondly, it has been recognized that numerous administrative and other measures to improve the conditions of detention and specifically to reduce overcrowding have been undertaken by the government.<sup>90</sup> Widespread concern over deaths in custody resulting from the denial of adequate medical care led to changes in the law governing pre-trial detention: house arrest and restrictions on the use of pre-trial detention were introduced for people suspected of economic crimes, although some are still detained in prisons. In 2010, 18,769 persons were released from pre-trial detention centres for reasons of the application of alternative measures of restraint,<sup>91</sup> from which one could argue that pre-trial detention was being used unnecessarily in many instances. However, the problems of overcrowding in penal<sup>92</sup> institutions and inadequate health care in pre-trial detention and prison colonies still remain.<sup>93</sup>

Thirdly, places of detention are not evenly spread across the Russian Federation. In particular, detention facilities for women exist in less than half of the constituent entities and this is a particularly pressing concern for girls, as only three colonies exist across the state.<sup>94</sup> Almost a third of the juvenile penal institutions will be closed, allegedly due to the drop in the number of juvenile offenders.<sup>95</sup> This uneven distribution is also true of penal colonies: as the national expert notes, ‘...[f]or example, in Moscow, the subject of the Russian Federation with the greatest number and density of population there are no colonies at all. In the Moscow region, which is the second after Moscow for these indicators there are only four colonies; in the third for these indicators Krasnodar Territory has only 12 correctional facilities. At the same time, Krasnoyarsk territory and Kemerovo region has 44 and 22 colonies respectively, despite the fact that the population in each of these regions is half of that in the Krasnodar region and four times less than in Moscow.’ The result of this uneven distribution is that many of those detained are held far from their homes, with journey times taking several weeks. As the national expert notes: ‘convicted Moscovites can be found in the prisons of Siberia and the Urals – many thousands of miles from home and family.’ A clear rule of article 75 of the Code of Execution of Criminal Sentences that the convicts serve their sentences in the region where they lived prior to conviction was abolished and the placement to a specific penal institution now depends on the discretion of the FSIN.<sup>96</sup> At the same time, as indicated by the national expert, juvenile offenders from Murmansk region serve their sentences in juvenile correctional colonies in Leningrad region (around 1,500 km away from home).

86 CRC/C/RUS/CO/3 p7 ss32, A/HRC/WG.6/4/RUS/2 p5 ss20

87 CRC/C/RUS/CO/3 p7 ss34, A/HRC/WG.6/4/RUS/2 p5 ss22

88 CRC/C/RUS/CO/3 p8 ss36

89 See, e.g., a recent research paper by Natalia Soshina, *Formirovaniye konstruktivnogo povedeniya podrostkov v situatsiyakh pritesneniya v usloviyakh zakrytykh obrazovatel'nykh uchrezhdeniy* [Formation of constructive behaviour of teenagers in situations of harassment in closed educational institutions], Kursk, 2009; with respect to one of the regions of the Russian Federation, the Republic of Sakha – Yakutiya, see the report of its Commissioner for Children's rights of 2010, especially chapter 2.2, available at <http://www.sakha.gov.ru/node/23093> (last accessed on 11 November 2011).

90 CAT/C/RUS/CO/4 p2 ss4

91 FSIN's official website, <http://fsin.su>

92 CAT/C/RUS/CO/4 p8 ss18. See also *Gorodnitchev v. Russia*, hudoc (20070); *Kalashnikov v. Russia*, 2002 VI, 36 EHHR 587; *Fedotov v Russia* (no. 5140/02); *Khudobin v Russia*, 2006-XI; *Khudoyorov v Russia*, 2005-X.

93 CAT/C/RUS/CO/4 p7 ss17

94 Information from national expert.

95 See the 2010 Concept of Reform of the System of the Execution of Criminal Judgments up to 2020 (reducing the number of correctional institutions for juveniles from 62 to 33, currently 47).

96 Code of Execution of Criminal Sentences Amendment Act of 8 November 2008.

## Other areas of concern

There are concerns about numerous, ongoing and consistent allegations of acts of torture and other cruel, inhuman or degrading treatment or punishment committed by law enforcement personnel, including in police custody.<sup>97</sup> Mass beatings of prisoners and other types of ill-treatment remain a serious problem.<sup>98</sup> CAT has noted in this regard, for example, the lack of training of medical personnel to detect signs of torture and ill-treatment.<sup>99</sup> Furthermore, the safeguards for detainees are insufficient. Laws and practices obstruct access to lawyers and relatives of suspects and accused persons. There are also reported reprisals and use of abuse against victims who lodge complaints as well as their defence lawyers alleging that their clients have been tortured or ill-treated.<sup>100</sup> According to national experts where there have been allegations of torture and ill treatment, there has been a lack of effective investigations into these human rights violations and subsequent accountability. Journalists and human rights activists who reported on such violations faced intimidation and harassment.<sup>101</sup> Despite these allegations of torture and ill treatment, the actual number of allegations submitted to the various oversight mechanisms is not known, although many national NGOs do record such allegations and provide legal support to victims of torture.<sup>102</sup> The problems would appear to be less related to what the legislation and policy is in place (although this requires attention as will be seen below) and more to the failure to implement such standards and policies in practice. This again points to the importance of an effective monitoring mechanism.

Further information indicates that there are serious concerns about the cases of involuntary or enforced disappearances. Since its establishment, the UN Working Group on Enforced or Involuntary Disappearances has transmitted 479 cases to the Government; of those, 10 cases have been clarified on the basis of information provided by the source, two cases have been clarified on the basis of information provided by the Government, and 467 remain outstanding.<sup>103</sup>

There are continuing reports of hazing in the military (*dedovshchina*) as well as of torture and other cruel, inhuman or degrading treatment or punishment in the armed forces, conducted by or with the consent, acquiescence or approval of officers or other personnel, notwithstanding the State party's reported intention to develop an action plan to prevent hazing in the armed forces.<sup>104</sup> The State submitted data regarding hazing in the armed forces (*dedovshchina*), but there are still concerns about the absence of comprehensive official statistics on investigations of complaints about torture.<sup>105</sup> Despite hundreds of reports, the investigations are inadequate or absent, and despite thousands of officers charged with such offences, there is still widespread impunity.<sup>106</sup>

There have also been allegations of torture in sobering-up facilities.<sup>107</sup>

Particular attention must also be paid to the situation in Chechnya. This has been noted by various independent experts, including the Office of the Commissioner of Human Rights: in the Report of Thomas Hammarberg, following his visit to the Russian Federation, (Chechen Republic and the

97 CAT/C/RUS/CO/4 p3 ss9, A/HRC/WG.6/4/RUS/2 p5 ss20

98 <http://www.hro.org/node/10291>; <http://chita-news.ru/stories/44>; <http://www.onk-ru.info/?p=7020#more-7020>; <http://www.onk-ru.info/?p=6904#more-6904>

99 CAT/C/RUS/CO/4 p8 ss19

100 CAT/C/RUS/CO/4 p3 ss8, p4 ss10, A/HRC/WG.6/4/RUS/2 p7 ss35

101 Amnesty International, The State of the World's Human Rights, <http://www.amnesty.org/en/region/russia/report-2011>

102 Information from national expert

103 A/HRC/16/48 p93 ss415. See also *Bazorkina v Russia*, hudoc (2006), 46 EHRR 261; and *Luluyev v Russia*. 2006-XIII.

104 CAT/C/RUS/CO/4 p4 ss10

105 CAT/C/RUS/CO/4 p11 ss25

106 Ibid

107 For example, journalist Konstantin Popov died as a result of severe beatings and abuse by sobering-up station personnel in Tomsk in 2010. (<http://en.rian.ru/russia/20100120/157628360.html>)



Republic of Ingushetia) on 2 -11 September 2009, that:

“The Commissioner regrets that stability in the North Caucasus region has yet to be achieved. Increased activity by illegal armed groups, the lack of effective investigations into disappearances and killings, and murders of human rights activists are of particular concern. Patterns of impunity persist, even though there are indications of serious efforts to reinforce the rule of law. The difficult economic situation is one of the destabilising factors, and the need for economic development and further social reconstruction is evident.” Evidence of torture in the region is apparent and investigations are rarely effective.<sup>108</sup>

## Available mechanisms and their suitability for a preventive function

In order to assess the suitability of current mechanisms for preventing torture, regard is had to their mandate (whether it includes a preventive function expressly or impliedly), as well as some of the criteria as outlined in OPCAT. Although the Russian Federation is not yet a party to OPCAT, the criteria for an NPM such as independence, the extent of powers, etc. are useful indicators of suitability for preventing torture.

There is no body created specially for investigating complaints of torture. However, the following bodies undertake some form of monitoring of places of detention:

Body or Official	Facilities under monitoring
Human Rights assistants to the heads of regional FSIN* departments	FSIN-administered institutions
Prosecutor's Office	All institutions regardless of the agency which runs them
Federal and regional ombudsmen Federal and regions ombudsmen for children's rights	FSIN-administered institutions Child care institutions and penal institutions for juveniles (Code of Execution of Criminal Sentences Amendment Act of 3 December 2011)
Public oversight commissions	FSIN-administered institutions Temporary detention wards (IVS) All administrative detention facilities Military detention facilities All detention facilities for juveniles Psychiatric institutions
Public councils of the Ministry of Interior	All police premises, all detention facilities administered by the Ministry of Interior

\* Federal Penitentiary Service

## Human rights assistants to the heads of regional FSIN departments

Human rights assistants are FSIN officers whose mandate has no entirely clear legal basis, but their functions are described in detail in the Methodology Guidance no. 2 annexed to the Methodology of Assessment of the Functioning of Territorial Departments of the FSIN, adopted by the Order of the FSIN no. 40 of 31 January 2011. These assistants are a recent creation as they did not exist in 2006 when the previous version of the Methodology was adopted (Order no. 38 of 6 February 2006). The assistants are recruited from old-age pensioners of the FSIN or other former FSIN officers (like those who failed their work within FSIN – Murmansk region is an example), in particular former directors of penal institutions. It follows from the 2011 methodology that the assistants may receive complaints from those detained in the FSIN-administered institutions to which replies should

be given “in compliance with the requirements of the legislation of the Russian Federation”.<sup>109</sup> This does not mean that the assistants are under an obligation to establish the facts and assess them against the applicable human rights standards, but merely that the time-limits for the replies are complied with, because the applicable legislation only contains rules of procedure and competence.<sup>110</sup>

As it transpires from the Methodology Guidance no. 2, the main obligations of the assistants concern litigation before the European Court of Human Rights.<sup>111</sup> However, they should not only advise potential applicants about the application form and address of the Court, but also “inquire about the personal motives for the application” and “to verify whether the power of attorney is duly certified by the head of the penitentiary institution”, both elements being examples of hindrances to the right of individual petition.<sup>112</sup> Furthermore, the assistants are under an obligation to collect and to provide to the FSIN and the Russian Government’s Agent before the European Court all the information that is necessary to cast doubt on the applicant’s allegations.

It is clear that the assistants are subordinate to the heads of FSIN departments and consequently not independent. However, it is not only their line of subordination that makes the recourse to the assistants utterly ineffective, but their mandate which is focused on *dismissing* the allegations of torture, particularly in the cases brought before the European Court of Human Rights, rather than on fully and independently assessing them.

## Prosecutor’s Office

According to article 1(1) of the 1992 *Prokuratura* Act prosecutors exercise supervision of compliance of public authorities and individuals with the Constitution of the Russian Federation and execution of the laws in force within the territory of the Russian Federation, including the respect for human rights in the course of operative-search activities, criminal investigations and in places of detention.

Prosecutors could play an important role in overseeing places of detention and supervising investigators. Firstly, they have uninhibited access to all places of detention regardless of the authority which runs a given detention facility. Secondly, even though the creation of the Investigative Committee deprived the prosecutors of the right to open criminal cases, they still exercise the review over the decisions taken by the investigators (article 124 of the Code of Criminal Procedure). Thirdly, representing the State in criminal proceedings and reviewing criminal cases before they are transmitted to trial courts, they are in a position to assess whether the evidence was collected in conformity with the law (article 221 of the Code of Criminal Procedure), including with the prohibition of torture. If the prosecutors routinely refused to present unlawfully collected evidence to the courts, this would encourage the investigators to respect the rights of the accused at the pre-trial stage of proceedings (however, as it will be shown below, the courts themselves do not exercise thorough review of the legality of collection of evidence and, in particular, easily dismiss the defendants’ allegations of torture during investigations).

However, despite their broad mandate and powers their efficiency is open to doubt as the prosecutors do not possess the necessary independence *vis-à-vis* the executive, even though their independence is declared in articles 4(2) and 5 of the 1992 Act. Under article 128 of the Constitution the *prokuratura* is a hierarchical and centralised system. Indeed, the executive controls the appointment of the prosecutors and is, thus, in a position to affect the decisions taken by them. The Prosecutor-General is appointed by the Council of Federation upon the nomination by the President of the Russian Federation for a renewable term of office of 5 years (article 12(5) of the 1992 Act). Although the final decision rests with the Council of Federation, the President may suspend the Prosecutor-General without seeking the upper house’s approval; according to the Constitutional Court, the Prosecutor-General has a particular position and the President of the Russian Federation exercises authority over it.<sup>113</sup> Regional prosecutors are appointed by the Prosecutor-General

<sup>109</sup> Para. 8 of the Methodology Guidance no. 2.

<sup>110</sup> See the 2006 Individual Petitions Act.

<sup>111</sup> Para. 9-10 of the Methodology Guidance no. 2.

<sup>112</sup> See, e.g., Eur. Ct. H.R., *Popov v. Russia*, no. 26853/04, 13 July 2006, paras. 248-250 in respect of questioning about the subject-matter of applications, and *Knyazev v. Russia*, no. 25948/05, 8 November 2007, para. 75, in respect of the absence of the requirement to certify the power of attorney for the proceedings under the Convention.

<sup>113</sup> Russian Constitutional Court, judgment of 1 December 1999 no. 17-P.

“in accordance with the bodies of State power of the constituent entities of the Russian Federation” (this refers to both executive and legislative bodies); such accord is sought and obtained following procedures set out in regional legislation (article 13(1) of the 1992 Act). District and town prosecutors are appointed by the Prosecutor-General, and are subordinate to him and to the regional prosecutors. This presents a clear line of subordination of the prosecutors to the federal executive within the prosecutors’ system and, ultimately, to the President of the Russian Federation.<sup>114</sup>

Oversight over pre-trial detention is undertaken by the district public prosecutors offices, while the penal institutions for convicts are overseen by the specialised departments of regional public prosecutors’ offices. For institutional reasons the latter are more inclined to support the penitentiary administration, and because their efficiency is measured by the drop in the number of complaints against the conditions of detention in the penitentiary, they are not encouraged to receive and consider the complaints. Even if they find a violation of the applicable legislation and order the administration to remedy it, these measures have no impact on other similar cases where similar violations may not be prevented.

The insufficient level of independence of the prosecutors is also due to the problems posed by the dual responsibility of the Prosecutor’s Office for criminal prosecutions and oversight of the proper conduct of investigations, which discourages the prosecutors from sanctioning investigators for illegal extraction of evidence, especially given that the judicial review of legality of the collection of evidence is not thorough (see the section on the legislation concerning the prohibition of torture for an analysis of the case-law). This results in the failure to initiate and conduct prompt, impartial and effective investigations into allegations of torture or ill-treatment.<sup>115</sup>

## Ombudsman of Russia

The Ombudsman institution is the Commissioner on Human Rights. Issues relating to their mandate, appointment and powers are as set out in the 1997 Commissioner of Human Rights in the Russian Federation Organic Act.<sup>116</sup>

The Commissioner must be a citizen of the Russian Federation, over 35 years old, ‘with knowledge in the field of the rights and freedoms of man and the citizen, and experience in their defence’.<sup>117</sup> He or she is appointed by the State Duma, the nominations can be made by the President of the Russian Federation, the Council of Federation and State Duma deputies. The Commissioner’s term of office is five years and can be renewed once.<sup>118</sup>

Article 2 of the 1997 Act declares that the Commissioner is independent and is not accountable to any State body or public official. Funding for the Commissioner and his or her staff is provided from the federal budget which is to ‘contain a separate position on the funds essential for the activity of the Commissioner and his working staff’.<sup>119</sup> The Commissioner ‘independently works out and fulfils his or her estimates of expenditure’.<sup>120</sup> It is up to the Commissioner to choose the number of staff and their positions and to establish ‘expert councils of persons...in order to provide consultative assistance’.<sup>121</sup>

The Commissioner’s mandate is as set out broadly in Article 1(3) of the 1997 Act:

*“By the means, indicated in the present Federal Constitutional Law, the Commissioner shall facilitate the restoration of violated rights, the improvement of legislation of the Russian Federation on human and citizens’ rights and the bringing of it into accordance with universally*

114 Even though the regional executive and legislature participates in the appointment of regional prosecutors, all regional governors are currently appointed by the President of the Russian Federation – and the approval of the legislative bodies has never been withheld.

115 CAT/C/RUS/CO/4 p5 ss12

116 Adopted by the State Duma on 25 December 1996, approved by Federation Council on 12 February 1997.

117 Article 6 of the 1997 Act.

118 Article 7(1) of the 1997 Act.

119 Article 5(2) and Article 38.

120 Article 38(3) of the 1997 Act.

121 Articles 39(2) and 41 of the 1997 Act.

*recognised principles and norms of international law, the development of international co-operation in the field of human rights, legal education on questions of human rights and freedoms, and the forms and methods of defending them.”*

The Commissioner is entitled to receive individual complaints from the people who consider their constitutional rights to be violated. However, the Commissioner may only act upon a complaint if all avenues of judicial protection of the complainant's rights have been exhausted.<sup>122</sup> This criterion is even more strict than the admissibility criterion of exhaustion of effective domestic remedies required to be met by the applicants to the European Court of Human Rights: for example, one needs not to exhaust extraordinary appeals for supervisory review, save in commercial cases, in order to complain to Strasbourg, but needs to do so if he or she wishes to complain to the Commissioner. In practice the Commissioner considers all applications he receives. Where there is information on ‘massive or gross violations of human rights and freedoms of citizens’ the Commissioner may act *proprio motu*.<sup>123</sup>

Acting upon an admissible complaint, the Commissioner may undertake a number of fact-finding measures, including visits to any institution, whether public or private, requests for information from the public officials, seeking expert opinions, and accessing court case-files. However, even when the Commissioner is of the opinion that there has been a violation of constitutional rights, his or her possibility to act is fairly limited: the Commissioner may complain to the courts on behalf of the applicant or request to open a criminal investigation against those responsible,<sup>124</sup> but this power is somewhat illusory given that these avenues had already been exhausted to no avail before the application was sent to the Commissioner. What remains is the right to request the high-ranked court officials to reopen the case under supervisory review procedure or, where the violation of constitutional rights stems from a statute

rather than from an illegal administrative act, to apply to the Constitutional Court asking the latter to strike down an allegedly unconstitutional statute.<sup>125</sup> The Commissioner may publish his or her conclusions once the consideration of the case is finished.

Under article 38(4) (3)-(4) of the 1993 Penal Institutions Act the Federal Commissioner for Human Rights as well as regional commissioners (where they exist) have the right to access the FSIN-administered penitentiary facilities without special authorisation. This does not mean, however, that the 1993 Act allows surprise visits or meeting detainees in private, but only that they are absolved from the obligation to seek permission to visit the penal facility. In practice the ombudsperson may request (and have it granted) a meeting in private. National experts raised the concerns as to whether such meetings in private may be overheard by technical means.

A significant number of constituent entities (more than 65 in 2011<sup>126</sup>) created the positions of regional ombudsmen – commissioners for human rights.<sup>127</sup> Their mandate and the mode of appointment vary from one region to another (usually appointed by regional legislatures), but, generally, despite the fact that criminal law, criminal procedure and execution of criminal sentences fall within the jurisdiction of the federal authorities and because regional constitutions contain human rights provisions comparable to those found in the 1993 Constitution of the Russian Federation and international instruments, the regional commissioners are not prevented from engaging in the oversight of the conditions of detention and prevention of torture (and they have the right of access under the above-mentioned 1993 Penal Institutions Act). Thus, ombudsmen in Perm *krai* and Sverdlovsk region (Yekaterinburg) regularly examine the situation of detainees in their regions, which is not the case, for example, in Lipetsk region or the Republic of Tatarstan. In Arkhangelsk the regional ombudsman, on the contrary, acted in favour of convicts illegally transferred to Arkhangelsk

<sup>122</sup> Article 15 of the 1997 Act.

<sup>123</sup> Article 21 of the 1997 Act.

<sup>124</sup> Article 29(1)(1)-(2) of the 1997 Act.

<sup>125</sup> Article 29(1)(3)-(4) of the 1997 Act. In one such case brought by the the Commissioner the Constitutional Court, in the name of victims' rights, struck down an important guarantee of *non bis in idem* for the defendants in criminal cases.

<sup>126</sup> <http://ombu.ru/>

<sup>127</sup> Full list with contact details is available at the Federal Commissioner's web-site <http://www.ombudsmanrf.ru/2009-11-03-08-54-03.html> (last accessed on 5 October 2011).

region from Murmansk (in harsh conditions of transportations) and was able to obtain their transfer back to Murmansk region where they should have served their sentences (the national expert was involved in this case).

A considerable number of regions (38 in 2005,<sup>128</sup> 74 in 2011<sup>129</sup>) have created the posts of Ombudsmen – Commissioners for Children’s Rights, this position was also created at the federal level as the Presidential Commissioner on Children’s Rights.<sup>130</sup> Just like in the case of the regional commissioners on human rights, the procedures for appointment and mandates of the commissioners on children’s rights vary from one region to another. None of them has access to juvenile detention facilities as a matter of right before the legislative amendments of December 2011. However, as a matter of practice (witnessed by the national expert) the Commissioner for Children’s Rights of Murmansk region has access to the detention facilities for minors and if he wishes to meet detained juveniles in private, he may choose the cell in the detention facility to hold the meeting in order to overcome concerns of being overheard.

If, as a credible monitoring mechanism, the Ombudsman Office appears to satisfy some of the criteria of efficiency, such as independence, a broad mandate, powers of access to penitentiary institutions, the law puts serious limits on the individuals’ right to petition the Commissioner and he or she manifestly lacks the ability to impose sanctions on those implicated in violations of human rights or even on those who fail to cooperate with him or her. The UN Human Rights Committee in 2009 in its Concluding Observations on Russia’s 6th periodic report specifically recommended that ‘the state party should strengthen the legislative mandate of the Federal Commissioner for Human Rights and the regional ombudsmen and provide them with additional resources so that they may be in a position to fulfil their mandate efficiently’.<sup>131</sup> It also called for more information on the number of complaints to the Commissioner and regional ombudsmen and their outcomes to be made public.

## Public Oversight Commissions

Public Oversight Commissions (POCs) are created under the 2008 Public Control over Human Rights in Detention Facilities Act. According to this law, POCs charged with the tasks of control of respect for human rights in places of detention and assistance to detainees are created in every Russian region. The POCs may visit the detention facilities under the authority of the FSIN, all facilities for administrative detention and all facilities for detention of minors. Their mandate does not cover the psychiatric wards.

The Commissions are composed of between five and 20 members who are nominated by all-Russian, inter-regional or regional non-profit organisations, which have been registered, operational for at least five years. The Commissions have protection of human rights among the aims of their activities, as set out in their charter. Each organisation can nominate up to two persons to stand for two years. The appointments are made by the Council of the Public Chamber of the Russian Federation (it is an advisory body under the President of the Russian Federation composed of members of non-profit organisations, public activists, journalists etc., representing, for the most part, GONGOs or government-controlled media).

Article 15(1) of the 2008 Act allows, *inter alia*, the POCs to visit places of detention and to consider individual complaints. However, the POC members are not allowed to take written complaints out of the detention facilities unless the complaints are registered by the penitentiary administration (the POC members themselves are unable to register such complaints while meeting the detainees). Acting upon the complaints the POC try to contact both the prosecutors, to open investigations and defence lawyers. As a matter of practice, the POC members were authorised (in one region more recently than in others) to bring recording devices to the detention facilities in order to record evidence of beatings. This has strengthened the POC influence over the penitentiary administration.

<sup>128</sup> UN CRC, CRC/C/RUS/CO/3, 23 November 2005, para. 13.

<sup>129</sup> <http://www.rfdeti.ru/announce.php?id=355> (last accessed on 5 October 2011)

<sup>130</sup> Decree of the President of the Russian Federation on the Presidential Commissioner on Children’s Rights no. 986 of 1 September 2009.

<sup>131</sup> CCPR/C/SR.2681, adopted 28 October 2009.



Strategies and practices of the POCs also vary depending on the region and composition of the POC. While some POCs aim to visit as many detention facilities as they can, others try to examine detainees' individual complaints, and yet others lobby for changes in the penitentiary systems. Few combine them all (strategies may vary within one POC, two members' agreement is enough to act) and not all of them prepare reports following their visits (or other activities). Such reports may be ignored (Nizhny Novgorod region) or taken into account in decision-making (Republic of Mari El, Perm and Krasnoyarsk *krais*).<sup>132</sup> The decisions of the POCs on the complaints are not binding, but are forwarded to the Commissioner for Human Rights and the Public Chamber of the Russian Federation (not to the regional public chambers).

POCs were instrumental in preventing mass beatings in prison, where, acting upon phone calls from penal colonies they intervened before the penitentiary administration in order to prevent the entry of specialforces into the colonies. They also oversee and prevent the transfers of ill detainees to court hearings (in such a case the detainee is deprived not only of food for the whole day, but also of medicine which adversely affects their health); they also prevented transfers of ill convicts to regions with an unsuitable climate. Many IVSs and special accommodation centres which failed to meet the required standards (international or municipal) were either closed or significantly renovated upon the requests of the POCs.

The right of access of the POC members to places of detention is subject to a prior notification of the relevant penitentiary authority. They cannot meet the detainees in private. However, in Murmansk region, the Republic of Tatarstan and Krasnodar *krai* (and in other regions as well) the POCs have been able to establish the practice of notifying the detention facilities by fax minutes prior to their entry and this was eventually accepted by the penitentiary administration (the introduction of an administrative offence of interference with the activities of the POC in 19.32 of the Code of Administrative Offences had considerable effect on the acceptance of the POC practices by the penitentiary administration). In

penitentiary institutions for convicts, but not in SIZOs, the POC members may request to meet the detainees in private and often obtain such meetings.

Despite the legal framework being generally favourable to the strengthening of public oversight over detention facilities, it contains a number of pitfalls which undermine the ability of the POCs to carry out their functions effectively. The selection and appointment of members of the POC is done by the Public Chamber, the members of which are themselves directly or indirectly appointed by the President of the Russian Federation (he personally appoints one third of the members which, in turn, select the remaining members). There are no criteria against which the candidates should be assessed by the Council of the Public Chamber. This has led to inconsistent, if not arbitrary, practices in the selection of candidates. For example, in 2008 local councilors and trade union activists were appointed to the POCs, but in 2010 they were declared ineligible; in 2008 the human rights NGOs represented in the Public Chamber took a decisive part in the selection of candidates to the POCs, in 2010 they were prevented from doing so.<sup>133</sup>

Furthermore, while the members of the POCs are nominated by non-profit organisations, this latter term makes no distinction between NGOs, GONGOs (GONGO are called those NGOs that are controlled by the state) and organisations of the veterans of the law-enforcement services. Consequently, POCs may end up being composed solely of former police or military officers and government-controlled activists, rather than independent experts in criminal procedure and penal institutions belonging to human rights NGOs. Overall, of 457 public commissioners appointed after the entry into force of the 2008 Act, only about one third belonged to human rights NGOs, but in 11 regions no human rights activists were represented; at the 2010 renewal their proportion dropped to around 25%.<sup>134</sup> Consequently, different POC members founded two different associations (independent from POC themselves) to unite them and allow to exchange experience across the regions: human rights activists form the Association of Independent Public Observers and the Council of the POC Chairmen is composed of those following

132 National expert's paper, «Can the POCs be efficient in Russia?» (in Russian, on file with PRI).

133 Ibid.

134 Ibid.

a more 'bureaucratic' approach. Each of the groups conducts regular meetings, trainings and other activities.<sup>135</sup>

Finally, the POCs' inability to meet inmates in private and the prohibition on unannounced visits renders the oversight much less effective than it could be. At least two members of POC should be present during a visit which makes it difficult for human rights activists to conduct visits if there's only one of them on the POC (as in the Sverdlovsk region).<sup>136</sup> In sum, the UN CAT's suggestion that Russia adopts "a national system to review all places of detention and cases of alleged abuses of persons while in custody, ensuring regular, independent, unannounced and unrestricted visits to all places of detention"<sup>137</sup> remains outstanding.

Even though the POC mandate does not explicitly cover psychiatric institutions, they were able to conduct monitoring of these facilities in Moscow region and the Republic of Tatarstan together with the Independent Psychiatry Association.<sup>138</sup> In respect of closed administrative-territorial entities (ZATO, for *zakrytoe administrativno-territorial'noe obrazovanie*), that is cities with restricted access, POC visits are not authorised.

### Public councils of the Ministry of Interior

These are a recent creation. The Presidential Decree of 23 May 2011 provides that public councils should be created to advise the Ministry of Interior, its regional and local departments (thus making it possible to create several thousand of public councils across Russia). They should consist of representatives of public associations, businesses or private individuals; their composition will be determined by the Minister of Interior at the federal level and by the heads of relevant territorial departments at regional and local levels. Even though the public councils are intended to make recommendations on policy-making (para. 5 of the 2011 Decree), their members are authorised to visit, even individually, and without prior permission all police premises and all places of detention administered by the Ministry of Interior. However,

detailed procedures for such visits are to be adopted by an order of the Ministry of Interior and this has yet to be done.

Nothing in the 2011 Decree guarantees the representation of human rights NGOs on the public councils; the mode of appointment depends on the discretion of the Ministry of Interior officials. Also, nothing guarantees that the members of the councils will be able to conduct unannounced visits or meet detainees in private. In any event, their mandate only covers the premises of and institutions administered by the Ministry of Interior.

## Context of Russian legislation relating to torture

The Russian Federation is not, therefore, completely devoid of monitoring mechanisms. However, in addition to the challenges and gaps raised above, these monitoring mechanisms have to operate within the context of the legislative framework relating to torture prevention as well as the human rights situation in the country itself, both of which will have an impact on their ability to carry out their work effectively. Exactly how this will be explored in discussed in further detail below. Here, it is pertinent to outline the relevant legislation and provide an overview of current trends in human rights in the Russian Federation.

Article 21 of the Constitution prohibits torture:

- 1. Human dignity shall be protected by the State. Nothing may serve as a basis for its derogation.*
- 2. No one shall be subject to torture, violence or other severe or humiliating treatment or punishment. No one may be subject to medical, scientific and other experiments without voluntary consent.*

The right not to be subject to torture and other prohibited treatment cannot be restricted in any way,

<sup>135</sup> Ibid.

<sup>136</sup> Ibid.

<sup>137</sup> UN CAT, CAT/C/RUS/CO/4, 6 February 2007, para. 9.

<sup>138</sup> <http://www.npar.ru/news/1108-noginsk.htm> (last accessed on 16 October 2011)

including a state of emergency or war (Article 53(3) of the Constitution). However, the Constitutional Court admitted the legitimacy of at least one limitation: in a case concerning the impossibility for relatives of those killed in counter-terrorist operations to obtain the bodies for burial, the Court ruled that even though the case fell under Article 21 of the Constitution, interferences with this right could be justified if provided for by law, and proportionate to one of the legitimate aims set out in Article 55(3) of the Constitution.<sup>139</sup> It appears, however, that this judgment hasn't provided a basis for a more comprehensive jurisprudence restricting the absolute prohibition of torture and remains a ruling based on the facts of the case.

Criminalising torture has been a long-standing problem after the ratification of UN CAT by the USSR in 1987. But according to Olga Shepeleva, a leading expert in the field of prevention of torture, its absence from the Criminal Code did not prevent prosecution for acts of torture, as they would be qualified as abuse of power (article 286 of the Criminal Code) or coercion to give evidence (article 302). However, she writes:

"The lack of an adequate definition of torture in the criminal law did not allow the law enforcement bodies fully to recognize its social danger and its characteristics as a criminal act, which undoubtedly had a negative impact on the effectiveness of the fight against this offence".<sup>140</sup>

Since the Criminal Code Amendment Act of 8 December 2003 Russian law contains a definition of torture. Indeed, Article 117 of the Russian Criminal Code criminalizes "tormenting" (in Russian, *istязanie*), defined as "the application of physical or psychological suffering by systematic beating or other violent means". One of the aggravating circumstances is if the "tormenting" is carried out with the application of "torture" (in Russian, *pytka*). Torture, or *pytka*, is defined in a footnote added to

the Criminal Code on 8 December 2003 which states that "torture (*pytka*) in the current article and other articles of this Code is to be understood to mean the application of physical or emotional suffering in order to force [the individual] to give testimony, or to carry out other actions against the will of the individual, and also in order to punish [the individual] or for other purposes".<sup>141</sup> However, the field of application of Article 117 (and, consequently, of the aggravating circumstance of the resort to torture) is very limited: it only concerns those acts which do not constitute grave or serious (average, *sredney tyazhesti*) bodily harm. Torture is also an aggravating circumstance for the crime of "forcing to give evidence" (article 302(2) of the Criminal Code), which only punishes investigators who resort to torture and those who apply it with consent of investigators. The case-law of the Russian Supreme Court contains a dozen publicly available judgments adopted under article 302(2) of the Criminal Code. It transpires that the Supreme Court is satisfied that there is torture if an investigator administers, orders or tolerates any violence against suspects, defendants or witnesses.<sup>142</sup> However, where torture was administered by public officials not in order to obtain evidence or confessions or without any knowledge of investigators, it is still article 286 of the Criminal Code (abuse of power) that would apply, as if there was no definition of torture.

Furthermore, even after the adoption of the relevant amendments to the Criminal Code, the government has been criticised on numerous occasions for failing to ensure that the Russian Criminal Code adequately reflects Article 1 of UNCAT,<sup>143</sup> as it does not, for example, 'address acts aimed at coercing a third person as torture'.<sup>144</sup>

According to article 75 of the Code of Criminal Procedure, evidence obtained illegally, including evidence obtained under torture, is inadmissible; even though the courts have no power to order immediate impartial investigations of allegations of torture (such investigations need necessarily to be

139 Russian Constitutional Court, judgment of 28 June 2007 no. 8-P on the applications of K.I. Guziyev and E.Kh. Karmova.

140 Olga Shepeleva, «Russian Law Amended to Include a Definition of Torture», (2003) 1 EHRAC Bulletin 2.

141 Amnesty International, Russian Federation: Torture and forced «confessions» in detention, 22 November 2006 (<http://www.amnesty.org/en/library/info/EUR46/056/2006/en>)

142 See, e.g., Rus. Sup. Ct. (Crim. Div.), 30 March 2007, no. 9-O07-3 (appeal), A.N. Bikhtyayev, N.A. Arzhatkin and A.V. Shal'nov; (Mil. Div.), 23 June 2009, no. 4n-131/06 (supervisory review), O.L. Ledentsov; (Crim. Div.), 20 May 2010, no. 21-O10-4 (appeal), S.M. Kahbiyev.

143 E.g. see CAT, 4th periodic report of the Russian Federation, CAT/C/55/Add.11, in its conclusions and recommendations of 23 November 2006, CAT/C/SR.751.

144 UN CAT, CAT/C/RUS/CO/4, 6 February 2007.

opened by the Investigative Committee).<sup>145</sup> What is more, the Supreme Court does not provide detailed explanations as to why it rejects the defendants' allegations that evidence against them was obtained under torture. The most common response of the Supreme Court (if it is given at all<sup>146</sup>) is that the allegations were examined by the trial court which had found them unsubstantiated.<sup>147</sup>

The 2006 Counteracting Terrorism Act (just like its predecessor, the 1998 Suppression of Terrorism Act) fails to explicitly outline the applicability of the safeguards for detainees in the Code of Criminal Procedure to counter-terrorist operations.<sup>148</sup> The counter-terrorism operation (CTO) regime in Chechnya was lifted by the Federal authorities in 2009. However, special operations (called *zachistki* or 'cleansing operations') still take place in different regions of the Northern Caucasus.<sup>149</sup> There are allegations of the widespread practice of detaining relatives of suspects of terrorism.<sup>150</sup> More than a hundred cases relating to torture, disappearances, unlawful detentions, extrajudicial executions, indiscriminate bombardments conducted in the course of counter-terrorist operations in the Northern Caucasus have already been decided by the European Court of Human Rights, with many more pending.

As the national expert notes, a number of trends have emerged in recent years which impact on the ability to prevent torture in the state and the role of monitoring mechanisms. These include, firstly, an increasing focus on security and resulting limitation of rights, 'decreasing of transparency and accountability of authorities, growth of abuse of laws and impunity of public officials, weakening of mechanisms of

protection and restoration of rights'.<sup>151</sup> Harassment of organizers of peaceful demonstrations, use of torture and other ill treatment by law enforcement officials have been reported.<sup>152</sup> In this context the POCs may see their representative role curtailed as there are proposals that those with previous criminal convictions and relatives of those who have been convicted cannot serve on the POCs (even though their experience may often be relevant to the POC work on the protection of human rights of detainees), and that the nominations to the POCs should be endorsed by the regional FSIN departments.<sup>153</sup> In Kaluga region a member of the POC lost her place on the Commission when the NGO she chaired had been dissolved by the authorities (though later this dissolution was quashed).

In addition, NGOs claim that the government has become 'increasingly formal' in its interaction with UN treaty and special procedures bodies, as well as failing to implement their findings or make them public.<sup>154</sup>

## Conclusions and recommendations

Although there are a number of monitoring mechanisms exist with a remit for torture prevention in the Russian Federation, none of them are without their problems in terms of providing an effective, independent and credible mechanism for the state. Thus, only the prosecutors (who lack independence from the executive) may visit all places of detention regardless of the authority which administers them or the nature of the detention. The POCs have a relatively broad mandate, but it does not extend to all places of

145 UN CAT, CAT/C/RUS/CO/4 p8 ss21, CommDH(2009)36 p5 ss8

146 Most recently, in Rus. Sup. Ct. (Crim. Div.), 24 June 2010, no. 74-O10-17 (appeal), *S.S. Khaptasov and others*, the Supreme Court noted that the defendant argued that evidence against him had been obtained under torture, but provided no reasons at all why this allegation was dismissed.

147 See, e.g., Rus. Sup. Ct. (Crim. Div., appeals), 25 May 2004, no. 23-O04-11, *A.L. Mayerkhanov, R.Kh. Nayevev and M.M. Ibragimov*; 21 March 2005, no. 86-O04-27, *Z.M. Karimov and others*; 30 April 2009, no. 16-O09-12sp (jury trial), *V.N. Fomichev and A.V. Korobeynikov*; 13 August 2009, no. 11-O09-60, *P.M. Dubrovina and others*.

148 CAT/C/RUS/CO/4 p10 ss24

149 CommDH(2009)36 p8, 13

150 CAT/C/RUS/CO/4 p10 ss24

151 Coalition of Russian NGOs, Shadow report produced in August-September 2008 for submission to the United Nations Office of the High Commissioner for Human Rights in the course of preparation of Universal Periodic Review of implementation of international obligations by the Russian Federation in the UN Human Rights Council, [http://www.memo.ru/2009/02/04/0402091.htm#\\_General\\_Dynamics\\_of](http://www.memo.ru/2009/02/04/0402091.htm#_General_Dynamics_of)

152 Amnesty International, The State of the World's Human Rights, <http://www.amnesty.org/en/region/russia/report-2011>

153 <http://ombudsmanrf.ru/2009-11-05-14-00-18/2009-11-05-14-03-05/8943-2011-10-20-06-24-03.html> (last accessed on 27 October 2011).

154 Shadow report, cited above.



detention and they cannot conduct unannounced visits nor meet detainees in private. Ombudsmen may enter into the FSIN-administered facilities, but yet again, no guarantees that they may meet detainees in private are provided for in the applicable legislation.

There is clearly a need for a credible independent monitoring mechanism or mechanisms for torture prevention. Several possibilities exist, but none are without their problems. Given that there also appears to be a general mistrust of officials and state bodies, the need to have a body or bodies which are perceived to be independent is crucial.

The overall human rights situation in the Russian Federation is evidenced by an increasing limitation of human rights and increasing intolerance towards those human rights organisations that are operating within the state. Allegations of torture and ill treatment are clearly evident within a variety of different institutions.

Evidence that there is a decrease in the willingness of the Russian authorities to engage meaningfully with international and regional human rights bodies, may provide an opportunity to lobby for a national body. Some states that have feared international scrutiny are more willing to look at national bodies over which they may perceive they have some control. In this context, lobbying for a more effective national body may work well. However, it may be that, given the current climate and hostility towards human rights by the state, the establishment of a new monitoring body is simply not a feasible option. Therefore utilising existing monitoring bodies and considering ways in which their mandates can be enhanced may be more effective. In this regard therefore, the following recommendations and suggestions are made with respect of improving the independence, mandate and therefore credibility of the existing bodies:

#### *In respect of the legislation on prevention of torture and its application:*

- Sign, ratify and implement the OPCAT and other relevant international instruments;
- Review the Criminal Code in a way to ensure the conformity of the definition of torture with the relevant international instruments;

- Encourage the Supreme Court (in particular, by amending the Code of Criminal Procedure or by a change in the case-law) and the lower courts to hear all evidence of the allegations of torture and not only that obtained by the prosecutors;
- Encourage the Supreme Court and the lower courts to quash the convictions based upon evidence extracted under torture and other forms of ill-treatment;
- Encourage the Supreme Court and the lower courts to provide explicit and detailed reasons when dismissing allegations of torture.

#### *In respect of the Ombudsman institution:*

- Given the difficulties raised with respect to the FSIN human rights assistants and the Prosecutor's office, as outlined above, in terms of creating an effective independent monitoring system, focus should instead be on developing the Ombudsman, the regional ombudsmen and Commissioners for children's rights. Specifically:
- Strengthen the institution of regional ombudsmen by encouraging the constituent entities of the Russian Federation which have not yet created ombudsmen institutions to create them and those which have created the position to create fair selection procedures;
- Attempts should be made to ensure consistency in the appointment and mandates of the commissioners on children's rights across the regions;
- Strengthen the institution of the Federal and regional Child Ombudsmen by encouraging them to examine the issues of treatment of juveniles in detention, including conducting visits to juvenile detention facilities and to pregnant women in detention;
- Consider creating the posts of Prison Ombudsmen at the federal level and/or in the regions with a significant prison population (possibly at the level of federal circuits; it may replace the prosecutors' office departments for the overseeing the penal institutions and/or the human right advisors to the heads of regional FSIN departments);



- Allow the federal and regional ombudsmen to conduct unannounced visits to detention facilities and to meet detainees in private as of right;
- Provide for an obligation on the executive to redress violations of constitutional rights found by the federal Ombudsman and to inform him or her on the measures taken to prevent new similar violations.

#### *In respect of the POCs:*

- Ensure independent selection of the members of the POCs, following a procedure independent from, in particular, the executive and the Public Chamber;
- Allow the members of the POCs to conduct surprise visits as a matter of right;
- Allow the POC to register complaints on their own and to take them out of detention facilities as a matter of right;
- Ensure that the POCs have the right to carry recording devices into the detention facilities as a matter of right;
- Ensure that the POCs have the right to enter detention facilities in the ZATOs;
- Extend the mandate of the POCs so that it covers all places of detention, including psychiatric hospitals, juvenile and military detention facilities;

- Provide for the right of POC members to be accompanied by experts instructed by them;
- Provide for a system of dissemination of the POC reports both to the general public and to federal and regional agencies;
- Provide for an obligation on the executive agencies and public officials to redress the violations of basic rights of the detainees found by the POCs;
- Encourage the practice of allowing visits of the general public to places of detention on a specific day of the year.

#### *In respect of the Public councils of the Ministry of Interior:*

- Their status should be fixed by a statute rather than a presidential decree;
- Ensure fair selection procedures, including representation of human rights NGOs;
- Ensure their right to meet detainees in private and conduct unannounced visits;
- Encourage publicity for the meetings of the public councils.

# Ukraine (as of 2012)

## Introduction

Ukraine is one of the largest countries of Europe by territory and its population is over 40 million. Ukraine is a unitary state divided in 24 regions (*voblasts*, or provinces) and one autonomy – the Autonomous Republic of Crimea (“the ARC”). The cities of Kiev and Sevastopol have the same status as regions. While the official language is Ukrainian, Russian is widely used in eastern regions, Crimea and the capital city of Kiev.

Under the 1996 Constitution, Ukraine is currently a semi-presidential republic, with the President elected by popular vote. The Prime-Minister and ministers collectively are responsible before the unicameral 450-member *Verkhovna Rada* (literally, the Supreme Council). The 2004 amendments to the Constitution which had provided for a parliamentary system of Government were struck down by the Constitutional Court in 2010 for the violation of procedure of adoption of constitutional amendments (an opinion on the bill should have been sought from the Constitutional Court, but the President and the Rada failed to refer it to the Court), thus returning the text to its pre-2004 version.

The judiciary of Ukraine also underwent a significant number of reforms in recent years. Currently, the 47-strong Supreme Court (the 2010 amendments to the Judiciary and Status of Judges Act intend to reduce the number of judges to 20) is at the top of three branches of the judiciary. Civil and criminal cases are heard by district courts and by Regional Courts of Appeal. Appeal on points of law lies with the High Civil and Criminal Court. Commercial and administrative cases are heard by the regional commercial courts and regional administrative courts, and then by one of eight Commercial Courts of Appeal or nine Administrative Courts of Appeal. Each of these two subsystems has its own High Court at the top. The Supreme Court hears extraordinary appeals from the three High Courts only where there is an inconsistency in the interpretation or application of substantive (but not procedural) law or a need to reopen a case following an international court’s judgment.<sup>155</sup>

The Constitutional Court of Ukraine hears cases of judicial review of constitutionality of legislative acts (national and those of the Crimean autonomy) and may give official interpretation of the Constitution on referrals from the President of Ukraine, the Cabinet of Ministers, at least 45 members of the *Rada*, the Ombudsman, the Supreme Court and the parliament of the ARC. Individuals may only request the Constitutional Court to give interpretation of Constitution or statutes, but not to assess the constitutionality of the latter. Although on paper the judiciary is considered to be independent, in practice they are perceived as corrupt and subject to political pressure.<sup>156</sup>

After briefly mentioning the international treaties applicable in Ukraine, this study will present the places of detention and areas of concern with respect to the prohibition of torture in the country. It will then examine the available mechanisms for the prevention of torture and the legislation aimed to combat it.

## Legal framework

Ukraine is a party to most of the international human rights treaties:

- International Covenant on Civil and Political Rights (signed 12 November 1973, came into force on 23 March 1976);
- Optional protocol to ICCPR (signed on 25 July 1991, came into force on 25 October 1991);
- International Convention on the Elimination of All Forms of Racial Discrimination (came into force on 7 April 1969);
- UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (signed on 27 February 1986, ratified on 24 February 1987; both Optional Protocols to the Convention also signed and ratified, with OPCAT ratified on 19 September 2006);
- European Convention for Prevention of Torture (signed on 2 May 1996, ratified on 5 May 1997, came into force on 1 September 1997);

<sup>155</sup> 2010 Judiciary and Status of Judges Act, article 38(2).

<sup>156</sup> Council of Europe, Support to Good Governance. Campaign against corruption in Ukraine, 6th progress report,

- European Convention on Human Rights (ratified of June 17, 1997 and signed on November 9, 1995);
- Framework Convention on National Minorities (signed on September 15, 1995, ratified on 9 December 1997).

Ukraine is yet to sign or ratify the UN Convention for the Protection of All Persons from Enforced Disappearances and the Rome Statute of the International Criminal Court.<sup>157</sup>

Ukraine has been found in violation of the ICCPR with respect to torture and ill treatment on a number of occasions and there have been some judgments by the European Court of Human Rights where violations of Article 3 have been found. For example in 2010 the European Court found 24 violations of the prohibition of inhuman and degrading treatment under Article 3 of the Convention in respect of Ukraine (only Russia and Turkey had more judgments against them – 102 and 32 respectively and 7 and 3 violations of torture; Romania came close with 22 findings of the prohibition of inhuman and degrading treatment).<sup>158</sup> For example, in *Davydov and others v. Ukraine*<sup>159</sup> the Court found a violation of Article 3 of the Convention on account of beatings of detainees in the Zamkova Prison in Khmelnytsky region. In a recent case of *Nechiporuk and Yonkalo v. Ukraine*<sup>160</sup> where the first applicant had confessed to a murder while in detention for an unrelated administrative offence and after electric shocks had been administered on him, the Court found a violation of the prohibition of torture (again, under Article 3 of the Convention). According to the judge elected to the European Court in respect of Ukraine, Ms. Ganna Yudkivska, Ukrainian cases under Article 3 of the Convention “strike with their medieval brutality”.<sup>161</sup>

## Places of detention

### Range of places of detention

There are a wide range of places of detention in Ukraine, falling under the remit of several different ministries. An outline of these is provided below.

The Ministry of Interior is responsible for the following places of detention (for arrested suspects and accused in criminal cases):

- 501 temporary isolation wards (IVS) – for criminal suspects who can be detained for three days pending court order;
- 37 special units (spezpriemnik – raspredelitel) – for homeless people, people without identification documents, foreigners waiting deportation etc;
- 29 special administrative units – for people suspected of commission of administrative offences (disorderly conduct, failure to pay a fine to traffic police, taking part in illegal public events, etc.)—who can be detained for up to 3 hours, and under circumstances specified in the Code of Administrative Offences up to 48 hours.<sup>162</sup>

Under the authority of the State Penitentiary Service:

- Pre-trial detention centers (SIZOs, for those accused of committing crimes);
- Correctional colonies open and close types and different levels of security (for people sentenced to imprisonment);
- Correctional colonies for juvenile offenders;
- Arrest centres (for those sentenced to short-term imprisonment).

<sup>157</sup> Ukraine signed on the Rome Statute on 20 January 2000 and acceded to the Agreement on Privileges and Immunities on 29 January 2007. It has yet to make the necessary constitutional changes to ratify the Rome Statute, and has not drafted legislation to implement these treaties.

<sup>158</sup> [http://www.echr.coe.int/NR/rdonlyres/596C7B5C-3FFB-4874-85D8-F12E8F67C136/0/TABLEAU\\_VIOLATIONS\\_2010\\_EN.pdf](http://www.echr.coe.int/NR/rdonlyres/596C7B5C-3FFB-4874-85D8-F12E8F67C136/0/TABLEAU_VIOLATIONS_2010_EN.pdf) (last accessed on 16 October 2011).

<sup>159</sup> Nos. 17674/02 and 39081/02, 01.07.2010.

<sup>160</sup> No. 42310/04, 21.04.2011, para. 157.

<sup>161</sup> <http://www.kyivpost.ua/ukraine/article/suddya-yevropejskogo-sudu-spravi-z-ukrayini-vrazhayut-svoyeyu-serednovichnoyu-zhorstokistyu-22078.html> (last accessed on 16 October 2011).

<sup>162</sup> System of monitoring of human rights' ensuring in activity of the Ministry of Interior of Ukraine, 06.06.2008, <http://www.mvd.gov.ua/>

Under the Ministry of Health:

- Those sentenced to compulsory medical treatment are held in psychiatric establishments and medical detoxification centres.

The Ukrainian system provides for a number of institutions designed to detain juveniles. There are Ministry of Interior-administered accommodation centres for children (*prymalnyky-rozpodil'nyky dlya ditey*)<sup>163</sup> where children over 11 years of age are kept if they committed acts classified as medium-degree crimes under the Criminal Code (punished by up to five years in prison) but did not reach the age of criminal responsibility. The decision on placement is taken by a judge and pending this decision a juvenile may be detained in an accommodation centre for children for up to 60 days. They also may be detained there pending placement in or return to special educational institution for a maximum of 30 days. Two further grounds for placement in the accommodation centres are vagrancy (up to 36 hours) and the need to return to the country of origin of alien children. Under article 8 of the 1995 Juvenile Affairs' Agencies and Special Juvenile Institutions Act the Ministry of Education administers social rehabilitation schools and professional education institutions. Juveniles are kept there if they committed crimes under the age 18 and until they reach this age. Children who abuse drugs or alcohol may be placed in medical and social rehabilitation centres under the authority of the Ministry of Health.<sup>164</sup> Finally, the State Penitentiary Service runs special institutions for juvenile offenders sentenced to deprivation of liberty.<sup>165</sup> Other institutions provided for in the 1995 Act are not designed for juvenile offenders, but for social rehabilitation of those not involved in criminal activities (shelters, social-psychological centres, social-rehabilitation centres).

The State Security Service is in charge of those who have committed crimes against the state such as espionage, terrorism etc. The places of detention under it include both temporary isolation wards and pre trial detention centres.

The State Migration Service (the work of which is coordinated by the Ministry of Interior) administers centers for temporary accommodation of migrants – foreign citizens, stateless persons and refugees – designed for placement and temporary accommodation (for a period from several days to three months) of the above categories of individuals pending determination of their legal status in Ukraine or expulsion.

There is geographical spread of these various places of detention across the Ukraine. Regional and district police units exist in almost all localities. Temporary isolation wards are placed in regional and district centers. The main part of correctional institutions for adults is located in the Eastern part of Ukraine (Donezk, Kharkiv, Dnepropetrovsk regions etc.) Correctional colonies for juveniles are located proportionally throughout the country.

According to the Penitentiary Service, on 1 October 2011 there were 155,654 persons (which is an increase if compared with 2009 (145,946 prisoners), and 2008 (149,690 prisoners)) in 184 penal institutions, including 38,879 persons in 33 SIZOs.<sup>166</sup>

115,461 persons are in 143 penal colonies: 10 minimal security colonies with common conditions for men contain 6,963 persons; 12 women's colonies keep 6,061 persons; 37 medium security colonies for those first time deprived of liberty – 36,628 persons; 39 medium security colonies for repeated offenders – 44,821 persons; nine maximum security colonies – 4,325 persons; nine minimal security colonies with weak conditions – 1,098 persons; 1,737 lifers under valid judgment are kept in four establishments, 28 are in investigative isolation wards and 13 in strong security sectors of penal colonies; 21 penal centres hold 5,004 persons; 22 medical institutions keep 5,673 persons; 10 educational colonies for juveniles train 1,434 minors; 1,488 disabled people (91 women among them) are among the convicts; 1,100 offenders are 60 years old or more; there are 618 drug addicted offenders sentenced to obligatory treatment (31 women among them) and 884 alcohol addicts (24 women among them); 659 HIV-infected

<sup>163</sup> Article 7(3) of the 1995 Juvenile Affairs' Agencies and Special Juvenile Institutions Act.

<sup>164</sup> Article 9 of the 1995 Act.

<sup>165</sup> Article 10 of the 1995 Act.

<sup>166</sup> [http://www.kvs.gov.ua/punish/control/uk/publish/article?art\\_id=91171&cat\\_id=66312](http://www.kvs.gov.ua/punish/control/uk/publish/article?art_id=91171&cat_id=66312) (last accessed on 16 October 2011).

offenders;<sup>167</sup> 2,234 foreigners in places of detention and 6,787 offenders without any citizenship;<sup>168</sup> 2,104 offenders for military crimes are kept in specialized military units.<sup>169</sup>

For the first time in seven years, in 2010 there was an increase in the number of convicts; a trend, according to the above statistics, which continued in 2011. It has to be seen over a longer period whether this increase is due to the penal policies of the new administration which came to power in early 2010. This may also be due to the wide amnesties that were held in 2004-2010, but not since.

## Areas of concern

According to national and international NGOs and other institutions, there are a range of concerns which can be identified in the country. Thus, conditions of detention in most SIZOs do not correspond to either international standards or national legislation.<sup>170</sup> For example, the European Court of Human Rights found violations of Article 3 of the Convention in a number of cases in respect of the lack of living space and inadequate ventilation.<sup>171</sup> Overcrowding is of particular concern in pre-trial detention centres in Donetsk city (741 persons more, 37,6% overcrowding), Simferopol (625 persons more, 42.1%), Kyiv (787 people more, 27,6%), Kharkiv (384 persons more, 13,7%) and Kherson (352 persons more, 38,6%). The situation is better in Zhitomir (SIZO is filled for 64% only), Uzhgorod (51%) and Vilnyansk (70%).<sup>172</sup>

Overcrowding is due, in particular, to the weak exercise of judicial review over the placement in

and extension of pre-trial detention. The courts do not elaborate why it is necessary to put a person in pre-trial detention limiting themselves to addressing only formal issues (gravity of charges, requests made in due time etc.). Investigations often last over 18 months during which time the defendants remain in detention, regularly and unquestionably extended by the courts (including where the courts remit the case for additional investigation: the time-limit of 18 months in detention pending investigation starts to run anew).

There are allegations of torture and other ill treatment by law enforcement agencies. For example, according to the data of Kharkiv Institute for Social Research, between 100,000 and 120,000 people suffer from torture by law enforcement agencies. The victims of unlawful violence in the internal affairs agencies numbered from 780,000 to 790,000 people (the same index in 2004 made over 1 million people, and in 2009—604,000 people).<sup>173</sup>

With respect to children, it has been recommended that a separate institution be created, in compliance with the Paris Principles for the monitoring of children's rights, in particular for the establishment of an Ombudsman for Children<sup>174</sup> and in the meantime to ensure that the state 'strengthen independent monitoring of children deprived of their liberty, including by 'mobile groups/teams' or other mechanisms'.<sup>175</sup>

One main issue of concern relates to the numerous, consistent and often credible allegations received from various sources, including victims, (some of whom are children) of confessions obtained under

<sup>167</sup> US State Department, Country Report on Human Rights Practices, Ukraine, available at <http://www.state.gov/g/drl/rls/hrrpt/2010/index.htm> (last accessed on 16 October 2010).

<sup>168</sup> Report of Ukrainian Ombudsman on Human Rights timed to 60 Anniversary of the Convention on Protection of Human Rights and Fundamental Freedoms, 22 October 2010.

<sup>169</sup> Ensuring human rights in Ukraine-2009. Annual report of NGO "Donetsk Memorial" 27.04.10.

<sup>170</sup> *Melnik v. Ukraine*, no. 72286/01, 28.03.2006, para. 47, *Koval v. Ukraine*, no. 65550/01, 19.10.2006, para. 76, and more recently, *Kharchenko v. Ukraine*, no. 4010702, 10.02.2011, para. 53.

<sup>171</sup> *Mustafayev v. Ukraine*, no. 36433/05, 13.10.2011, para. 32; *Zhaykin v. Ukraine*, no. 40107/02, 10.02.2011, paras. 49-53; *Pokhlebin v. Ukraine*, no. 35581/06, 20.05.2010, para. 50.

<sup>172</sup> Ensuring prisoners' rights in Ukraine-2009. Annual report of Donetsk Memorial 27.04.10. Data for 2009.

<sup>173</sup> <http://rama.net.ua/news/ukraine/2010/11/12/1289565786/>, <http://newzz.in.ua/main/1148847613-izdevatelstvami-pytam-so-storony-milicii-ezhednod-podvergayutsya-bolee-600-tysyach-ukraincev.html>, <http://regpol.org.ua/projects/2583> (all last accessed on 10 November 2011).

<sup>174</sup> Committee on the Rights of the Child considered the consolidated third and fourth periodic report of Ukraine (CRC/C/UKR/3-4) at its 1602nd and 1603rd meetings (see CRC/C/SR.1602 and CRC/C/SR.1603) held on 28 January 2011, and adopted, at its 1611th meeting, held on 3 February 2011 (CRC/C/UKR/CO/3-4).

<sup>175</sup> Ibid, para 3(b); CCPR/C/UKR/6/Add.1 (2008) and CAT/C/UKR/CO/5 (2007).



torture by the police (including arrests on unrelated administrative charges, as in the above-mentioned, *Nechiporuk and Yonkalo*). Police powers of arrest under the laws on administrative offences and on vagrants, are at times abused to extract confessions under duress.<sup>176</sup> Furthermore, with respect to pre-trial detention, the UN Working Group on Arbitrary Detention was concerned about the high number of arrests carried out in the country, many of them not registered, which some sources estimated at approximately 1 million each year.<sup>177</sup> It is also believed that the recourse to pre-trial detention and restrictions applied during detention on remand was too frequent with courts not exercising genuine control when authorizing pre-trial detention.

## Mechanisms of prevention

Despite being a party to OPCAT since 2006, Ukraine has yet to designate its national preventive mechanism (NPM). This will be discussed further below. It is worth outlining the number of institutions that the state has for monitoring places of detention. These include: the executive itself, prosecutors and the Ombudsman. Furthermore, following a 2004 Decree of the Cabinet of Ministers, Oversight Commissions were created in all regions of Ukraine.

### Former Department for Human Rights Monitoring of the Ministry of Internal Affairs (MIA)

In 2008, the Department for Human Rights Monitoring within the MIA was established, which a 2008 NGO report estimated<sup>178</sup> as “a new stage in relations between human rights organizations and the State”. During the first and the only full year of its operation (2009) the Department demonstrated its effectiveness in preventing ill-treatment by police (specific improvements are listed below in this section). The department staff under the authority of the deputy

Minister of Interior included representatives in every regional department of the interior who coordinated the activities of Mobile Human Rights Monitoring Groups in places of detention under the MIA, which comprised, in particular, members of human rights NGOs. They were able to participate in regular checks of police stations and detention facilities, while transportation was provided at the Ministry’s expense. The outcomes of the visits were notified to the deputy Minister of Interior who could swiftly react to the violations found. In 2009, mobile groups, which became the prototype and the only valid model in Ukraine for the national preventive mechanism in detention facilities, made 424 visits to prisons. In particular, only these groups had access to preventive detention cells in police stations.<sup>179</sup>

By the Order of 18 March 2010 concerning the structure of the Ministry of Interior the new Minister Anatoly Mohyliov disbanded the Department for Human Rights Monitoring in the MIA agencies.<sup>180</sup> This led to the suspension of mobile monitoring groups, dismissal of assistants for Human Rights of the Minister and halt to the operation of Ministry’s Public Councils throughout the country.<sup>181</sup> No reasons were given by the Minister to justify the dissolution of the Human Rights Department.

It is the opinion of a significant number of Ukrainian NGOs that these mobile groups contributed to the prevention of torture in detention, through receiving complaints from those in police detention regarding torture by policemen and regarding re-formulation of administrative charges into criminal ones. Acting upon a complaint and if convinced of its validity, the mobile groups could raise the relevant issues with the Ministry’s senior officials who were in position to order to put an end to the violation established.<sup>182</sup> It is believed that they helped to maintain and observe respect for the European and municipal standards for treatment of detainees (in particular, regular access to food and water, denial of which had been practiced by the police; notification of the relatives of the detained of the fact of detention; notification

176 See, e.g., *Nechiporuk and Yonkalo v. Ukraine*, judgment cited above.

177 UN HRC, Report of the Working Group on Arbitrary Detention, Mission to Ukraine\*\*A/HRC/10/21/Add.4, 9 February 2009.

178 <https://www.helsinki.org.ua/files/docs/1245860601.pdf>,

179 Kharkiv Human Rights Group Report, *100 Days of the New Administration of the Ministry of Interior [100 dniv novogo kerivnytstva MVS]*, p. 29 et seq., available at <http://library.khpg.org/files/docs/1277206750.pdf> (last accessed on 16 October 2011).

180 For a photocopy of the Order see <http://helsinki.org.ua/files/docs/1289993539.pdf> (last accessed on 16 October 2011).

181 <http://helsinki.org.ua/files/docs/1289993517.pdf> (last accessed on 16 October 2011).

182 See their joint declaration at <http://www.hro.org/node/7795> (last accessed on 16 October 2011).

of the detained person of the charges against him or her; medical assistance to those in police detention etc.)<sup>183</sup> In addition, the Assistants to the Minister initiated official inspection of appeals about police mistreatment, and Public Councils designed projects intended to prevent torture.<sup>184</sup> This action by the Interior Minister was therefore a step backwards.

## Prosecutors

Under article 121 of the Constitution the Office of the Prosecutor (the *Prokuratura*) is entrusted with four main tasks:

- Prosecuting criminal defendants before the courts;
- Representing the interests of the State or, where required, individuals before the courts;
- Oversight of the activities of the operative-search and criminal investigation agencies;
- Oversight of the compliance with the applicable law in execution of criminal sentences.

Independence is questionable on paper, with the Prosecutor-General being appointed by the *Verkhovna Rada* for a term of five years and may be dismissed either by the *Rada* or by the President of Ukraine.<sup>185</sup> Regional prosecutors and their deputies, as well as district prosecutors are appointed by the Prosecutor-General, except for the Prosecutor of the ARC which is appointed with the consent of the *Rada* of the ARC.<sup>186</sup> However, the range of powers are broad: under article 24 of the Code of Execution of Criminal Sentences of Ukraine, prosecutors may access penal correctional institutions without prior authorisation. Even though no explicit provision to that end exists in respect of pre-trial detention facilities, article 22 of the 1993 Pre-Trial Detention

Act provides for the prosecutors' supervision over the pre-trial detention facilities and binding nature of the prosecutors' orders to the State Penitentiary Administration.

Various concerns have been raised with the way in which the Prosecutors carry out their mandate. In his report on a 2006 visit to Ukraine, the Council of Europe's Commissioner for Human Rights noted that whilst the office of the Prosecutor had extensive powers, it is both an investigator and criminal prosecutor, functions which were not compatible with each other.<sup>187</sup> As a result he concluded that the Public Prosecutor's Office was 'extremely powerful and sometimes even threatening' and recommended that the Office simply focus on prosecuting criminal offences and that the pre-trial investigations in particular be transferred to another authority.<sup>188</sup> In light of these recommendations, it would be inappropriate to suggest that the Prosecutor's Office extend its remit further in terms of monitoring places of detention. It has, however, been recommended furthermore that the Prosecutor improve its relationship with civil society.<sup>189</sup>

## Ombudsman

The Ombudsman institution is represented in Ukraine by the Commissioner for Human Rights of the *Verkhovna Rada*. Under article 6 of the 1997 Commissioner of Human Rights Act the Commissioner is appointed by an absolute majority of the *Rada* upon a proposal of its Chairman or a quarter of its members (113). The Commissioner should be at least 40 years old, should speak the official language of Ukraine, live in Ukraine at least five years prior to the appointment, be of high moral qualities and possess human rights experience. Despite the 1997 Act's requirements of political neutrality of the Commissioner (article 8), notably the prohibition to hold an elective mandate or to be a member of a

<sup>183</sup> *Human Rights in the Activities of Ukrainian Police* [Prava lyudyny v diyal'nosti ukrayns'koy militsii], pp. 73-75, available at <http://www.umdpl.info/index.php?id=1242209395> (last accessed on 16 October 2011).

<sup>184</sup> See, e.g., an analysis of the Ukrainian Association of Monitors of the Respect for Human Rights by Law-Enforcement Bodies, available at <http://umdpl.info/index.php?id=1273224536> (last accessed on 16 October 2011).

<sup>185</sup> article 122 of the Constitution.

<sup>186</sup> article 15(4)-(5) of the 1991 *Prokuratura* Act

<sup>187</sup> Report by the Commissioner for Human Rights, Mr. Thomas Hammarberg on his visit to Ukraine, CommDH(2007)15 p. 11, ss. 25

<sup>188</sup> *Ibid.*, and para 26. See also Committee Against Torture, fifth periodic report of Ukraine (CAT/C/81/Add.1) at its 765th and 768th meetings, held on 8 and 9 May 2007 (CAT/C/SR.765 and CAT/C/SR.768), and adopted, at its 779th meeting on 18 May 2007 (CAT/C/SR.779), para 5.

<sup>189</sup> *Ibid.*, para 28.

political party, Ms. Nina Karpacheva who has held this post since 1998, ran for the *Rada* elections in 2007 on the Regions' Party list. The incumbent Ombudsperson Ms. Valeriya Lutkivska was appointed in 2012. She was nominated by the governing Regions' Party<sup>190</sup> but was only appointed after having argued for the Government before the European Court of Human Rights at the oral hearings in the case of *Lutsenko v. Ukraine*.<sup>191</sup> The case concerned the detention of a minister in a previous government to which the Regions' Party had been in opposition. This illustrates a problem not unique to the Ukraine, that despite Parliamentary involvement in the appointment process this does not always guarantee that conflicts of interest will not arise.

The Commissioner may receive complaints from individuals, *Rada* members and act *proprio motu*. The admissibility criteria for individual complaints are not too difficult to comply with: they should be lodged with the Commissioner's office no more than one year after the alleged violation of human rights (the Commissioner may extend this time-limit to two years) and should not concern a pending court case.<sup>192</sup>

In the course of the examination of complaints and *proprio motu* actions the Commissioner may, in particular, visit any detention facility, including those intended for compulsory medical (including psychiatric) treatment and meet the detainees. Article 13(1)(8) of the 1997 Act does not specify, however, whether the Commissioner may conduct unannounced visits and meet the detainees in private. In practice, the Commissioner comes to the detention facilities without prior notification and may request the prison guards to leave the room where she holds the meetings with detainees (although concerns of the administration overhearing the conversation via technical devices remain). There is a special unit within the Ombudsman's Office responsible for monitoring the human rights situation in closed institutions. The main area of the unit's responsibility lays in examining complaints and taking measures in cases where complaints are well-founded. This unit's

staff was, however, reduced from 6 to 3 in recent years because of the lack of funding.

The Commissioner's powers to act following what he or she considers to be a violation of human rights are nevertheless limited: besides presenting regular and thematic reports to the *Rada* the Commissioner may only apply to the Constitutional Court (asking it to declare a statute in issue unconstitutional) or complain to the relevant body implicated in the violation. The only obligation on the latter would be to reply to the Commissioner within 1 month.<sup>193</sup>

On paper the Commissioner has extensive powers and it has been recommended that it should be strengthened in a number of areas, including in its ability to deal with complaints,<sup>194</sup> and improving the regularity of visits. However, others have noted that 'the institution in its current form does not seem to enjoy esteem in the human rights community'<sup>195</sup> and this would need to change if, as has been recommended, it were to be designated as the NPM under OPCAT.

## Oversight Commissions (OCs)

Article 25 of the Code of Execution of Criminal Sentences, as amended in 2010, endorsed the Statute of Oversight Commissions adopted by the governmental decree of 1 April 2004 no. 429 (amended in 2006 and 2010) by which the OCs had been created. Under article 24 of the Code the only concession made to the OCs was the recognition of their right to enter penitentiary institutions (for the execution of criminal sentences, rather than pre-trial detention facilities). No powers of inquiry are provided for in either the Code or the 2004 Statute.

The 2004 Statute provides that the OCs *may* be created by regional or local administrations. Up to 700 OCs could thus be created under this rule. According to para. 9 of the 2004 Statute the OCs are composed of the members of public associations (not necessarily human rights NGOs, associations of law-

190 See, e.g., <http://www.pravda.com.ua/rus/articles/2012/04/26/6963555/>

191 [http://www.echr.coe.int/ECHR/EN/Header/Press/Multimedia/Webcasts+of+public+hearings/webcastEN\\_media?id=20120417-1&lang=lang&flow=high](http://www.echr.coe.int/ECHR/EN/Header/Press/Multimedia/Webcasts+of+public+hearings/webcastEN_media?id=20120417-1&lang=lang&flow=high)

192 Article 17 of the 1997 Act.

193 Article 15(3) of the 1997 Act.

194 Council of Europe Commissioner for Human Rights visit to Ukraine, para 26.

195 APT, OPCAT Database, Ukraine, as at 8th July 2011.

enforcement veterans qualify), representatives of the executive, representatives of the local government, or any other individuals, who serve on the OCs for the three-year term. Nevertheless, half of the members of a given OC should originate from public associations (not necessarily human rights NGOs). According to the national expert, no human rights activist has ever been refused membership on the OCs; quite to the contrary, there's a deficit of human rights NGOs' participation in the OCs, especially, at the local level. The composition of every commission is approved by the administration which creates it. Chairpersons and secretaries of the OCs are also appointed by the executive (usually the chairperson is the deputy head of the regional or local executive) who have the power to sign or withhold signature of the OC decisions and minutes of its sessions (in Kiev region the OCs members even requested a prosecutor to intervene because of the failure of the chairperson of the OC to appear at the OC meetings and to sign its decisions).

The tasks of the OCs, as formulated in the 2004 Statute, are not focused on supervision of compliance with human rights under the Constitution and international treaties. Thus, para. 3 of the 2004 Statute lists the following among the tasks of the OCs:

- Organisation and carrying out of public control over the facilities for execution of criminal punishments;
- Assistance to the penitentiary administration in the correction and rehabilitation of offenders;
- Organisation of education for those released on parole;
- Assistance in social adaptation to those released from the penitentiary institutions after having served their sentences.

In carrying out of those tasks the OCs were authorised, in particular, to:

- Take part in decision-making on early conditional release of prisoners;
- Take part in decision-making on transfer of a prisoners from one level of security to another;

- Assist the prison administrations in improving social and physical conditions of prisoners and resettlement of offenders upon release;
- Assist and support prisoners in finding employment and accommodation upon release.

More recently, the OCs have become routinely informed of the court sessions held in penal institutions where the issues of early release are being considered (participation in such hearings is the primary task of local OCs). They attend such sessions and regional OCs take this opportunity to encourage local OCs to participate in the hearings and visit the penal institutions on the same occasion. Otherwise, many local OCs fail to visit the detention facilities on their own initiative.

It follows from the applicable legislation and practice that the OCs can hardly be considered as effective. Firstly, the legal basis for their existence is an executive resolution rather than an act of parliament and can easily be modified by the executive alone. In terms of their composition, there have also been allegations that the appointment process was not as transparent as it could have been.<sup>196</sup>

Secondly, their mandate, at least according to the applicable legal rules, only extends to penitentiary facilities for offenders, excluding police, administrative and pre-trial detention facilities. Thirdly, the executive retains a significant degree of control over the composition of the OCs: unfettered discretion in appointing members, selecting chairpersons and secretaries (those may easily render a given OC inoperative). Fourthly, even if the Code on Execution of Criminal Sentences allows the members of the OCs to enter penitentiary facilities without prior permission, this does not imply that it has the power to make unannounced visits or meet detainees in private. But just like the Commissioner for Human Rights, they may appear in the penal institutions without seeking prior permission and request the prison guards to leave the room to make the meeting private (subject to the overhearing concerns). It is, however, impossible to verify whether all those who want to meet the OC have indeed the opportunity to meet it.

196 Information from the expert's report.

The OC reports should normally include the OC's conclusions and the response of the administration of the penal institution concerned. Although the OCs are required to make their reports public, forward to the regional or local administration and relevant executive agencies, this does not always appear to have been done. By the end of 2011 the consolidated national report of the OCs of different levels should for the first time be compiled. It remains to be seen what will be its effects.

In sum, the OCs are designed in a way to assist the penitentiary administration in carrying out of its statutory functions rather than to monitor the respect for human rights in detention facilities, even though the human rights activists on the OCs encourage the commissions to focus on the latter issues. This has an impact on the overall ethos of the institutions, their ability to undertake a preventive and human rights-based approach to their work. Lastly, there are questions over the extent to which the chairperson is perceived as independent, despite his ability in Statute to operate as such.<sup>197</sup>

### National preventive mechanism

In 2008-2009 the Ministry of Justice of Ukraine in cooperation with NGOs and with public participation, developed a draft law on the national preventive mechanism for preventing torture. It provided for a newly formed and separate committee (of 6-8 expert persons), which would coordinate visits of monitoring groups to prisons in all regions of Ukraine.<sup>198</sup>

Despite these promising developments, in August 2010 another draft law was issued by the Ministry of Justice, without consultation, 'On the Ukrainian Parliament Commissioner for Human Rights' suggesting that the Commissioner become the NPM. After considerable protest, this was then withdrawn. One month ago, in September 2011, a Presidential Decree established a Commission on Prevention of Torture as an advisory body to the President.<sup>199</sup> The

Chairman is the Head of the Department of Judiciary Administration. Its objectives, as provided in section 3 of the Decree, are to make proposals relating to prevention of torture, comment on draft and current legislation and to make unannounced visits to places of detention. The following are listed in the Decree: pre-trial detention facilities, penal institutions, mental institutions, special education and educational institutions'.<sup>200</sup>

Various concerns arise with this Decree. Firstly, the manner in which it was created, without broad consultation or a transparent process. Secondly, the appointment of the chairperson and its position as a standing advisory body to the President lacks independence. Thirdly, its remit regarding the places of detention is limited, and although there is the provision for the Commission to question detainees, this is not specifically in private. There are specific provisions to involve civil society and other stakeholders including through forming subcommittees and working and expert groups<sup>201</sup> thus opening the possibility for civil society engagement and work with the NPM. Members of the Commission are voluntary but its composition is upon approval of the President.<sup>202</sup> Its decisions are advisory only and are simply required to be 'considered' by the relevant authorities.<sup>203</sup>

### Legislation pertaining to the prohibition of torture

Article 28(2) of the Constitution of Ukraine prohibits torture, cruel, inhuman and degrading treatment. The prohibition is unqualified and may not be derogated from even during a state of emergency or war (article 64(2) of the Constitution). This section will examine how these constitutional rules are reflected in the criminal law, criminal procedure and legislation on national preventive mechanisms.

<sup>197</sup> Information from the expert's report.

<sup>198</sup> Law On the National Committee for the Prevention of Torture.

<sup>199</sup> Statement by H.E. Mykola Maimeskul, Ambassador, the Permanent Representative of Ukraine, at the workshop on the role of prevention in promotion and protection of human rights (Geneva, May 20, 2011), <http://www.mfa.gov.ua/geneva/en/publication/print/53446.htm>, Decree 950/2011.

<sup>200</sup> S.4.

<sup>201</sup> S.4.

<sup>202</sup> S.6.

<sup>203</sup> S.10



Article 127 of the Criminal Code of Ukraine criminalises torture. According to this provision, torture is “infliction of severe physical pain or physical or mental suffering by way of beatings, tormenting or other violent actions with the aim of forcing the victim or another person to undertake actions against their will, including either to make him or another person confess or provide information, or to punish him or another person for the acts committed by him or another person or in the commission of which he or another person is suspected, as well as with the aim of intimidating or discriminating him or other persons”.

The only aggravating circumstances provided for in para. 2 of article 127 of the Criminal Code are the commission of torture for a second time, by a group of persons or for reasons of racial, ethnic or religious intolerance. The latter hardly allows to distinguish the aggravating circumstance from the aim of discrimination found in para. 1 of article 127. This version of the aggravating circumstances of torture adopted in 2009 replaced the original 2008 text which had provided, in particular, that the commission of torture by an official exploiting his or her position constituted an aggravating circumstance. Consequently, the current version of article 127(2) of the Criminal Code does not allow a distinction between torture committed by private individuals<sup>204</sup> and that committed by public officials. The United State Register of Judicial Decisions of Ukraine contains around 100 criminal judgments concerning torture, but this includes both public officials and private individuals.<sup>205</sup>

What is even more troubling is that the crimes of abuse of official power (article 365) and forcing another person to give evidence (article 373) are

formulated in a way that they do not apply if the coercion exercised by the public official amounts to torture: in this latter case, the public official is prosecuted under article 127, just like any other individual. In one case, however, the Supreme Court, upholding the conviction under article 365 of the Criminal Code, noted for the purpose of sentencing that the acts committed by the defendants constituted serious crime and a grave violation of the prohibition of torture under international human rights law, so that the defendants should not have been exempted from punishment<sup>206</sup>.

In the context of inadmissibility of evidence obtained under torture, article 22(3) of the Code of Criminal Procedure explicitly prohibits coercion in obtaining testimonies. However, only one example of quashing a conviction based on the evidence obtained under torture could be found in the Supreme Court’s case-law. It noted that while the trial court was satisfied that the defendant’s allegations of torture at the pre-trial stage of proceedings had been verified by the prosecutors’ office and found unsubstantiated, it was clear that the prosecutor, in fact, had taken no action to investigate the defendant’s credible allegations.<sup>207</sup> More common is the approach taken by the lower courts in that case or, more recently, the Court of Appeal of Kiev which, rejecting the defendants’ allegations of recourse to torture at the pre-trial stage of proceedings, limited their reasoning to a statement that the allegations had been verified, but had not been confirmed.<sup>208</sup> It clearly follows from these cases that the burden of proof of torture falls essentially on defendants in criminal cases, while the courts unreservedly accept the prosecution statements denying any wrongdoing.

204 See, e.g., a recent judgment of Romny Interdistrict Court (Sumy region), 12 August 2011, Case no. 1-280/11, Doc. no. 17744220 (available at <http://reyestr.court.gov.ua/Review/17744220>, last accessed on 10 October 2011), finding an individual who committed crimes against other individuals guilty of torture under article 127 of the Criminal Code.

205 <http://reyestr.court.gov.ua>, last accessed on 10 October 2011.

206 Supreme Court of Ukraine, 18 May 2010, Case no. 5-1397km10, Doc. no. 9793010, available at <http://reyestr.court.gov.ua/Review/9793010> (last accessed on 10 October 2011).

207 Supreme Court of Ukraine, 24 June 2008, Case no. 5-2146km08, Doc. no. 2264200, available at <http://reyestr.court.gov.ua/Review/2264200> (last accessed on 10 October 2011).

208 See Court of Appeal of Kiev, 12 December 2010, Case no. 1-03/10, Doc. no. 12906450, available at <http://reyestr.court.gov.ua/Review/12906450> (last accessed on 10 October 2011).

## Conclusions and recommendations

Despite the fact that recourse to torture persists in Ukraine, not much is being done in order to eradicate it. Quite to the contrary, useful initiatives, like the creation of Mobile Human Rights Groups within the Ministry of Interior do not always last long. Despite the fact that the OPCAT is binding on Ukraine since 2006 and no declaration having been made in order to postpone the fulfillment of obligations under this instrument,<sup>209</sup> Ukraine has only just appeared to have established its national preventive mechanism. The SPT's visit to the country earlier on in 2011 underscored the need for the mechanism to be independent<sup>210</sup> but its report has yet to be made public, so further analysis of any discussions with the government in this regard cannot be made.

How this new Commission will operate in collaboration with the existing visiting mechanisms remains to be seen, and questions need to be asked as to what degree of coordination there will be among these various bodies. The independence of the newbody, is debatable and the process by which the Bill was created lacked transparency. This is likely to have implications for how the resulting Commission is perceived and can impact on its potential credibility and legitimacy, not only by the public but also by the existing monitoring bodies.

There are various attempts being made, including by the Council of Europe, to deal with corruption among public bodies in the Ukraine. Further work needs to be done with the courts in this context, in particular in light of their role in dismissing evidence obtained under torture. Judicial colloquia may assist in this regard.

In general, not only the OCs, but different ways of inclusive participation of the civil society in the oversight of places of detention should be developed. In this respect the experience of mobile groups of the Ministry of Interior is highly relevant. Consideration was given to the idea of restoration of

the Department and mobile groups in the context of NPM, but no decision has been taken so far. Other ways of engagement with civil society should also be considered.

### *With respect to criminal legislation and its application:*

- The *Rada* should revise the definition of torture so that it would be in conformity with Article 1 of CAT<sup>211</sup> and provide for aggravating circumstances, in particular, that of torture committed by public officials;
- The Criminal Code should distinguish between torture committed by private individuals and that committed by public officials.
- The Supreme Court in its exercise of its jurisdiction over extraordinary appeals and the High Civil and Criminal Court should be encouraged to substantially rather formally review the allegations of torture made by the defendants during trial and/or appeal (not relying on the prosecutors' conclusions of the absence of torture), order investigations and quash convictions based on evidence extracted under torture.
- Measures should be taken to ensure that the burden of proof for torture should fall on the prosecution rather than the defendant.
- National School of Judiciary should be encouraged to include the issues of prevention of torture in the curricula of the courses for judges', disseminate the best jurisprudential practices in the field of prevention of torture.

### *With respect to the Prosecutor's Office:*

- Recommendations have already been made by international bodies that the functions of investigation be removed from the Prosecutor's Office, leaving it to focus on criminal prosecution so as to avoid a conflict of interest.

209 Under Article 24 to OPCAT.

210 [http://www2.ohchr.org/english/bodies/cat/opcat/docs/PR\\_VisitUkraine25052011.doc&sa=U&ei=WjC9Tvf6G4-EhQev05nGBA&ved=0CA8QFjAA&usg=AFQjCNGAk3GjLst9VHhQhHsJ0M38DEBO7Q](http://www2.ohchr.org/english/bodies/cat/opcat/docs/PR_VisitUkraine25052011.doc&sa=U&ei=WjC9Tvf6G4-EhQev05nGBA&ved=0CA8QFjAA&usg=AFQjCNGAk3GjLst9VHhQhHsJ0M38DEBO7Q) (last accessed on 11 November 2011).

211 See recommendation by the Committee Against Torture, fifth periodic report of Ukraine (CAT/C/81/Add.1) at its 765th and 768th meetings, held on 8 and 9 May 2007 (CAT/C/SR.765 and CAT/C/SR.768), and adopted, at its 779th meeting on 18 May 2007 (CAT/C/SR.779).

- Further legislative amendment also needs to be undertaken to enhance the independence of the Prosecutor General, in particular to prevent him being dismissed arbitrarily by the President.
- It is also clear that Prosecutors need to have further training on issues relating to the prevention of torture.

### *With respect to the institution of the Commissioner for Human Rights of the Verkhovna Rada:*

The appointment process for the Ombudsman should be transparent, open and inclusive and based on clearly publicized criteria. The legislation governing the activities of the Ombudsman should be reviewed in order to extend the clauses governing the possible conflict of interest and incompatibilities.

The Ombudsman also needs to be provided with further powers of sanctions in the event of a finding of a violation. Reports of the Ombudsman need to be properly debated in the *Rada* and authorities should be under an obligation to respond to the Ombudsman on measures they have taken, within a specified time limit, to remedy the violation found.

### *With respect to the Oversight Commissions:*

At present there are a number of concerns with the OCs as effective bodies for monitoring places of detention, as noted above. In order for these to be improved a number of recommendations are made:

- Their legal basis needs to be effected by statute;
- Their mandate should be extended to all places of detention, in particular pre-trial detention facilities;
- They should also be provided with the specific powers to make unannounced visits and meet detainees in private;
- There should be a clear, transparent and inclusive appointment process to members of the OCs, with the criteria for membership being published in advance and appointment not at the sole discretion of the executive (the practice of including all those human rights activists who apply should be maintained). This criteria should include expertise and training in human rights, and NGOs with a particular expertise in torture prevention should be encouraged to apply;
- Members of the OCs should receive training on human rights.

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