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IMMIGRATION DETENTION AND THE RULE OF LAW

NATIONAL REPORT: UKRAINE

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List of Abbreviations

Code of Criminal Procedure, 1960	CCP 1960
Code of Criminal Procedure, 2012	CCP 2012
Code of Ukraine on Administrative Offences	CoUAO
Criminal Code of Ukraine	CC
Criminal Procedure Code of Ukraine	CrPC
European Convention on Human Rights	ECHR
European Council on Refugees & Exiles	ECRE
European Court of Human Rights	ECtHR
Global Detention Project	GDP
Human Rights Watch	HRW
International Covenant on Civil and Political Rights	ICCPR
Médecins Sans Frontières	MSF
Migrants Accommodation Centre (Centres for temporary accommodation of foreigners and stateless persons who illegally reside in the territory of Ukraine)	MAC
Ministry of the Interior	MOI
Person of Concern	PoC
Remand prison	SIZO
State Border Guard Service of Ukraine	SBGS
State Migration Service of Ukraine	SMS
Temporary Holding Facility	THF
The Code of Administrative Proceedings of Ukraine	CAP
UN High Commissioner for Refugees	UNHCR
Working Group on Arbitrary Detention	WGAD

Part I: Substantive criteria

According to the SBGS during the period from January 1, 2009 to June 30, 2012, 9,751 persons were detained for illegally crossing the border. In the border areas of Ukraine there are THF functioning under the administration of the SBGS, where violators of the state border, including irregular migrants, can be placed on short time. Meanwhile, Volyn and Chernigov MACs are functioning designed for simultaneous detention of 373 irregular migrants. In the period from 1 January 2009 to 30 June 2012 in these MACs over a thousand people were placed. Under current law, pending the execution of court decisions on deportation from Ukraine a foreigner or a stateless person may be detained in MACs up to a year.¹

In 2012 the main efforts of the SBGS were directed to carry out tasks set by the President of Ukraine, the Verkhovna Rada of Ukraine and the Government on matters of national security at the border, as well as the Concept and Programme of Development of the State Border Service of Ukraine for the period till 2015 and the Concept of Integrated Management of boundaries. To ensure not only the efficiency of border controls but the quality of service and comfort to those who cross the Ukrainian border as well, was one of the priorities of border agencies. Of particular relevance is the question of the country's matches of the European Football Championship Euro 2012, during which the passenger traffic sharply increased. Overall in 2012, almost 93 million people and 21 million vehicles crossed the state border of Ukraine.

In the course of border control SBGS officers found 179 individuals who possessed stolen passports, 381 citizens have used forged documents and more than 16 000 persons detained with invalid documents. During the year the Administrative fines were imposed amounting to nearly 30 million, up 10% over 2011. In addition, during 2012 the employees of the SBGS discovered 2181 illegal migrants, including 1117 for illegal border crossing, this is more than 12% compared with 2011 (1263 persons). It should be noted that since 2008, there was a tendency to reduce the number of detainees or missing migrants, especially potential illegal immigrants found during attempts to enter the crossing points. Among those detained for illegally crossing the border, violations of the stay of foreigners in Ukraine and other offenses the highest numbers are found among citizens of Moldova, Georgia, Afghanistan, and Somalia. Special activities of illegal travellers are observed on the Ukrainian-Slovak border. Only on this site for illegal border crossing during the year border guards detained 440 illegal immigrants. In general, over the past year in Ukraine there is 4644 potential illegal migrants missing, which is 27% lower than the previous year (2011 - 6.3 thousand). The main reasons for denial to cross the territory of Ukraine was that "travellers" could not specify the purpose of travel or high school, which supposedly had to learn.²

In Ukraine during 9 months of 2011 there were arrested at the border 2.5 times less illegal immigrants then over the same period last year. During the period of 9 months of 2010 there were discovered and arrested 15,7 thousand illegal migrants, over the same period of 2010 - 6.2 thousand people, of which nearly 5 thousand denied crossing the border. Most illegal migrants were detected at the border with Russia (more than 2.7 thousand people) and Moldavia (about 1.3 thousand

1 Ukraine will take care of the rights of detained migrants - Press Release of the Office of the Ukrainian Parliament Commissioner for Human Rights dated 31 January 2013,

http://www.ombudsman.gov.ua/index.php?option=com_content&view=article&id=2318:2013-01-31-09-18-59&catid=231:2013&Itemid=21

2 Press-Release of the SBGS dated 25 January 2013, http://dpsu.gov.ua/ua/about/news/news_1032.htm

people). Also 435 illegal migrants found in the Ukrainian-Slovak border, 506 on the border with Belarus, 158 - with Poland, about 100 - Hungary, 29 - Romania and 77 and 933, which went through sea and air routes Ukraine respectively.

It is noted that workers in the EU change the direction of their journeys and fewer choose Ukraine as a transit route. Getting a significant reduction in the number of illegal migrants observed since 2008. Of all detected illegal migrants 88.5% came from CIS countries and only 10.2% from the migration risk, whereas 3 years ago the percentage of immigrants from South-East Asia and Africa reached 20%.

State Border Service reported that the detection and prosecution of organizer and supporter groups involved in smuggling of migrants has led not only to reducing the flow of illegal migration through Ukraine, but also to reorient their adherence to transit via Belarus and the Baltic countries. Also it has affected and increase criminal liability involved in the smuggling of persons. In general, in 2011 SBGS initiated 82 criminal cases under Article 332 of the Criminal Code of Ukraine "trafficking of persons across the state border of Ukraine" and brought to trial 125 people - mostly the inhabitants of border areas who were the organizers, supporters or smugglers.³

According to the Report of the Working Group on the Universal Periodic Review on Ukraine presented on the twenty-second session of the Human Rights Council on 20 December 2012 (A/HRC/22/7) the following recommendations were made with regard to rights of foreigners in Ukraine⁴:

“P - 97.117. Ensure that the new criminal procedure code respects the human rights of those held in custody, and that the statements informing migrants of the justification for their deportation is in one of the languages that the deportee understands (Egypt);

P - 97.143. Review the Ukrainian legislative framework on asylum and refugees, so as to ensure respect of the principle of non-refoulement and that asylum seekers are not deported to countries where they might find themselves at risk (Spain);”

Arbitrariness

As is apparent from Article 29 of the Ukrainian Constitution, every person has the right to freedom and personal inviolability and no one shall be arrested or held in custody except under a substantiated court decision and on the grounds and in accordance with the procedure established by law. Meanwhile, the decision of the Constitutional Court of Ukraine in the case No. 1-28/2011 of 11 October 2011 on detention, considering detention in three dimensions: as administrative procedure measure, as administrative punishment and as criminal procedure temporary preventive measure, held that “administrative detention without a reasoned decision of the court shall not exceed seventy-two hours”⁵. The Constitution further guarantees to everyone the right to challenge his or her

3 RBC Ukraine Press-Release, 19 October 2011, <http://www.rbc.ua/ukr/top/show/v-ukraine-za-9-mes-2011-g-zaderzhano-v-2-5-raza-menshe-nezakonnyh-19102011173800>

4 UN Human Rights Council, Report of the Working Group on the Universal Periodic Review : Ukraine, 20 December 2012, A/HRC/22/7,

http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/AHRC227_English.PDF

5 Decision of the Constitutional Court of Ukraine dated October 11, 2011 No. 1-28/2011 upon the constitutional petitions of 50 People's Deputies of Ukraine concerning conformity with the Constitution of Ukraine (constitutionality) of some provisions of the Article 263 of the Code of Ukraine on Administrative Offences and paragraph 5 of the part 1 of Article 11 of the Law of Ukraine “On militia” <http://zakon2.rada.gov.ua/laws/show/v010p710-11>

detention in a court at any time. In other contexts, those constitutional safeguards are set out in further detail in separate instruments, such as the Code of Criminal Procedure etc.

However, Ukrainian legislation has no definition of “arbitrary detention” or “arbitrariness” at all except as provided for by the international instruments Ukraine is party to (e.g. the ICCPR, ECHR and alike). This, combined with inadequate system of control of detention authorities, leads to what HRW has concluded regarding the arbitrary detention of Somali asylum seekers in January, 2012:

“The arbitrary detention of many or all members of this group mirrors the situation of thousands of asylum seekers in Ukraine who are or have been arbitrarily detained because they have not been provided access to Ukraine’s asylum procedure, have been wrongly excluded from the procedure, or have not been allowed to pursue appeals of negative decisions on their claims.”⁶

It is vital that all the conditions of detention be fulfilled. At the moment of detention the following should happen:

- questioning or interrogation must be carried out only through a qualified interpreter. The reason for detention, quoting the Article of the Law of Ukraine, should be explained to the detained.
- the detainees should be told about their right to have advocacy assistance. If a detainee has no his/her own advocate or has no funds for an advocate, **then he/she has the right to have an advocate free of charge**⁷. All interrogations without the advocate are illegal. The detainee has the right not to provide any information about himself/herself and the members of his/her family, if they so wish, according to the rights established by the Constitution of Ukraine. **An advocate should be provided within maximum period of 72 hours since the moment of detention as provided for in the paragraph 5 part 1 of Article 14 of the Law “On free legal Aid”**. The detainee must be given a chance to meet an advocate before the first interrogation, you should be told about your right to write down a claim related to illegal actions of state bodies. That should then be passed on to the local Prosecutor.⁸

The WGAD of the UN Human Rights Council examined the situation of asylum-seekers and migrants in detention in February 2009 and identified root causes of arbitrariness in Ukraine:

- “... the accumulation of powers within the Office of the Prosecutor General, who has both criminal prosecution and oversight powers, answers extradition requests and can at the same time challenge in court the refugee status of the person for whom extradition is sought...”⁹
- “... the perceived lack of an independent judiciary and an ineffective system of criminal defence and legal aid...”¹⁰

6 Ukraine: Open Letter regarding the Arbitrary Detention of Somali Asylum Seekers – HRW, January 31, 2012, <http://www.hrw.org/news/2012/01/31/ukraine-open-letter-regarding-arbitrary-detention-somali-asylum-seekers>

7 Law of Ukraine "On Free Civil Legal Aid" No 3460-VI adopted on 2 June 2011, <http://zakon2.rada.gov.ua/laws/show/3460-17/print1320311424269317>

8 Information for British nationals detained / imprisoned in Ukraine, British Embassy, Consular Section, Kyiv, Ukraine; Updated January 2013

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/142296/Ukraine_Prison_Pack.pdf

9 Report of the Working Group on Arbitrary Detention [Mission to Ukraine], 9 February 2009, Human Rights Council, 10th session, A/HRC/10/21/Add.4, p. 2,

<http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.21.Add4.pdf>

10 Report of the Working Group on Arbitrary Detention [Mission to Ukraine], 9 February 2009, Human Rights Council, 10th session, A/HRC/10/21/Add.4, p. 3,

<http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.21.Add4.pdf>

- “... rampant corruption throughout the law enforcement system...”¹¹
- “... the high number of arrests carried out in the country, many of them not registered, which some sources estimate at approximately 1 million each year...”
- “... the recourse to pre-trial detention and restrictions applied during detention on remand is too frequent with courts not exercising genuine control when authorizing pre-trial detention...”¹²
- “... a number of overlapping departmental regimes which could be contributing factors to the existence of arbitrary detention. ...”¹³

HRW further elaborated that:

“Under the European Convention for Human Rights, to which Ukraine is party, any detained person has the right to challenge the lawfulness of his or her detention, and must be given access to an effective remedy to do so. Ukrainian law provides for the review of migrants’ detention in appeals courts, but, in practice, those courts have not always been able to review cases before the maximum time in detention ends. Detained migrants also often lack an effective remedy to challenge the lawfulness of their detention because they lack sufficient access to lawyers to file appeals within the required time limit. The few lawyers who represent migration detainees are too overstretched to provide adequate representation to all who need it.”¹⁴

In *Soldatenko v Ukraine*¹⁵ the ECtHR resolved that:

“The foregoing considerations are sufficient for the Court to conclude that Ukrainian legislation does not provide for a procedure that is sufficiently accessible, precise and foreseeable in its application to avoid the risk of arbitrary detention pending extradition.”

In *Nowak v Ukraine*¹⁶ the ECtHR concluded that “the applicant’s detention was arbitrary and not based on law” further elaborating that:

“...the notion of “arbitrariness” in this context extending beyond lack of conformity with national law. As a consequence, a deprivation of liberty which is lawful under domestic law can still be arbitrary and thus contrary to the Convention. Furthermore, detention will be

11 Report of the Working Group on Arbitrary Detention [Mission to Ukraine], 9 February 2009, Human Rights Council, 10th session, A/HRC/10/21/Add.4, p. 3,

<http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.21.Add4.pdf>

12 Report of the Working Group on Arbitrary Detention [Mission to Ukraine], 9 February 2009, Human Rights Council, 10th session, A/HRC/10/21/Add.4, p. 3,

<http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.21.Add4.pdf>

13 Report of the Working Group on Arbitrary Detention [Mission to Ukraine], 9 February 2009, Human Rights Council, 10th session, A/HRC/10/21/Add.4, p. 22,

<http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.21.Add4.pdf>

14 *Buffeted in the Borderland: The Treatment of Asylum Seekers and Migrants in Ukraine*, report of the HRW, p. 68; 16 December 2010, <http://www.hrw.org/sites/default/files/reports/ukraine1210WebVersion.pdf>

15 *Soldatenko v. Ukraine*, Appl. no. 2440/07, Council of Europe: European Court of Human Rights, 23 October 2008, <http://www.unhcr.org/refworld/docid/4906f2272.html> [accessed 31 March 2013]

16 *Nowak v Ukraine*, Appl. no. 60846/10, Council of Europe: European Court of Human Rights, 31 March 2011, [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104289#{"itemid":\["001-104289"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104289#{) [accessed 21 May 2013]

“arbitrary” where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities...”

Reasons

In order to correctly define needing grounds for detention it is necessary to outline the types of detention Ukrainian legislation prescribes:

- administrative detention as administrative procedure measure;
- general detention under suspicion of committing criminal offence;
- detention as preventive measure in course of criminal investigation and court hearings;
- extradition and temporary detention.

Administrative arrest under the CoUAO is one of the administrative penalties which may be applied for committing some administrative offences by, inter alia, foreigners and stateless persons. The list of administrative offences in this regards includes but not exhausts by the following:

- Minor hooliganism (**Art. 173 of CoUAO**)
- Persistent defiance of an instruction or demand of a militia worker, a member of a public formation for protection of public order and state border, or a military man (**Art. 185 of CoUAO**)
- Violation of the border regime or the regime in Ukrainian state border check-points (**Art. 202 of CoUAO**)
- Violation of the rules of stay in Ukraine and transit via the territory of Ukraine by foreigners and stateless persons (**Art. 203 of CoUAO**)
- Violation of the procedures of job placement, admission for education, provision of habitation, registration or de-registration of foreigners and stateless persons, and of execution of documents for them (**Art. 204 of CoUAO**)
- Illegal crossing or an attempt of illegal crossing of the state border of Ukraine (**Art. 204-1 of CoUAO**)
- Violation of the procedures of providing foreigners and stateless persons with habitation, means of transport, and promotion in provision of other services (**Art. 206 of CoUAO**)

General detention under suspicion of committing criminal offence may take place in case the law enforcement officer considers a person has committed a crime and may arrest him/her in order to establish personality, conduct further inquiry and must present reasonable grounds for further detention to be authorized by court.

The WGAD Mission to Ukraine Report it is stated that:

“Ukraine has special detention facilities for vagrants. The term “vagrant” is not defined by law and may in practice apply to anyone who cannot produce an identity document when stopped on the street by Militia officers, although the purpose of law is to combat socially inadequate behaviour. Such persons can then, at the request of a Militia officer and sanctioned by a prosecutor, be held in administrative detention for up to 30 days (for the main purpose of establishing the identity of the detainee) without any involvement of a court of law.”¹⁷

Ukrainian legislation governing detention of irregular migrants are scattered and complex, the codification doesn't exist and it makes difficult even for law enforcement officers to sort out the situations that may take place. Pursuant to Ukrainian laws a person suspected of infringing the legislation with regard aliens may be detained for up to 72 hours by the SBSG or the Militia, provided that the public prosecutor has been notified within 24 hours after the arrest (**Art. 263 of CoUAO**).¹⁸ At the same time in most cases the law enforcement bodies try and use all the period of 72 hours of detention instead of facilitating the procedure.

Until October 2011 for persons who could not produce an identity document the period of detention could be extended for up to 10 days with prior authorisation by the public prosecutor, but these provision was cancelled by the Constitutional Court of Ukraine in its decision dated 11 October 2011:

“Provisions of the second and third paragraphs of Article 263 of the Code, which provides for detention of persons who committed the administrative offense, for up to ten days, which means more than seventy-two hours, is contrary to Article 8, the third paragraph of Article 29, Article 64 of the Constitution of Ukraine.”¹⁹

Following amendments, in 2003 and 2011, of article 30 of the Law of Ukraine on the Legal Status of Foreigners and Stateless Persons, the text reads as follows: “Foreigners and stateless persons stay in the Centres for temporary accommodation of foreigners and stateless persons who illegally reside in the territory of Ukraine, for the time necessary to execute decision of the court of forced expulsion, but not more than twelve months.”²⁰, whereas previously the period could have been indefinite. Upon expiry of the period of twelve months, the detainees must be released and are equipped with a temporary stay permit should their cases not have been processed by then.

Detention as preventive measure in course of investigation and court hearings is conducted exclusively in criminal cases upon authorization by the court or the prosecutor. The investigator or the prosecutor are to present reasonable arguments that there is fear that the detained may prevent the court hearings or investigation if be free.

17 Report of the Working Group on Arbitrary Detention [Mission to Ukraine], 9 February 2009, Human Rights Council, 10th session, A/HRC/10/21/Add.4, p. 16, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.21.Add4.pdf>

¹⁸ Unofficial translation: “Persons who have violated the border regime or regime at checkpoints at the state border of Ukraine, may be detained for up to three hours for the protocol, and, where necessary for the identification and clarification of the circumstances of the offense - for three days. In the latter case, the prosecutor must be notified of the detention within 24 hours of the arrest.”

19 Decision of the Constitutional Court of Ukraine on Case No 1-28/2011 dated 11 October 2011, <http://zakon2.rada.gov.ua/laws/show/v010p710-11/print1361295671445302>

20 Law of Ukraine on the Legal Status of Foreigners and Stateless Persons, paragraph 4 Article 30, <http://zakon4.rada.gov.ua/laws/show/3773-17/print1360002089721591>

Through the extradition process, a sovereign (the requesting state) typically makes a formal request to another sovereign (the requested state). If the fugitive is found within the territory of the requested state, then the requested state may arrest the fugitive and subject him or her to its extradition process.²¹ Ukraine has several extradition treaties in force, including the Convention on Legal Aid and Legal Relations in Civil, Family and Criminal Cases adopted by the states of Commonwealth of Independent States on January 22, 1993. The latter provides for the extradition between States Parties to the Convention.

The general practice in extradition cases is that Ukrainian authorities perform extradition examination without due attention and often with negligence since no attention is paid very often to the asylum applications which leads to the extradition of persons which are still in asylum, procedure or even were granted refugee status in other countries.²²

The UNHCR notes that:

“First, the current law gives the SMS and the State Border Guard Service the authority to detain a person in a MAC without a decision of the court. Article 19 Law of Ukraine "On the State Border Guard Service of Ukraine", determining the powers and functions of the SBGS includes, inter alia, the following:

“15-1) taking decisions in due course about the placement of foreigners and stateless persons detained within the controlled border areas during or after trying to illegally cross the state border of Ukraine, at the Centres for temporary accommodation of foreigners and stateless persons who illegally reside in the territory of Ukraine, following the notification of the prosecutor within 24 hours”.²³

Meanwhile, Standard regulation “On the Centre for temporary accommodation of foreigners and stateless persons who illegally reside in the territory of Ukraine” reads:

“Placement of foreigners and stateless persons in the Centre for temporary accommodation is carried out by the administration of such a centre on the basis of the decision of the territorial authority of SMS or organ of the state border protection in accordance with the act, by the Centre for temporary accommodation and body that brought foreigners and stateless persons to the centre”²⁴

Previously detention had to be authorized by a court. The decision to abolish judicial review in the context of detention is definitely not a step in the right direction as it is not in line with international and national legal standards. The ECHR requires that a court should speedily review the lawfulness of detention, a position echoed in UNHCR’s guidelines. Nevertheless, migrants can be detained for longer periods before they are brought to court for a hearing on their forcible expulsion. While in recent practice, courts have continued to render a simultaneous decision on both detention and expulsion, UNHCR is concerned that this

21 Dan E. Stigall, “Ungoverned Spaces, Transnational Crime, and the Prohibition on Extraterritorial Enforcement Jurisdiction in International Law”, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2211219&download=yes

22 "The UN Refugee Agency condemns refoulement of a refugee to Russian Federation" UNHCR Press Release, 17 August 2012, <http://www.unhcr.org/502e576c9.html>

23 Law of Ukraine "On the State Border Guard Service of Ukraine" <http://zakon2.rada.gov.ua/laws/show/661-15>

24 Standard regulation "On the Centre for temporary accommodation of foreigners and stateless persons who illegally reside in the territory of Ukraine" approved by the regulation of the the Cabinet of Ministers of Ukraine dated July 17, 2003 № 1110 with amendments as to 08.02.2012 <http://zakon2.rada.gov.ua/laws/show/1110-2003-%D0%BF/ed20120216>

practice may change, given that administrative bodies are empowered to authorize detention without the decision of the court.

Second, the current legal framework does not make it possible for asylum-seekers to obtain a speedy judicial review of their detention and deportation. The law provides for only a five-day time limit to file an appeal (paragraph 5 of Article 183-5 of the CAP). It is not possible for most individuals to file in that time period as they do not know the Ukrainian language (the appeal is to be filed in Ukrainian or any other regional language as provided for in the Article 14 of the Law of Ukraine “On Principles of the State Language Policy”)²⁵, have access to legal counsel, or even have a copy of the first-instance court decision. Furthermore, after the first-instance decision, they are moved a significant geographic distance to the Migrant Custody Centre. This complicates the issue of geographic jurisdiction. For example, an individual can receive a deportation order from a district administrative court in Zakarpattya, which he should then appeal to the Appellate Administrative Court in Lviv, while being detained a 7 hour drive away from Lviv in Chernihiv. Under these conditions, it is almost impossible for detainees to secure legal counsel and file an appeal within five days, so they must file a request to reinstate the terms of appeal.

Third, the current legal framework does not provide for any periodic review of the ongoing need for detention of persons for the purposes of deportation. According to the UNHCR, when asked about this issue, the relevant authorities note that they continue to detain these individuals in order to conduct identification. While detention for minimal periods may be permissible to carry out initial identity and security checks, it is incumbent on the authorities to undertake identification with due diligence, avoiding delays that unnecessarily prolong the individual’s detention. Detention for the purposes of deportation or removal is not a legitimate ground for detention of refugees and asylum-seekers under international law because their removal would constitute refoulement. Currently Ukrainian law does not provide for any periodic review of the ongoing necessity of detention and whether the authorities’ efforts to identify the individual are conducted with due diligence. As a result, UNHCR is aware of cases where individuals, particularly those from Somalia, have been administratively detained on multiple occasions for the purposes of deportation, even though the authorities have repeatedly not even attempted to deport the individual. Persons serve time and are released only to try to cross an EU frontier again.”²⁶

Who has the Authority to Detain?

In Ukraine there are a few authorities having powers to detain:

- militia (under paragraph 5 of Article 11 of the Law of Ukraine “On militia”)
- bodies, units, servicemen and employees of the SBGS (under Article 20 of the Law of Ukraine “On the State Border Guard Service of Ukraine”)

²⁵ Law of Ukraine “On Principles of the State Language Policy” <http://zakon2.rada.gov.ua/laws/show/5029-17>

²⁶ "Legislation and judicial practice related to international protection in Ukraine" UNHCR Publication, Kyiv, Ukraine, November 29 – 30, 2012, <http://unhcr.org.ua/en/2011-08-26-06-58-56/news-archive/844-legislation-and-judicial-practice-related-to-international-protection-in-ukraine>

- bodies of prejudicial investigation (under paragraph 19 Article 36 of CrPC)
- investigator and the public prosecutor
- the court (Article 189 of the CrPC)

According to paragraph 5 of Article 11 of the Law of Ukraine “On militia” the state armed executive authority – militia – has the power to detain and keep in specially designated areas:

- “persons suspected of committing a crime, defendants avoiding the investigation or trial, prisoners who avoid punishment - on time and in the manner provided by law;²⁷
- persons who have committed administrative offenses, for the protocol or the merits, if these issues cannot be resolved on the spot - for up to three hours;²⁸
- minors under 16 who have lost custody - up to transfer legal representatives or arrangement in due course, and minors who have committed socially dangerous acts and under the age of criminal responsibility - to transfer to their legal representatives or sending in reception centres for children, but not more than eight hours;²⁹
- persons who are drunk in public places if they offend human dignity and public morality, or if they have lost the ability to walk or could harm others or themselves - to bring them in special medical facilities or for delivering the residence, in the absence thereof - to their sobering;³⁰
- ...
- foreigners and stateless persons who are wanted by law enforcement authorities in other countries as suspects accused of a crime or as convicts avoiding punishment - in the manner and on the terms specified in the legislation of Ukraine, international treaties of Ukraine”³¹

In accordance with Article 20 of the Law of Ukraine “On the State Border Guard Service of Ukraine” the SBGS has the right to:

- “perform under the orders of law enforcement bodies of Ukraine detention at checkpoints of persons who are crossing the state border of Ukraine and wanted on suspicion of a crime, fleeing from the inquiry, investigation or trial, trying to avoid serving a criminal sentence and in other cases provided by the law of Ukraine;³²

27 Law of Ukraine "On Militia" No 565-12 adopted on 20 December 1990, Article 11, paragraph 5, subparagraph 1 <http://zakon4.rada.gov.ua/laws/show/565-12/print1360002089721591>

28 Law of Ukraine "On Militia" No 565-12 adopted on 20 December 1990, Article 11, paragraph 5, subparagraph 2 <http://zakon4.rada.gov.ua/laws/show/565-12/print1360002089721591>

29 Law of Ukraine "On Militia" No 565-12 adopted on 20 December 1990, Article 11, paragraph 5, subparagraph 3 <http://zakon4.rada.gov.ua/laws/show/565-12/print1360002089721591>

30 Law of Ukraine "On Militia" No 565-12 adopted on 20 December 1990, Article 11, paragraph 5, subparagraph 4 <http://zakon4.rada.gov.ua/laws/show/565-12/print1360002089721591>

31 Law of Ukraine "On Militia" No 565-12 adopted on 20 December 1990, Article 11, paragraph 5, subparagraph 6 <http://zakon4.rada.gov.ua/laws/show/565-12/print1360002089721591>

32 Law of Ukraine “On the State Border Guard Service of Ukraine” No 661-15 adopted on 3 April 2003, Article 20 paragraph 7 <http://zakon2.rada.gov.ua/laws/show/661-15/print1361295671445302>

- to carry out administrative detention on the grounds and on the terms specified by law, including foreigners and stateless persons who have illegally crossed the state border of Ukraine, about which a decision has been taken in due course with regards to their transfer to the border authorities of neighbouring states, the time required for such transfer,³³
- perform on the grounds and in the manner established by law, personal inspection of detainees and inspect and, if necessary, remove things that could be material evidence or harm to human health,³⁴
- keep people detained administratively in specially equipped for this purpose³⁵

In its statement UNHCR in December 2012 called the attention of Ukrainian authorities that:

“the amendments to the Law on the State Border Guard Service of Ukraine give the State Border Guard Service the power to authorize the detention of foreigners and stateless persons in the Migrant Custody Centre, if the individuals were detained in the border regions while attempting or making an illegal border crossing. Until now, such detentions have been authorized by a court, not an administrative body, and this is the better approach. According to the Ukrainian constitution, detention should be authorized by a court (Art. 29), and European human rights law reinforces this norm, which is a fundamental guarantee for individual liberty.”³⁶

What is a Fair Hearing?

The old problems of the judiciary system persist. In particular, trials still tend to drag along beyond any reasonable terms; the workload per judge is increasing (on the average, up to 130 cases per year, and 138 materials per judge at the Highest Administrative Court of Ukraine); the court’s rulings are not implemented if the state is a party to the case, the corruption in courts never decreased and they are still perceived by the public as the most corrupt bodies; the number of complaints against them grows annually. The selection of judges failed to improve, as was expected³⁷, while the structure of their education through higher educational establishments accredited by the Ministry of Education and Science, and not through the independent universities, leaves much to be desired.³⁸

Independence and impartiality

33 Law of Ukraine “On the State Border Guard Service of Ukraine” No 661-15 adopted on 3 April 2003, Article 20 paragraph 14 <http://zakon2.rada.gov.ua/laws/show/661-15/print1361295671445302>

34 Law of Ukraine “On the State Border Guard Service of Ukraine” No 661-15 adopted on 3 April 2003, Article 20 paragraph 15 <http://zakon2.rada.gov.ua/laws/show/661-15/print1361295671445302>

35 Law of Ukraine “On the State Border Guard Service of Ukraine” No 661-15 adopted on 3 April 2003, Article 20 paragraph 16 <http://zakon2.rada.gov.ua/laws/show/661-15/print1361295671445302>

36 "UNHCR is concerned about the impact of the amendments in the legislation on persons seeking protection in Ukraine" - UNHCR Press Release, 26 August 2011, <http://unhcr.org.ua/en/2011-08-26-06-58-56/news-archive/839-unhcr-is-concerned-about-the-impact-of-the-amendments-in-the-legislation-on-persons-seeking-protection-in-ukraine>

37 First judges election under the new law; Did the sieve crack? Roman Kuibida, Center for Political and Legal Reforms <http://www.pravo.org.ua/index.php/2010-03-07-18-06-07/laworganisationsandstatusdiv/249-2011-05-25-10-17-07>.

38 Human rights in Ukraine 2011. IV. THE RIGHT TO FAIR TRIAL. Kharkiv Human Rights Protection Group http://www.khpg.org/en/index.php?id=1332398246#_ftn2

The judicial reform carried out in Ukraine in 2010, posing new serious challenges related to further loss of independence by the judges and their further politicizing and outside manipulating, practically identified the only courts' controlling body — Supreme Judicial Council, which, in its turn, is totally subordinate to politicians, and, specifically, to dominating political force. This political dependence brought to life rather bizarre (from the legal point of view) decisions of the courts, from local courts' rulings to the decisions of the Constitutional courts. However, the independence of judges is attacked also in other areas.

Therefore, under the circumstances, when the parliamentary majority and the president belong to the same political force, which appoints high executive officials (heads of higher legal educational establishments, ministers, Prosecutor General etc.) only 7 members of the Supreme Judicial Council, at most, can remain independent.

Free legal aid (see Access to legal advice/aid)

Appeal to detention order

According to Art. 185 of the CAP, “parties and other persons involved in the case, as well as those who did not participate in the case, if the court decided the question of their rights, freedoms, interests or duties, have the right to appeal the decision Court of First Instance in whole or in part, except as prescribed by this Code”. The appeal shall be submitted to the administrative court of appeal through the court of first instance that issued the contested judgment. A copy of the appeal is simultaneously sent by the person, who submits it, to the court of appeals. The appeal against the decision of the court of first instance is filed within ten days of its announcement.

Refugee cases in courts

In case of receiving a negative decision by the applicant, in particular, decisions about the refusal to accept refugee application, about the refusal in official registration of papers for solving of the issue of granting of refugee status, the applicant has the right, during five working days, to appeal to a specially authorized central executive agency on migration, which is SMS, and to court (paragraph 9 Article 12 of Law of Ukraine «On Refugees and Persons in Need of Complementary Protection») At the same time the problem exists with the subject, territorial and institutional jurisdictions as in some cases it remains unclear what court is in charge of the case. Combined with such a short period for appeal procedure for asylum seekers may be regarded as lacking due time framework and proper legislative definition.

The UNCHR in a bid to assess the judicial reform has noted that:

“...the amendments have introduced a change in the jurisdiction of the courts for hearing cases on forcible expulsion. Such cases were previously considered by circuit administrative courts, but

now they will be considered by courts of general jurisdiction at the location of the state authority initiating the case. The reasoning behind this change is not clear. However, UNHCR notes that the administrative courts have been developing expertise in the consideration of asylum and migration cases over the past years, and this change will necessitate a greater investment by the authorities in training a new group of judges in this field of law.³⁹

Meanwhile, the HRW report reads that:

“Migration detainees in Ukraine have no consistent, predictable access to a judge or other authority or access to legal representation to enable them to challenge their detention. Furthermore, there generally is no individualized assessment of the necessity of detaining migrants or asylum seekers as required by international law.”⁴⁰

Duration of Detention

Although migration detention is limited to a twelve-month maximum, many migrants are frustrated in their ability to challenge the legality of their detention because severely overworked Ukrainian courts are usually not able to review cases before this period has passed. In several instances, migrants said they were issued a twelve-month detention order but were never presented before a judge or given an opportunity to challenge their detention. Many, including children, reported that border guards threatened to keep them detained for the full twelve months unless they paid a bribe.⁴¹

Nothing in Ukrainian law prohibits the authorities from re-arresting migrants shortly after release from detention and detaining them for another six months.⁴²

Additionally, according to UNHCR, if an individual cannot be deported, there is no rationale to detain him/her for the purposes of deportation. Despite administrative and judicial appeals in this regard, these detention practices continue. As of 2012, 77 per cent of foreigners in administrative detention are asylum seekers.⁴³

Many asylum seekers fall in a vicious circle of re-detention. Although Ukrainian law provides that migrants may only be detained for a maximum of 12 months, upon release many persons are often rearrested.⁴⁴ The ECtHR held in *John v. Greece* that the immediate re-arrest and detention of a migrant without any additional elements that would justify an independent ground for renewed detention constitutes a violation of the Convention’s right to liberty and security.

39 "UNHCR is concerned about the impact of the amendments in the legislation on persons seeking protection in Ukraine" - UNHCR Press Release, 26 August 2011, <http://unhcr.org.ua/en/2011-08-26-06-58-56/news-archive/839-unhcr-is-concerned-about-the-impact-of-the-amendments-in-the-legislation-on-persons-seeking-protection-in-ukraine>

40 Buffeted in the Borderland: The Treatment of Asylum Seekers and Migrants in Ukraine, report of the HRW, p. 6, 16 December 2010, <http://www.hrw.org/sites/default/files/reports/ukraine1210WebVersion.pdf>

41 Buffeted in the Borderland: The Treatment of Asylum Seekers and Migrants in Ukraine, report of the HRW, p. 5, 16 December 2010, <http://www.hrw.org/sites/default/files/reports/ukraine1210WebVersion.pdf>

42 Buffeted in the Borderland: The Treatment of Asylum Seekers and Migrants in Ukraine, report of the HRW, p. 6, 16 December 2010, <http://www.hrw.org/sites/default/files/reports/ukraine1210WebVersion.pdf>

43 “Aide Memoire Ukraine’s Asylum System” UNHCR, 20 June 2012, <http://unhcr.org.ua/attachments/article/608/Briefing%20Note%20on%20asylum%20>

44 “ECRE Interview with Leila Zhdanova, Lawyer of Public Movement “Faith, Hope and Love”, Member of Ukrainian Refugee Council, ECRE, March 2012, <http://www.google.fr/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB0QFjAA&url=http%3A%2F%2Fwww.ecre.org%2Fcomponent%2Fdownloads%2Fdownloads%2F554.html&ei=N19cUMT5K4fE0QXBooHoCA&usq=AFQjCNGsiDhroo9sRxwA5Z-zUY6EJoP0Ig&cad=rja>

The main problems occur in SIZOs (investigation and pre-trial detention facilities), where migrants can be kept for months pending extradition or return:

- Detention often exceeds the legal time limit (72 hours) without a court order;
- Some people are detained for up to a year in SIZOs pending extradition;
- Persons who cannot be extradited often remain in detention for lengthy periods of time.⁴⁵

Alternatives to Detention

According to UNHCR, “there is no practice of alternatives to detention, in particular for asylum seekers and persons with special needs including vulnerable families, women with children in the sub-region. The only possibility for the most vulnerable asylum seekers to avoid detention is the accommodation in government administered temporary accommodation centres. However, this is implemented mostly for those asylum seekers whose claims were accepted into the national asylum procedure for the substantive review and it has therefore limited scope as almost half of the asylum claims are rejected on admissibility grounds”.⁴⁶

Shortages of provisions in the legislation, or badly formed legislation, means options that are provided as alternatives to pre-trial detention are either obsolete or implemented in the wrong way.⁴⁷

Part II: Procedural safeguards

Bail

There is no bail used in administrative cases, where detention is often used as a penalty and preventive measure. Neither CoUAO, nor CAP provide for bail. Thus, persons who were detained for administrative offences as described above (see Reasons) are deprived of any alternative.

45 Detention of Migrants in Ukraine, ECRE, 2010, <http://bordermonitoring-ukraine.eu/files/2011/12/ECRE-Detention-of-Migrants-in-Ukraine.pdf>

46 Regional Protection Programme: Support to UNHCR’s Activities in Belarus, Moldova and Ukraine: April 2009-September 2011, UNHCR. <http://www.unhcr.org/ua/en/publications-3/regional-protection-programme-m>

47 Evaluation of PRI and SDC Project: Support to Penitentiary Reform in Ukraine 2009-2012, August 2011, <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CDEQFjAA&url=http%3A%2F%2Fwww.penalreform.org%2Ffiles%2FUkraineEvaluation%2520final%2520260911%2520PDF.pdf&ei=VotYUYDtKYSM4ASXq4DYCA&usg=AFQjCNFk0HwcsXh9mXP2tqO089fEDCMk4g&sig2=wzedgrK5YukXSB3PpkUMg&bvm=bv.44442042,d.bGE&cad=rja>

Automatic Review of Detention Order

In theory, persons subject to administrative detention have the right to have their case reviewed before the competent authority (court or representative of the border guard service) within fifteen days (Art. 277 of the CoUAO). In practice, such reviews are extremely rare, because detained persons lack legal representation and are unaware of the right to request a review. The prosecutor's office which endorses the detention order is also responsible for supervising the legality of detention.

The HRW in their report state that:

“The overwhelming majority of detainees interviewed during our mission were unable to challenge their detention. Most detainees had not been shown the order authorizing their detention, and were unaware that it was possible to challenge the length and legality of detention. Of the almost seventy detainees and former detainees interviewed by Human Rights Watch, only one had been brought before a court to challenge the detention following the request of his Ukrainian friends.

Ukrainian lawyers explained to Human Rights Watch that in practice the constitutional guarantees of judicial review for persons in detention do not apply in cases of administrative detention, including immigration detention and vagabonds' centres. The Code of Administrative Violations enshrines the right to challenge any violation of the law in court. However, our research showed that migrants and asylum seekers in detention are not able effectively to exercise that right.”

Moreover, UNHCR had advocated with the authorities to introduce periodic judicial review of detention in cases where persons are in administrative detention pending deportation. In Ukraine, such detention can last up to 12 months. The ECtHR has held that in cases involving deportation, judicial review should be frequent (generally about every two months), since “factors relating to the progress of...the deportation proceedings and the authorities’ diligence in the conduct of such proceedings, may change over the course of time.”⁴⁸

“In Ukraine, the absence of periodic judicial review has led to prolonged detention of asylum-seekers” states UNHCR.⁴⁹ For example, in 2012, it has observed that many asylum-seekers (including persons from Afghanistan, Eritrea and Somalia) have remained in detention even while their asylum applications were under substantive consideration. These asylum-seekers have filed appeals against their deportation and detention; however, practice shows that they must wait for lengthy periods—often 6-9 months—for Appeal Administrative Courts to consider their appeals. Many asylum-seekers thus remain in detention for twelve months at the cost of the state, as the authorities do not even attempt to deport them for various practical or financial reasons. Then they are released because the maximum detention period has been served with no solution available to them other than to attempt to cross the border into the European Union once again.

48 *Abdulkhakov v. Russia*, Appl. no. 14743/11, Council of Europe: European Court of Human Rights, 2 October 2012, paragraph 214, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113287>

49 "UNHCR is concerned about the impact of the amendments in the legislation on persons seeking protection in Ukraine" - UNHCR Press Release, 26 August 2011, <http://unhcr.org.ua/en/2011-08-26-06-58-56/news-archive/839-unhcr-is-concerned-about-the-impact-of-the-amendments-in-the-legislation-on-persons-seeking-protection-in-ukraine>

In *Yeloyev v Ukraine*⁵⁰ the ECHR resolved that “the domestic court refused to look again into the reasonableness of the applicant’s detention on the ground that it had ruled on the lawfulness of his detention on several previous occasions, therefore denying the applicant’s right to a review of the lawfulness of his detention as guaranteed by Article 5 § 4”.

In *Volosyuk v Ukraine*⁵¹ the Court noted that “the domestic legislation did not provide the applicant with any other remedies enabling him to obtain judicial review of the lawfulness of his detention, either at the initial stage or at reasonable intervals thereafter, before his committal for trial. It follows that during this period of the applicant’s detention the requirements of Article 5 § 4 of the Convention had not been respected”, further bringing to attention the fact that “in the course of the applicant’s trial there was an interval between 2 October 2001 and 6 October 2003 when no hearings were held. It follows that for two years and four days the applicant had not been in a position to obtain a judicial review of the lawfulness of his detention, which is incompatible with the requirements of Article 5 § 4 of the Convention”.

In *Molodorych v Ukraine* the ECtHR emphasizes that: “Despite the existence of the domestic judicial authorities competent to examine such cases and to order release, it appears that without a clear procedure for review of the lawfulness of the detention the above authorities often remain a theoretical rather than practical remedy for the purposes of Article 5 § 4”.⁵²

Continuous Review of Appropriateness of Detention

As already stated above, review of detention is initiated by the detainee, public prosecutor or the court. Public prosecutor or the court are not obliged to perform the review. Meanwhile, the detainee has the right to appeal to the court in order to review the detention order. In the examples of ECtHR cases above it is clearly stated that Ukrainian courts abuse their right to review detention orders. For more information refer to b. Automatic Review of Detention Order.

Places of detention

According to Global Detention Project estimates, as of late 2012, there were a total of 13 dedicated migrant detention facilities in operation in the country. These figures include two migrant accommodation centres, ten THF, as well as one “dormitory” used to hold women and children. It does not include the Lutsk THF, which was under repair as of November 2012⁵³. These facilities have a combined estimated total capacity of about 700. The GDP does not include in these figures

50 *Yeloyev v Ukraine*, Appl. no. 17283/02, Council of Europe: European Court of Human Rights, 6 November 2008, <http://echr.ketse.com/doc/17283.02-en-20081106/view/>

51 *Volosyuk v Ukraine*, Appl. no. 1291/03, Council of Europe: European Court of Human Rights, 12 March 2009, <http://hr-lawyers.org/index.php?id=1237637192>

52 *Molodorych v Ukraine*, Appl. no. 2161/02, Council of Europe: European Court of Human Rights, 28 October 2010, <http://echr.ketse.com/doc/2161.02-en-20101028/view/>

53 Calhoun, Noel (UNHCR – Ukraine) Email message to Mariette Grange (Global Detention Project), October 2012, Global Detention Project. Geneva, Switzerland

specially equipped premises (SPs) because they are generally used to hold detainees for less than three days.⁵⁴

The same GDP elaborates that:

“The THFs are officially meant to hold people for no more than 72 hours (Code of Ukraine on Administrative Offenses, Art. 263). The Global Detention Project generally only classifies as “dedicated migrant detention centres” facilities that are used to confine people for periods exceeding 2-3 days. However, the GDP classifies the THF as dedicated facilities because the State Border Guard Service (SBGS) is allowed to hold migrants in THFs for up to ten days with the permission of the prosecutor. Staffing (including guards) and running costs for THFs are more substantial than those of SPs, which are commonly located in areas with less intensive irregular migration. THFs tend to be situated closer to migration “hot spots.”

The SMS, established in 2011, is responsible for management of the two MACs, which are Ukraine’s main long-term dedicated facilities. These facilities, which are officially called “centres for temporary accommodation of foreigners and stateless persons who illegally reside in the territory of Ukraine,” are located in the Chernihiv province in the village of Rozsudev and in the Volyn province in the village of Zuravichi⁵⁵ Before the establishment of the SMS, the MOI operated these two facilities. As of late 2012, the MAC in Chernihiv had a capacity of 208 and was half full⁵⁶.

The EU assists Ukraine with building capabilities for detention centres for migrants. The EU ‘Consultancy to Set Up Custody Centres and Temporary Holding Facilities for Irregular Migrants’ helps Ukraine to detain and adequately treat irregular migrants - in compliance with European best practices and humanitarian standards set by Council of Europe, the ECtHR, the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, as well as the EU *acquis communautaire*.

Contracts for THF are planned to be signed in: Pavlovychi (Lviv region), Smilnitsya, (Lviv region), Uzhgorod (Zakarpattia region), Velikiy Berezhniy (Zakarpattia region), Solotvino (Zakarpattia region), Sopych (Sumy region), Krasnodon (Lugansk region). Migrant Custody Centres are intended to be built in Zhdanivka (Donetsk region) and Martynivske (Mykolaiv region). The construction of the THF is expected to start in the autumn of 2011 and to be completed by the spring of 2014. On 19 October 2011, the EU Delegation to Ukraine and the SBGS inaugurated the commencement of construction of the first THF in Sopych, Sumy region.

A recent investigation in Ukraine by the Jesuit Refugee Service noted that the state’s detention centres – built under bilateral agreements with the EU, and with EU funding – are situated in such remote areas of the country that access by lawyers and interpreters is very difficult.⁵⁷

54 Ukraine Detention Profile, Last updated: December 2012, Global Detention Project, <http://www.globaldetentionproject.org/countries/europe/ukraine/introduction.html>

55 Soos, Karoly (Delegation of the European Commission to Ukraine) Email message to Alex MacKinnon (Global Detention Project), 22 October 2009. Global Detention Project, Geneva, Switzerland; Soos, Karoly (Delegation of the European Commission to Ukraine) Email message to Alex MacKinnon (Global Detention Project), 26 October 2009, Global Detention Project, Geneva, Switzerland; Danish Refugee Council (DRC) Email messages to Mariette Grange (Global Detention Project), October and November 2012

56 Blazhievsky, Dmytro (UNHCR – Ukraine) Email message to Mariette Grange (Global Detention Project), October 2012, Global Detention Project, Geneva, Switzerland; Galkin, Aleksandr. (Hebrew Immigrant Aid Society - Kyiv) Interview by Mariette Grange (Global Detention Project), Phone conversation, 9 October 2012, Global Detention Project, Geneva, Switzerland

57 Stefanie Grant "Immigration Detention: Some Issues of Inequality", *The Equal Rights Review*, Vol. Seven (2011), http://www.equalrightstrust.org/ertdocumentbank/ERR7_grant.pdf

HRW in its report in 2010 has outlined fundamental problems that detainees encounter in detention centres:

- in some locations (particularly the Baby Lager), failure to segregate male and female, as well as adult and child detainees;
- in some locations, lack of sanitary napkins for women and insufficient hygiene items for detainees generally;
- in some locations, limited access to toilets and showers;
- in at least one location (the Baby Lager), restriction on access to drinking water at night;
- in at least one location (Chop), poor quality of drinking water;
- in some locations (including Chop), inadequate ventilation and natural sunlight;
- in some locations, infestations of mosquitoes, and other insects;
- in some locations, insufficient bed linens;
- in many locations, discriminatory treatment by nationality/race/language, such that non-European, non-white, non-Russian speakers are required to clean the facility but white, European, Russian speakers are not;
- in many locations, verbal abuse from guards and staff, some of which is racial in nature;
- in many locations, inadequate access to telephones;
- in many locations (including the Baby Lager and Boryspil') inadequate access to recreation, open space, and fresh air;
- in many locations, lack of access for NGOs and other providers of social services, psychological counselling, and humanitarian aid;
- in all locations, substandard quality and quantity of food, including numerous complaints in some locations from Muslim detainees about being served pork without alternative dietary offerings (an allegation detention personnel denied);
- in all locations, lack of competent interpreters and staff who speak non-Slavic languages;
- in all locations, lack of sensitivity toward women of other cultures;
- in all locations, an environment of corruption that pressures detainees to pay for food, services, other goods, and even release from detention.

ECRE in its bulletin “Detention of Migrants in Ukraine” described conditions in SIZO:

“Detention conditions for people detained pending extradition in SIZO No. 13, Kiev Cells are 6 x 12 m and 6 x 5 m and hold 38 and 12 beds respectively. There are often twice as many detainees in a cell as there are beds. There are no chairs. There is a table bolted to the floor, and a few benches. There is a television, fridge and radio. There are no newspapers or books but they can be obtained on request. The toilet is not separated from the cell but the detainees have screened it off. There is no shower. Detainees use a hose from the sink in the toilet and

wash there. Detainees are allowed one proper shower a week. Cells are not properly ventilated. Mattresses and bed linen are not provided but are brought in by relatives. There is little natural light in the cell - a light bulb burns 24 hours a day and detainees are not able to turn it off. Detainees are allowed one hours exercise per day in an inside courtyard, where they can play football or work out on the horizontal bars. The food provided to detainees is not varied and of very poor quality. Laundry is collected once a week. Mobile phones are not allowed, but detainees use them although they are confiscated if found by the prison administration.”⁵⁸

Part III: Conditions of detention

“State Authorities of Ukraine endeavour to ensure the rights of irregular migrants, whose freedom is limited within administrative procedure” reads the latest press-release of the Office of Ombudsman dated 28 January 2013.

During 2009 - 2012 years International Organization for Migration (IOM) monitored the conditions of detention of irregular migrants and their rights. Relevant project was funded by the European Union (budget 2.377 million) and implemented jointly by the Administration of SBGS, the Office of Ombudsman, the Ministry of Internal Affairs of Ukraine, the SMS (since 2011), and several other government agencies. Now, due to the completion of the project, these functions are fully transferred to the jurisdiction of the Ukrainian State. The abovementioned press-release furthers:

“During 2012 there were a number of positive changes that will help Ukraine to independently provide a full internal and external monitoring of human rights of detained irregular migrants. Thus, the function of the organization of the national preventive mechanism to prevent torture were transferred to the Ombudsman, SBGS has introduced the practice of questioning migrants about the conditions of detention and their rights, hotlines of SMS and IOM were introduced. Administration of the SBGS and the SMS gained expertise in organizing monitoring visits.”

"The current practice, institutional and regulatory arrangements provide assurance that effective monitoring conditions of detention and the rights of migrants will be under government funding and initiative of relevant bodies concerned" - said IOM Ukraine's Chief of Mission Manfred Profazi.⁵⁹

On February 28, 2013 the fourth, final meeting of the National Steering committee of the SIREADA, project for support of introduction of the Agreement on readmission between EU and Ukraine, the Republic of Moldova and the Russian Federation, and also promoting assistance in voluntary return and reintegration of citizens of Ukraine, was held. Implementation of the SIREADA project is carried out by the International Organization for Migration with financial support of the European Union. The main components of the SIREADA project became: program of voluntary return; legal, social and medical care for migrants who are detained in centres of temporary detention of foreigners and stateless persons who are illegally in Ukraine; potential strengthening in reintegration of citizens of Ukraine which return according to any voluntary procedures from EU countries or were returned in order of readmission.

58 Detention of Migrants in Ukraine, ECRE, 2010, <http://bordermonitoring-ukraine.eu/files/2011/12/ECRE-Detention-of-Migrants-in-Ukraine.pdf>

59 Ukraine will take care of the rights of detained migrants - Press Release of the Office of the Ukrainian Parliament Commissioner for Human Rights dated 31 January 2013, http://www.ombudsman.gov.ua/index.php?option=com_content&view=article&id=2318:2013-01-31-09-18-59&catid=231:2013&Itemid=21

During implementation of the project from 2011 to 2013 representatives of the Secretariat of the Commissioner for Human Rights together with other participants of the project, in particular International Organization for Migration, the Ministry of Internal Affairs of Ukraine, the SBGS, the SMS and non-governmental organizations carried out number of monitoring visits to Centres for temporary accommodation of foreigners and stateless persons who illegally reside in the territory of Ukraine.

Acquaintance with activity of centres, conditions of stay of foreigners and stateless persons, ensuring their rights and legitimate interests, including, foreseen by the Law of Ukraine "On refugees and persons needing additional or temporary protection" was the purpose of monitoring visits. As a result of monitoring visits and held meetings for the joint solution of issues appropriate state authorities and international organizations elaborated "The Action plan for the solution of issues of foreigners and stateless persons being in places of temporary detention".⁶⁰

Access to Healthcare

Médecins Sans Frontières published an assessment of four detention centres in Ukraine in May 2010 with a detailed focus on health care⁶¹. The MSF report found “a significant lack of basic medical equipment and inadequate staff presence” in all detention centres it assessed (the Chop and Mukachevo “Baby Lager” THFs and the Zhuravychi and Chernigiv MACs). The MSF report detailed the following gaps in the provision of medical services in all four detention facilities:

- lack of access to medical services;
- inadequate diagnosis;
- inadequate treatment;
- poor management of contagious disease outbreaks;
- lack of access to secondary care;
- lack of mental health support; and
- inadequate monitoring of access to medical services and health care.

Prisoners are given a medical examination on arrival in prison. There are special hospitals at prisons that can provide any kind of medical help, from dental treatment to mental illnesses. Any healthcare

60 Final meeting of the National Steering committee of the SIREADA project was held - Press Release of the Office of the Ukrainian Parliament Commissioner for Human Rights dated 28 February 2013,

http://www.ombudsman.gov.ua/en/index.php?option=com_content&view=article&id=1675:final-meeting-of-the-national-steering-committee-of-the-sireada-project-was-held&catid=14:2010-12-07-14-44-26&Itemid=75

61 “MSF assessments in four detention centres in Ukraine”, Médecins Sans Frontières, May 2010

that is not available in prison hospitals is provided in Ministry of Health facilities. If you need a surgery you will be transported to a local civil hospital.⁶²

Meanwhile, a regulation of the Council of Ministers (#667 of June 2011) excludes asylum seekers from receiving free medical assistance.⁶³

In absence of any assistance from the state-run health care system, UNHCR provides medical assistance to the persons of concern (PoC). Direct assistance by UNHCR in the form of food and non-food items, medical assistance or monthly subsistence allowance in 2011 amounted to 450,000 USD. Standard Operating Procedures of the UNHCR in such cases state:

“Refund of medical expenses

60) Refund of medical expenses is provided to the PoC who are considered vulnerable against the existing criteria only in the situations when:

- i) the medicines required were not available at the UNHCR medical IP or
- ii) the IC could not reach the medical IP for objective reasons (i.e. urgency of the treatment or other which should be confirmed by the UNHCR social IP Medical Adviser).

61) If the request is found justified, the costs are reimbursed directly by UNHCR RR Kyiv. In case of such a request, the following documents should be submitted by the UNHCR social IP:

- i) written request for reimbursement (drafted and signed by the designated Social Counsellor through the Project Coordinator. The request should include basic bio and social information on the IC including description of the current situation and reasons for the request),
- ii) brief written recommendation of the UNHCR social IP Medical Adviser,
- iii) preferably copy (or original) of the doctor’s prescription for the exact medicine or procedure,
- iv) original of the receipt.

62) Upon submission of the documents to UNHCR RR Kyiv, the documents are reviewed jointly by the Senior Regional Programme Officer in consultation with the Community Services Assistant. In case of a negative decision, UNHCR social IP should be informed in writing and copy of the letter (or E-mail) should be included in the social file of the PoC. In case of a positive decision, the voucher and the cash is handed to the UNHCR social IP who will effect the payment to the PoC and return the signed voucher to UNHCR RR Kyiv. Alternatively, payment can be done by UNHCR Community Services Assistant.⁶⁴

62 Information for British nationals detained / imprisoned in Ukraine, British Embassy, Consular Section, Kyiv, Ukraine; Updated January 2013

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/142296/Ukraine_Prison_Pack.pdf

63 "Procedure of medical assistance to foreigners and stateless persons who are temporarily staying in Ukraine" approved by the Order of Cabinet of Ministers of Ukraine No 667, 22 June 2009,

<http://zakon4.rada.gov.ua/laws/show/667-2011-%D0%BF>

64 Standard Operating Procedures For Provision Of Material And Social Assistance To Persons Of Concern (Poc) In Ukraine, p. 11, UNHCR RR Kyiv, September 2010,

http://unhcr.org.ua/img/uploads/docs/SOPs%20on%20material%20assistance-review_29-Sept-2010_1.pdf

Protection of Vulnerable People

Unaccompanied children cannot claim asylum by themselves. They are considered to lack the legal capacity to file an application and to need an officially appointed legal representative (zakonnyy predstavnyk) to enter the asylum procedure.⁶⁵ The appointment of legal representatives is not guaranteed throughout Ukraine; the failure to provide legal representatives in some regions prevents unaccompanied children in those places from seeking asylum and from legalizing their status and obtaining documentation.⁶⁶

Minors and age assessment.

HRW in its report states:

“The law does not provide that age assessments on migrant children should be conducted and there are no guidelines on how to deal with undocumented migrants whose age is contested. In the absence of any procedure some officials accept the declared age of a person; some register children as adults; some systematically contest declarations of persons who say they are underage; some ask for physical exams despite the absence of a legal basis to determine age; and others push children to declare a higher age. Other officials register adults as underage after collecting a bribe. Practice varies from one region to the next and there is no guarantee that unaccompanied children are correctly identified and treated as such.”

UNHCR further states:

“It remains unclear why so many persons who claim to be minors are considered by the authorities to be adults as the Ministry of Health has only recently started to formulate a procedure for age assessment. Determining the true age and sometimes also the identity of asylum seekers who are undocumented poses serious problems in every context.”

Persons of other religion, nationality or race. NRW notes that:

“Many of the detainees in Ukraine are Muslim and some said that detention officials treated their religion and religious practices with disrespect. We also heard accounts from women and children that suggested that they were treated with a lack of sensitivity to their needs in detention, particularly with regard to hygiene.

Muslim women voiced particular concerns that guards did not respect their modesty and their cultural norms and that the detention centres failed to provide them with necessary sanitary items.”⁶⁷

⁶⁵ Law of Ukraine “On Refugees and Persons in Need of Complementary Protection”

⁶⁶ “Legal and Social Protection for Asylum Seeking and Refugee Children in Ukraine,” Danish Refugee Council, June 2009, pp.10-15

⁶⁷ Buffeted in the Borderland: The Treatment of Asylum Seekers and Migrants in Ukraine, report of the HRW, p. 78, 16 December 2010, <http://www.hrw.org/sites/default/files/reports/ukraine1210WebVersion.pdf>

Access to legal advice/aid

Under Ukrainian legal system if a detainee is unable to pay for legal representation he/she will be provided with a legal aid lawyer free of charge (Article 3 of the Law of Ukraine "On Free Civil Legal Aid"). A legal lawyer is usually present at interviews which he/she may have with the Investigator. In many cases he or she will work in liaison with the Investigator. The presence of your lawyer is obligatory during the official interrogations and when the charge is produced.⁶⁸

During the last 3 years there was a significant improvement in this regard by passing a law "On free legal Aid"⁶⁹: all the persons detained through administrative and criminal procedure, and individuals in custody have been granted the right to legal assistance. It will help to do away with systematic violations of right to defence, referred to in the decisions of the ECtHR.

At the same time, it is noteworthy that viability of these provisions is seriously threatened, as militia officials are not required to inform the legal assistance Centres about detainees, if a detained individual "defends him/herself personally".⁷⁰ It may lead to manipulations and preservation of status quo, as the Ukrainian Helsinki Human Rights Union notes, when a person is forced to sign a refusal from legal assistance, which is a violation.

The principles of attorney pro bono operation within the system of free legal assistance are spelled out, although not directly, in the law. It is the Concept of the free legal assistance system in Ukraine⁷¹ that envisages that "relations between attorneys and the state in the area of secondary free legal assistance should be based on voluntary participation of attorney in providing such assistance and on the contract between attorneys and state". The law envisages tenders, contracts and agreements signed on the voluntary basis by both parties. The voluntary principle in providing free legal assistance is one of the largest achievements of this reform, as free legal assistance was not available till now, its availability can also contribute to other reforms, e. g. more efficient criminal action, decrease in number of people arrested and held in custody, reduction in number of groundless charges etc.

The system of free legal assistance management, absent in Ukraine for 20 years, has been set up. Despite the criticism of the proposed system, the existence of competent management of free legal assistance gives hope that it will eventually become efficient. However, as the report of the Ukrainian Helsinki Human Rights Union emphasizes, "the quality of free legal assistance still leaves much to be desired".

⁶⁸ Information for British nationals detained / imprisoned in Ukraine, British Embassy, Consular Section, Kyiv, Ukraine; Updated January 2013

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/142296/Ukraine_Prison_Pack.pdf

⁶⁹ Law of Ukraine "On Free Civil Legal Aid" No 3460-VI adopted on 2 June 2011,

<http://zakon2.rada.gov.ua/laws/show/3460-17/print1320311424269317>

⁷⁰ Law of Ukraine "On Free Civil Legal Aid" No 3460-VI adopted on 2 June 2011, Chapter VI, paragraph 7,

subparagraph 2 <http://zakon2.rada.gov.ua/laws/show/3460-17/print1320311424269317>

⁷¹ Presidential Decree of June 9, 2006, No. 509/2006, <http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=509/2006>