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REPORT BY THE COMMISSIONER FOR HUMAN RIGHTS

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ON HIS VISIT TO UKRAINE

10 – 17 December 2006

For the attention of the Committee of Ministers and the Parliamentary Assembly

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I. Introduction

In accordance with Article 3 e) of Resolution (99) 50 of the Committee of Ministers on the Council of Europe Commissioner for Human Rights, the Commissioner visited Ukraine on 10 – 17 December 2006 on the invitation of the Minister of Foreign Affairs. The Commissioner was accompanied by Mr. Alexandre Guessel, Mr. Roman Chlapak and Ms. Anne-Laure Duval. Ms. Zsafia Szilagyí joined the team for the last three days.

First and foremost, the Commissioner would like to thank Mr. Viktor Yushchenko, President of Ukraine, Mr. Viktor Yanukovich, Prime Minister and Mr. Olexander Moroz, Speaker of the Verkhovna Rada for their cooperation and openness. The Commissioner would like to express his sincere thanks to the Minister of Foreign Affairs, Ambassador in Strasbourg and the staff of the Permanent Representation of Ukraine to the Council of Europe. The Commissioner is grateful to all the other interlocutors he met, in particular to Mr. Olexander Chalyi, Deputy Head of the Secretariat of the President of Ukraine; the Ministers of Justice, Internal Affairs, Education; the Head of the Department of the execution of punishments; officials of the State Committee of nationalities and migration; the mayors of Lviv and Odessa; officials of local State administration; leaders of the main party factions of the Verkhovna Rada; religious leaders; and representatives of NGOs and international organisations.

During his mission the Commissioner visited Kyiv, Lviv and Odessa. The objective of the mission was to assess the human rights situation in Ukraine, identifying the major shortcomings and formulating recommendations for improvement. The recommendations will be a point of departure for a continuous dialogue with the Ukrainian authorities with the purpose of consolidating and improving human rights.

The programme was elaborated in cooperation with the Ministry of Foreign Affairs and with active assistance from the Permanent Representation of Ukraine to the Council of Europe and the Council of Europe Information Office. The mission included meetings with representatives of the authorities, civil society and religious leaders. The Commissioner went to detention places, schools, police stations, hospitals and centres for persons with disabilities. The Commissioner would like to draw attention to the special role played by non-governmental organisations (NGOs), which helped significantly, both at the preparatory stage and throughout the visit.

II. General background

1. Ukraine became a member state of the Council of Europe in November 1995. It ratified the European Convention on Human Rights (hereafter "the Convention") on 11 September 1997.

2. Since its accession, Ukraine has benefited from a general monitoring procedure by the Parliamentary Assembly of the Council of Europe (PACE) of its obligations and commitments as a member state, with the latest report on the functioning of democratic institutions being debated in April 2007. The country has also benefited from targeted assistance in the implementation of reforms. Thus in June 2005, the Committee of Ministers adopted an action plan for co-operation between the Council of Europe and Ukraine (DSP (2005)9), elaborated in co-operation with the Ukrainian authorities and international organisations active in Ukraine. For its part, the President of Ukraine has enacted the *Decree on the Action Plan for the Honouring by Ukraine of its Obligations and Commitments to the Council of Europe* in January 2006.

3. At the time of the Commissioner's visit, tensions between the various branches of power and among the main political forces were again mounting, delaying the reform process and hampering the proper functioning of institutions. These tensions would eventually lead to a constitutional stalemate and early elections. The present report deals only marginally with aspects of the power crisis, which received a lot of international attention, and focuses instead on proper human rights issues.

III. Administration of justice

1. Reform of the judiciary

4. The existence of an independent and impartial judiciary, competent and efficiently organised, is a central pre-condition for the effective protection and enjoyment of human rights. As the Commissioner could ascertain, much work remains to be done in that respect. The judicial system in Ukraine stems from the Soviet legacy, which was characterised by a powerful prosecutor's office and a degree of politicisation and dependency of the courts on the executive. The public perceives that "buying" or "arranging" court decisions is a widespread practice. Efforts were made over the years to reform the judiciary, but they were often described to the Commissioner as too patchy and implemented in a chaotic way, following advice from too many sources.

5. Important measures were taken to foster the reform of the judiciary. The National Commission on Strengthening Democracy and Establishing the Rule of Law, established by the President of Ukraine in May 2005, elaborated the *Concept for the improvement of the Judiciary in order to ensure fair trial in Ukraine in line with European standards*. The National Unity Pact provided that further reform of the judiciary should be implemented in line with the above Concept. Following the Concept two fundamental draft laws have been elaborated: the draft *Law on the judiciary of Ukraine* and the draft *Law on the status of judges of Ukraine*. Both texts have been recently tabled to the parliament after being redrafted taking into account the major part of the comments by the Venice Commission. Both Government and relevant parliamentary committees

supported these two drafts, which should be adopted soon after the Parliament resumes work. The public discussion on the drafts is under way.

6. During his visit, the Commissioner raised questions linked to the necessity of pursuing the judicial reform with President Yuschshenko, as well as with the President of the National Commission, Mr. Holovaty, and with the representatives of the Ministry of Justice and the magistracy. These interlocutors were unanimous in underscoring the importance of the work that has been undertaken. Civil society, political leadership, major political forces and representatives of the Supreme Court seem to agree on the necessity of a further comprehensive reform. The Commissioner commends the recent progress made in the reform of the judiciary and calls upon the Ukrainian authorities to continue this fundamental reform in a comprehensive manner in order to ensure full independence, impartiality and effectiveness of the judiciary. Moreover, the Commissioner underlines that all related reforms, i.e. those of the public prosecutor's office, pre-trial investigation, legal aid, the system of execution of judgments, admission to the legal profession, notary system, and the penitentiary system should be implemented in a coordinated manner.

7. The necessary work will not stop with the adoption of new laws. Proper implementation will be crucial. A technical co-operation project co-funded by the Council of Europe and the European Commission is relevant here. It aims at ensuring the independence and efficient functioning of the judiciary, the priority tasks to be tackled by the authorities in order to make progress towards fulfilling the commitments undertaken by Ukraine when joining the Council of Europe. The Commissioner hopes that this ambitious program will actually help the authorities to conduct the reform efficiently.

8. The Commissioner would like to single out three specific issues, which warrant special attention. While welcoming the creation of the Higher Administrative Court and adoption of the Code of Administrative Justice in 2005, he notes that the system of administrative courts is not fully operational and the local administrative courts have not yet been created. The Commissioner also noted with regret the lack of a system of specialised juvenile courts in Ukraine. He was informed that the issue of introduction of juvenile justice and restorative justice were under debate. Furthermore, the Commissioner was informed that the judges specialised in juvenile matters were already designed in local and appellate courts. While visiting penitentiary institutions in Ukraine, the Commissioner noted that juveniles constitute a considerable proportion of prison population. This is yet another reason for prioritising the establishment of juvenile courts. Indeed, juvenile delinquents have special needs and cannot be tried under the same conditions as adults. Finally the situation with the Constitutional Court gives rise to concern. For two years the functioning of the court was blocked due to the obstruction of the elections to obtain the required number of judges. As a matter of fact, the first ruling of the Court is still being awaited.

2. Status of judges and their independence

9. Justice cannot be independent if judges are not themselves independent. Although the principle of the independence of individual judges is clearly stated under Art. 129 of the Constitution, and influencing judges in any manner is prohibited under its Art. 126, there are widespread allegations that judges are often subject to undue influence from a variety of sources (often referred to as "telephone law"). Examples of attempts by Government officials to influence judicial decisions were presented to the Commissioner in several meetings with representatives of the judiciary. Low salaries, insufficient funding of the courts and appealing fringe benefits (ex. State supplied housing) make judges vulnerable and dependent.

10. The considerable weight of public prosecutors should also be mentioned in this respect. When visiting a district court in Odessa, the Commissioner's attention was drawn to the fact that prosecutors, considering their excessive power and quasi-judicial function of general oversight, frequently interfere in the judicial process. The interlocutors there confirmed the NGO allegations that judges are afraid to rule against prosecutors and that threats and intimidation are used in some cases. Out of fear of reprisal, undue influence exerted on the lower court judges is rarely brought up. The reluctance to go against these practices leads to a *status quo* of the situation and leaves little hope for the true independence of judges. These concerns were underlined in a number of cases that were examined by the European Court of Human Rights¹. The Commissioner believes that improper influence in judicial decision-making is a very serious problem and should not be tolerated.

11. The judicial reform in Ukraine has not led to any noticeable change in the situation of the integrity of judges. The appointment (and dismissal) procedure is a crucial element when it comes to both independence and professionalism. The legislation (Constitution, *Law on the Judicial System*, *Law on Status of Judges*) defines the conditions for becoming a judge, among them a minimum age requirement of 25 years (which seems to be unusually low), the requirement of a diploma of higher legal education and two years of legal professional experience. According to the Commissioner's interlocutors, the quality of higher legal education has seriously deteriorated. The legal education, lacking sufficient financial resources and qualified legal trainers, emphasises theory without sufficient attention to practical skills. Qualification commissions conduct qualification examinations and, as a result, may recommend candidates for judicial appointment. In the absence of any uniform set of rules for evaluating the level of professional knowledge and skills of candidates, each commission develops its own approach and criteria, which are not transparent and thus allow for wide discretion as far as selection goes. This can also lead to certain corrupt practices. The professional ethics of judges, identification and resolution of conflicts of interest, etc., which are essential to prevent corruption do not appear in the curriculum.

12. The Commissioner calls for the adoption of measures liable to make the process of judicial selection more transparent, fair and merit-based. The requirements concerning the integrity of judges should be defined already at the stage of their selection and appointment (election). Each candidate should be reviewed properly with focus on theoretical as well as practical issues. The questions related to the European Convention and the case law of the ECtHR should be integrated into the selection procedures on a permanent basis. In Ukraine, there is no uniform state system of periodic training of judges. Although the Academy of Judges has elaborated the *Concept Paper on the National System for Training of Judges and Court Staff*, it has not been implemented so far. The Commissioner considers that a systematic approach to judicial training should be introduced, in particular with regard to the training on human rights issues. The Commissioner was satisfied with the President of the Malinovski district Court of Odessa's positive appreciation of the training he received during his visit to Strasbourg.

13. Although the position of a judge is considered to be prestigious, judges continue to be underpaid. The monthly salary of a judge reportedly ranges between the equivalent of 400 - 550 euros. Notwithstanding that the salary of judges is high in comparison with the minimum wage in Ukraine, the amount remains insufficient for judges to feel adequately compensated for their services. In addition, such a salary does not reflect the level of responsibility entrusted in the profession. The Commissioner believes that the salaries of judges should be increased.

3. Administration of the judiciary and funding

14. To function efficiently the judiciary requires the allocation of adequate resources. According to the judges the Commissioner met, the judicial system is still chronically under-funded. The Commissioner was made aware that the courts are financed at 50% of their actual needs. Most of the buildings housing courts are dilapidated and in desperate need of repair. Many courts lack sufficient funding for basic needs like light, heat, and paper. Inadequate financing of courts gave rise to a judgment of the European Court of Human Rights in the case of *Zubko and Others v. Ukraine*², in which the Court found lack of adequate financing to be contrary to the principle of independence of the judiciary. Even in the entirely renovated (which seems to be a happy exception) Malinovsky Court of Odessa visited by the Commissioner, judges complained about their lack of sufficient equipment, including computers and internet connection (for which they were paying from their pocket). It was reported that the 2007 state budget did not provide funds for renovation of court buildings. The Commissioner welcomes the increase in funding of the judiciary made in 2005 – 2006 and calls the Ukrainian authorities to intensify their efforts aimed at improving the conditions for judges and courts. The adoption of the State Program for providing judges with appropriate premises for the period 2006-2010 is a positive step forward and should be properly implemented.

15. The State Judicial Administration, not being part of the judiciary, but acting within the structure of the Cabinet of Ministers of Ukraine is responsible for funding the courts' needs, construction and repair and other organisational and logistical issues. Many judges consider the State Judicial Administration as an instrument of control by the executive power, since the latter is responsible for the allocation of resources to the judiciary. The Commissioner believes that the issue of subordination of the State Judicial Administration should be carefully reviewed. In order to guarantee and secure the courts' independence, the allocation of resources of this body should be provided for by a specific budgetary provision.

16. In connection with courts, the problem of backlog cannot be overlooked. The judges are faced with ever-growing caseloads. Local court judges dealt on average with 127 cases per month in 2006. Procedural delays are frequent. A lack of funding prevents new positions for judges being created in response to the growing number of cases. Even the Supreme Court judges seem unable to handle their caseloads in a diligent way or examine them within a reasonable time, considering that each judge of the Supreme Court has approximately 200 cassation appeals per month, lying on his desk. Thus, the Supreme Court has a backlog of about 40,000 appeals in cassation, and cassation review lasts from 2 to 3 years. The length of the proceedings in criminal and civil cases is generally seen as a problem by the European Court of Human Rights, which had already found this malfunctioning aspect of the judicial system to be in violation of the requirements of "reasonable time" under Article 6 § 1 of the Convention. Moreover, there are no uniform methods for assigning cases to judges. In practice, cases in most courts are assigned and distributed by the court chairmen. The role of the registry in the courts is minimal and all the judicial administration is usually controlled by the chairman of each particular court.

4. Auxiliaries of justice

17. In 1995, Ukraine decided to establish a professional bar association with legal status to ensure the protection of the legal profession. However, this decision was never implemented. The Union for Advocates created in 1990 is a public association with the legal status of non-governmental organisation (NGO). In addition to the traditional mistrust of the judiciary and therefore of lawyers, actual legal obstacles still exist. Indeed, the Commissioner was informed about a disturbing piece of legislation and practice according to which the Prosecutor's Office can issue a resolution suspending the advocate's authority to represent a defendant in criminal proceedings. Furthermore, it can, in certain instances, institute criminal case against the advocate, based on allegations of committing certain criminal acts. The Commissioner underlines that this procedure risks preventing the right to defence that should be provided to any person charged with an offence. He calls for measures to be taken to relieve the advocates of undue pressure.

18. The controversial issue at stake in the setting up of a bar association is the mandatory character of its membership (such an association is contrary to freedom of association guaranteed by Art. 36 of the Constitution). There are several organisations of lawyers currently involved in reform of the legal profession – the Ukrainian Bar Association, the Union of Lawyers of Ukraine, Ukrainian Legal Foundation. A new *Law on advocacy* was submitted for review and adoption to the Parliament. Since a decision of 16 November 2000 of the Constitutional Court, legal representation in criminal cases is no longer a prerogative for licensed advocates (lawyers who have successfully passed the bar examination before the relevant Advocates Qualification Commission). This decision was justified by Art. 59 of the Constitution, which provides for free choice of one's defence. The Commissioner calls for the establishment of a professional bar association independent from the State in compliance with the principles of the Council of Europe and the case-law of the European Court of Human Rights, as mentioned by PACE³. The legal profession should have a set of rules and regulations such as a professional code of ethics, along with disciplinary sanctions in case of misbehaviour in legal practice.

5. The right to a fair trial

a) Access to justice and Publicity of judgments

19. The right of access to justice is one of the principle rights enshrined in the ECHR. It is all the more important in a country where, traditionally, the resolution of conflicts did not happen in the courtroom. Indeed, during Soviet times, citizens had very little confidence in the judiciary for the settlement of disputes between them and the administration. The mainstream mentality believed that the organs of the party could settle disputes much more efficiently than a judiciary system dominated by and dependent on the administration. Therefore, one of the priorities of Ukrainian society today has been to reinforce the judicial system, to open it up to citizens, and to provide them with the opportunity of speedy, assured and worthy access to it. Such a task has not yet been achieved. A lot remains to be done even if one can already notice vast improvements.

20. One of the most important unresolved issues is the cost of justice. Considerable portions of the population are financially destitute and not at liberty to seek the assistance of a lawyer due to lack of resources. This is why the need to improve legal aid mechanisms is pressing. Art. 59 of the Constitution provides for free legal assistance for criminal proceedings only. Free access to justice is a basic principle of a fair trial. The system is inefficient because lawyers who earn a symbolic income of UAH 15 (2.3 euros) per day have no incentive to carry out their duties. In addition, payments by the state are frequently late. This does not enable a defendant to obtain qualified legal representation, thus his/her effective access to court cannot be ensured. The Commissioner met several lawyers and defendants, including those detained in the Lviv remand centre, who voiced complaints about this situation. Consequently, the Commissioner welcomes the adoption by the President of Ukraine (June 2006) of a concept for the establishment of a system of free legal aid in line with European standards.

21. Quite separately, the Commissioner is concerned with the lack of transparency of the legal process, in particular court decisions and documents. A transparent legal process constitutes an absolute necessity for the organisation of fair, impartial and transparent proceedings respecting the procedural deadlines. With the exception of the judgments of the highest courts, only a small percentage of judicial decisions are published. Accurate and reliable trial records are an exception. It is necessary to secure one of the cornerstones of legal proceedings as provided for by Art. 129 of the Constitution of Ukraine, i.e. transparency and full record of proceedings. In this context, the Commissioner welcomes the adoption of the *Law on access to court rulings* enacted in June 2006, which provides a simplified procedure for access to courts rulings through a State register of judicial decisions, and feels that this register should be made operational as soon as possible.

b) Execution of judgments

22. The non-execution of court decisions remains an important problem, as an essential aspect of the right to a fair trial is the assurance that the final judgment will be executed. It is of little use to have access to a court and to obtain a decision but then have no enforcement of the decision. It seems that an important part of judicial decisions is not enforced in the country (more than 40% of 5 million enforcement proceedings – according to statistical data available on the website of the Ministry of Justice). Even if the situation seems to be gradually improving (especially in some regions) the backlog of unexecuted judgments is considerable. Some sources indicate that the reason may lie with the lack of funding of the State Enforcement Service under the Ministry of Justice. Legally individuals may challenge actions of the State Enforcement Service in the court that issued the judgment in question, but in practice the procedure is too cumbersome and unclear. Another very serious problem perceived was the overall lack of respect for judicial decisions and the judiciary in general. It appears that even political figures at high levels find all kinds of pretexts to disregard judicial decisions and sometimes make public statements that convey a lack of respect of the judiciary (see *Nosal v. Ukraine* of 29 November 2005).

23. Ukraine has been condemned on a number of occasions by the ECtHR for a lack of timely and proper enforcement of judicial decisions⁴. Some concern the non-execution of domestic judicial decisions such as *Zhovner v. Ukraine* of 29 June 2004; others the excessive length of proceedings, civil and criminal⁵. That situation cannot be tolerated. Measures should be taken to reinforce the implementation of court decisions in order to reinforce public trust in the judiciary system. Appropriate funding should be allocated to the State Enforcement Service.

24. In March 2006 the new *Law on the Enforcement of Judgments and the Application of the case-law of European Court on Human Rights* entered into force. It sets forth a domestic mechanism for the implementation of judgments of the European Court. This example can be followed by other countries. The Commissioner welcomes also the direct effect granted to European Court judgments through decisions of the Supreme Court. The Commissioner believes, however, that to be fully effective all these measures have to be accompanied by appropriate instructions to all relevant authorities drawing their attention to their particular obligations under the Convention and the new Law and providing them with clear guidelines in this respect. From this point of view, the new system (introduced by the aforementioned Law) of scrutiny of all draft laws seems to be a positive measure. It aims to ensure that they are compatible with the Convention and encourages the authorities to exploit it to the fullest, notably through closer cooperation with the Council of Europe's organs.

IV. Reform of the Prosecutor's Office

25. Many of the Commissioner's interlocutors, especially the representatives of civil society, were deeply concerned with the extent of the competences attributed to the Prosecutor's Office and reported cases of intimidation and pressure by prosecutors, in particular, to obtain confessions. Both in theory and in practice, the Prosecutor General and his/her office yield considerable powers. Although the competence of general supervision was withdrawn by the 2001 reform, prosecutors still supervise the observance of "rights and freedoms of citizens and the fulfilment of laws" by bodies of executive power and by bodies of local self-government. Moreover, prosecutors combine contradicting functions of pre-trial investigation and criminal prosecution on behalf of the State. The combination of these functions renders the Public Prosecutor's Office extremely powerful and sometimes even threatening.

26. Ukraine undertook a commitment to reform the role and functions of the Prosecutor's Office when acceding to the Council of Europe⁶. Although a series of measures have been taken to limit the competencies of prosecutors, this commitment remains unfulfilled today. Indeed, constitutional amendments of December 2004 which introduced the function of supervision of observance of "rights and freedoms of citizens" and the "fulfilment of laws" have reversed some of the positive reform steps which had been taken up to that point. The Parliamentary Assembly in its Resolution 1466(2005) regretted "*the step back in the reform of the Prokuratura*". The Commissioner calls upon the Ukrainian authorities to reform the Prosecutor's Office in line with Venice Commission opinions. The Prosecutor's Office should not be a separate branch power. Courts must ensure effective implementation of legal provisions to protect human rights and furthermore this should be supported through national human rights structures, such as the Parliamentary Ombudsperson. The task of prosecutors should be finally limited to the prosecution of criminal offences and defending the public and State interest. The institution of the Parliamentary Ombudsperson must be adequately strengthened in order to be able to cope with the growing number of complaints. The Commissioner calls for careful consideration and effective implementation of the comprehensive reform package so as to avoid any potential lacuna or insufficiency in the system of protection of human rights. If implemented effectively, the reforms package should offer an increased level of protection. As mentioned above an adequate system of legal aid should be made operational as soon as possible. In order to avoid conflicts of interest in combining contradicting functions of pre-trial investigations and criminal prosecution on behalf of the State, the Ukrainian authorities should transfer the function of pre-trial investigation from the Prosecutor's Office to a different institution (as required by the Transitional provisions of the Constitution). There seems to be a consensus on this particular point among decision-makers.

27. The draft constitutional amendments on the Prosecutor's Office prepared by the Office of the Prosecutor General is a step forward but contains important shortcomings. NGOs have criticised the reform proposed, alleging that the project was elaborated to allow prosecutors to maintain their prerogatives, including the function of supervision of implementation of laws. The Commissioner deems that the reform still requires considerable attention in order to respond adequately to the needs of Ukrainian justice.

28. Furthermore, it is advisable that the Prosecutor's Office opens itself to contact with civil society. More particularly, the prosecutors' attitude needs to change with regard to their cooperation with the public councils. Indeed, the latter's representatives regretted a lack of comprehension on behalf of the prosecutors, even on occasion suspicious behaviour on their part. The Commissioner believes that the programme of cooperation with the Council of Europe should be fully implemented, including training on the European Convention on Human Rights and the case-law of the ECtHR.

V. Law Enforcement agencies

1. Reform of the Law enforcement agencies

29. Since the end of the 80s several reforms of law enforcement agencies were conducted. The Commissioner considers that it is essential to reform the law enforcement institutions fully in line with European standards because maintaining public order is tightly intertwined with the deprivation of liberty and it is often during investigation, detention and imprisonment that human rights violations take place. He underlines that the police should both protect and respect human rights.

30. There are two principal security agencies, which share responsibility for internal security: the Ministry of Interior, which controls the various police forces, and the Security Service of Ukraine (SBU), which is responsible for intelligence gathering. The Prosecutor's Office while being an independent institution is also considered as a "law enforcement agency", certainly because it has retained until now the function of pre-trial investigation.

31. The National Commission on Strengthening Democracy and Establishing the Rule of Law is elaborating a Concept for a comprehensive reform in the sphere of criminal justice, which includes a new criminal procedure code, a new law on the security service, the reform of the law enforcement bodies and a new law on the public prosecutor's office. The working group on the development of the concept of the National Service (Bureau) of Investigations was instituted in March 2005. The current thinking is that this body will take over investigative functions from the Prosecutor's Office, but focus on high-level and complex criminal cases only.

2. Ministry of the Interior

32. As suggested by the Minister of Interior himself, any significant improvement of the law enforcement agencies calls for both structural changes and an adjustment of mentalities. Several important reforms had been initiated by the former Minister. The tackling of corruption became of utmost priority. The Council of Europe has been working for many years on police ethics and human rights and has conducted a series of cooperation activities in Ukraine, including the publication of the European Code of Police Ethics in Ukrainian. The Commissioner underlines that efforts aimed at reducing corruption should be pursued. Four key issues were touched upon during the two meetings with the Minister.

33. Firstly, the law enforcement agents are imbued with the Soviet notion of effectiveness. The success of the criminal justice system used to be measured by the number of cases solved. This kind of aim leads to an authoritarian model of control and decision-making. This easily results in human rights violations because an agent seeks conviction at any cost.

34. Secondly, training and education programs for the Police service provided by a network of training and research institutions contain an imbalance between theory and practice. Little time if any is devoted to training in communication skills and methods of working with the general public. In addition, a strong emphasis lies in teaching the law rather than providing training relevant to the requirements of being a police officer. Theoretical education needs to be matched with practical instruction. The Ministry of Interior officials expressed their wish to introduce a system of competitive recruitment. This might ensure more qualified staff, more likely to deal with cases respecting human rights standards.

35. The third difficulty encountered is the lack of funding. Law Graduates most often decide to provide their services to the private sector where pay and conditions are far better than those offered in the Police Service. The lack of funding of the Ministry represents a problem in its functioning. Some of the budget shortfall is made up by local government subventions. The current Minister reassured the Commissioner that he "would seek internal possibilities of financing", as it seemed impossible to secure the necessary funds from the State in 2007. The Commissioner noted that the inability of the State to properly fund and maintain the police has led to a reduction in the ability to train reliable police officers and criminal investigators. The Commissioner met several investigators in Brovary (Kyiv oblast) working on complex time-consuming issues who were paid the monthly equivalent of 115 Euro. The Commissioner underlines that the police should be adequately staffed, trained and funded.

36. Fourthly, the Commissioner is concerned with police capacities to efficiently manage information. It was indicated during the discussion with heads of parliamentary political groups that police were unable to treat complaints from the public in time. Moreover, the police forces lack an efficient electronic network of internal communication and storage/sharing of collected data in real time covering the whole country.

37. On the positive side the NGO community underlined that the Ministry of Interior has become more open and willing to cooperate with civil society organisations on human rights issues. The creation of the Public Council for Human Rights in December 2005 by the Ministry of Interior is a major achievement. The Council is an advisory body on human rights issues composed of high officials of the Ministry, human rights activists and researchers. It can create expert and working groups and conduct monitoring of the Ministry of Interior bodies, focusing on the rights during arrest, detention, inquiry and investigation, respect of rights during elections, raising awareness on human rights, prevention of domestic violence, rights of migrants and asylum seekers, rights of minors, respect of private life, respect of the right of assembly and legal review and drafting. Public councils started operating at the regional level as of June 2006. On-site monitoring of police stations and pre-trial detention centres is carried out on a permanent basis by mobile squads, which include representatives of civil society. The NGOs reported several difficulties encountered by public councils and mobile squads. In some regions, the heads of the Ministry of Interior departments allegedly tried to minimise civic control, trying to appoint their people or subordinates instead of human rights activists in the public councils. The Minister pledged his commitment to further develop co-operation with civil society and support the effective functioning of public councils and mobile squads. The Commissioner believes that the operation of public councils contributes to bridging the gap between the society and the police and to improve confidence in the institution. It plays an important role in instituting democratic control over the police. The public councils and mobile squads should be supported and given special attention. They can be an example for other countries.

3. Arrest and detention

a) Arbitrary arrest and detention

38. The number of cases of arbitrary arrests and detentions has steadily decreased these past few years. The Commissioner was informed in the Lviv region that all persons were detained on court orders in 2006 (as required by Art. 165 of the

Criminal Procedure Code). Nonetheless arbitrary arrests are still quite frequent, and the representatives of Roma community complained about them. Several judgments of the European Court concern arbitrary arrest and detention, in particular *Salov, Nevmerzhytsky, Dvoynykh v. Ukraine*. The relevant legislative provisions leave too much discretion and leeway to police officers. The arrest of a person suspected of committing a crime is regulated by Art. 106 and 115 of the Criminal Procedure Code. Legally, the police may detain a person for up to three days without a warrant. The three-day limit prescribed by law for custody is often not respected in practice because the courts that authorise longer detention cannot cope with the heavy workload. Thus, custody can last for months. Pre-trial detentions decided by a court, legally should last up to two months but may be prolonged by a judge for two months (if the investigation cannot be completed) or nine months (for "grave" or the "most grave" crimes). In cases involving exceptionally grave offences, the Prosecutor General may petition a judge of the Supreme Court to extend the period of detention to 18 months. There is a possibility to appeal a court's decision on pre-trial detention to a higher instance. The Commissioner noticed that in practice, not only are people detained longer than provided for by the law but they also fear to challenge their arrest and detention.

39. The Commissioner noted from the conversation he held with the detainees in a number of penitentiary institutions that according to them, police officials quite often advised detainees not to ask for an advocate. Many of the persons detained, including minors, reported not to have seen an advocate. At the same time there is a right to legal representation in Ukrainian legislation. Art. 21 of the Code of Criminal Procedure provides for the right to legal defence and states that investigators, prosecutors and judges have the obligation to make detainees aware of this right before the first interrogation. In addition, Art. 5 of the *Law on Police* gives suspects the right not to make any statements until their legal counsel is present. In case of failure on the part of the police to inform the suspect of his/her rights, she/he or the family can apply to a court for redress and compensation. Moreover, Art. 45 of the Code of Criminal Procedure provides for compulsory participation of an advocate in a series of cases, in particular for the suspects who are minors or persons with disabilities. The Commissioner recalls that the right to legal counsel is one of the key norms for a fair trial under international human rights standards and should be effectively enforced.

40. Art. 106 of the Code of Criminal Procedure requires the investigator to present the detainee with a report which explains the reasons for arrest and also explains the detainee's rights. After interviewing several detainees, the Commissioner was led to believe that the legal provisions are not followed in practice systematically. The Commissioner urges information to be provided without delay in a systematic manner in simple and non-technical language to the arrested and detained persons. All law enforcement agents should present arrested and detained persons with the list of their rights, including those rights which provide key safeguards against torture or ill-treatment. The Constitution requires that officials notify family members immediately concerning an arrest, but in practice they often do not do so. A detainee of one of the ITTs (*Izoljator tymčasovoho trymannja*), a police detention facility visited in Brovary, said his family was not informed about the change of the place of detention. The Commissioner considers those violations unacceptable and calls on the Ukrainian authorities to prevent them in the future.

b) Premises of the ITT

41. The Commissioner visited a police station and two ITTs in Brovary (Kyiv oblast). The cells at the police station where detainees may be held up to three hours had recently been renovated following new security norms. Despite insufficient ventilation, they seemed to be in relatively good condition. The Commissioner can only hope that this ITT represents the majority of the facilities. The Ombudsperson, however, informed the Commissioner that many of the cells in Ukraine were in a deplorable state.

42. The Ministry of Interior runs 501 ITTs. A building renovation program was instigated in 2005. Conditions in 269 ITTs have been improved recently. Apparently the monitoring of NGOs has greatly contributed to that. It was reported that the Ombudsperson has supported the construction of an ITT in the centre of Kyiv in line with European standards. Five new ITTs have been built in Kharkiv, Dnipropetrovsk, Kivohrad, Kyiv et Mariupul. The Commissioner calls for further improvement of medical and sanitary conditions in pre-trial detention facilities.

c) Torture and ill-treatment

43. Acts of torture constitute a criminal offence in Ukraine. In 2005 the Ukrainian Parliament (Verkhovna Rada), adopted laws which strengthened the prosecution of perpetrators of torture, the respect of rights of detainees and arrested persons as well as a Law which ensured the right of detainees to correspond with the ECtHR. This legislative improvement is welcomed by the Commissioner but it has to be matched by proper and systematic implementation. Ukraine has ratified the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (CETS 126) in 1997 and its two additional protocols in 2002. The UN *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* entered into force for Ukraine in 1987.

44. Despite these achievements practically all the Commissioner's interlocutors, including heads of parliamentary political groups, representatives of law enforcement and civil society confirmed that torture was widespread in Ukraine. In the General Prosecutor's Office the Commissioner's interlocutors underlined a distinction between police violence and torture. They believe police violence is frequent, not torture. It was stated that 61 police officers were convicted for police violence in 2006. The NGOs reported that racially-motivated police violence was frequent in particular against Roma and dark-skinned people. The NGO community expressed pessimism as to the possibility of radical positive change to the situation in the near future.

45. One of the explanations of the practice of torture mentioned during the discussions was the Soviet indicator for police statistical ("on-paper") productivity. The percentage indicator no longer exists but continues to influence police attitudes. Moreover Art. 96 of the Code of Criminal Procedure provides for plea of guilty, *javka z povynnoju*. NGOs and judges reported that in order to obtain this type of plea, which is a confession, torture was often used. It was indicated that in practice torture was not punished adequately. The Commissioner underlines that the occurrence of torture casts a shadow on Ukrainian democracy. New comprehensive policy backed by regular training and appropriate control should be implemented to prevent the occurrence of torture and change the attitude to work performance. A guilty plea should not be used as the main evidence in court. All cases of abuse should be systematically investigated and the perpetrators brought to justice. The Commissioner believes that the mobile groups and public councils should increasingly focus on the issue of torture.

VI. Penitentiary system (including SIZOs and colonies)

1. General observations

46. The penitentiary system has been removed from the competence of the Ministry of the Interior, but has never been transferred to the Ministry of Justice as required by the commitments of Ukraine taken during accession to the Council of Europe. The State Department for the execution of sentences was created in 1998 as the central body of the penitentiary system, with a special status subordinated to the Cabinet of Ministers. The Control of the SIZOs has been transferred from the Security Services to the State Department. The penitentiary system is chronically under-funded. While appreciating that the State financing has been increasing steadily, the Commissioner urges the State to continue improving conditions of detention. Salaries for staff should be raised in order to ensure integrity and education should be promoted.

47. The monitoring of civil society is insufficient. The Commissioner underlines that the monitoring by civil society is essential for the successful reform of the system. The public council should be made operational as soon as possible and mobile groups instituted and supported in the penitentiary system as it is done in the Ministry of the Interior system. The Commissioner also remarked that an alarming number of convicts are very young. Apparently many were drug users. There seems to be a lack of state funding to ensure education for the inmates. The Commissioner calls for special attention to be directed towards this category of prisoners. Schooling and food variety for juveniles should be improved and sufficient time for outdoor activities ensured throughout the country. Finally, the Commissioner also noted a lack of occupational activities for men and lack of efficient measures for re-socialisation/reintegration of former prisoners. In the colony in the village of *Zaklad*, near Lviv, all the educational activities were carried out by volunteers.

2. Overpopulation

48. Overcrowding in the penitentiary institutions is one of the most troublesome issues. This was particularly noticeable in the Lviv and Odessa SIZOs visited by the Commissioner. The overcrowding is linked to the length of proceedings. The Commissioner, however, did take into account and welcomed the fact that despite an important degree of overcrowding of prisons, the number of prisoners has considerably decreased. The leadership of the Department for the execution of sentences said that the number of prisoners was 209,000 in 1999 compared to 161,900 today. At the same time, the number of penitentiary institutions remained the same. It was reported that this decrease has been made possible by the systematic release of persons imprisoned for petty offences through amnesty and pardons by the President of Ukraine. The detention rate remains one of the highest in the world and further effort is needed to cope with the serious level of overcrowding. The draft law on alternative punishments was reported to be under consideration of parliamentary commissions. The Commissioner urges the Ukrainian authorities to institute and promote alternative punishments, such as community service, reduced sentences in cases of good behaviour, and liberation on parole.

3. Premises

49. The Commissioner noticed that many penitentiary institutions buildings were dilapidated and in a poor state of repair. Thus, they do not offer sanitary and other special international requirements. The detainees the Commissioner met mostly complained about the lack of light, bad ventilation systems, undernourishment, poor sanitary conditions, lack of beds and failure to separate inmates with infectious contagious diseases. When visiting detention centres in Lviv, Odessa and Kyiv, the Commissioner was concerned that not a single cell met European standards. One could see the traces of humidity on the walls. The latrines were in a appalling state of repair spreading a stench throughout the whole cell. This environment is not only unhealthy for the inmates, but also undermines their right to a certain degree of dignity. The disciplinary cells were even worse. The Department is considering the possibility of negotiating with private investors for the construction of new prison facilities outside Odessa in exchange for acquisition of land plots in the city centre. There are four penitentiary institutions in the centre of Odessa. It is planned to transfer Lviv SIZO outside of the city.

4. Medical treatment

50. The Commissioner welcomes Government's efforts aimed at improving medical treatment of prisoners. According to the authorities, there has been a 38% reduction of people infected with TB in the last four years. Lethal cases have been reduced by half (see *Melnyk v. Ukraine*⁸). The Cabinet of Ministers decided that special establishments for sick convicts should be built over the 2005-2010 period. The State Department has started to implement the World Bank (WB) program for the control of TB and HIV/AIDS of convicts. Medicines for 1st and 2nd stage tuberculosis were made available through cooperation with the International Monetary Fund and the WB. Nevertheless, many shortcomings remain. The Commissioner considers it unacceptable that inmates who have contracted contagious illnesses often serve their sentences with others. The authorities justify the situation by a lack of resources. The Commissioner underlines that the inmates should regularly be tested for HIV/AIDS. The representatives of NGOs in Odessa reported that the Department had no more laboratories for testing HIV. Ukraine has been condemned several times by the European court for Human Rights, in particular in the case of *Melnyk v. Ukraine* (Article 3, violation in respect of lack of medical treatment and assistance provided in detention to the applicant who suffered from tuberculosis) and of *Nevmerzhitsky v. Ukraine*⁹ (Article 3 violation in respect of forced feeding of the applicant without established medical necessity).

5. Women in detention

51. It would appear that women in detention centres are afforded better conditions than men. Indeed, in the Chornomorsk Correction Centre n°74, the Commissioner had a positive opinion of the conditions for women. Firstly, women who are pregnant when convicted can have their child within the institution for the first three years of the infant's existence. The quarters reserved for the infants conveyed a child-oriented atmosphere. The child is then sent to his or her family, to a foster home or to an orphanage. Unfortunately, the child can then only visit the mother several times a year. The fact that women can stay in contact with their children is positive and represents a step forward towards reintegration, which is the ultimate goal of the judicial system, but this measure is not sufficient. Secondly, in the same vein, women are able to work and earn living from the work they carry out within the prison. This is another measure that can ensure future re-integration into society. The Commissioner was only able to visit one institution for women but hopes that the encouraging conditions there are replicated in other institutions.

VII. ETHNIC MINORITIES

1. General Observations

a) Introduction

52. While there has been some progress toward fair treatment of Ukraine's ethnic minorities in recent years, the Commissioner noticed problems remaining related to discrimination, more particularly against Roma, Crimean Tatar and Jewish communities. Even Odessa, which is known as a multi-cultural city, faces problems. Indeed, the 133 minority groups cohabit peacefully, but there are still extremist movements. Issues of political representation and minority language use remain unresolved.

b) The drawbacks in the legislative framework

53. The protection of minorities is broadly enshrined in the Constitution and other pieces of domestic law. The Constitution (Art 11) promotes "the development of the ethnic, cultural, linguistic and religious identity of all indigenous peoples and national minorities of Ukraine". It specifies that there cannot be any privileges of restrictions based on race, colour of skin, political, religious and other beliefs, sex, ethnic and social origin...(Art.24). Similar provisions are contained in the *Law on National minorities in Ukraine* (Art.18) and in the *Law on local self-government* (Art.2). Ukraine ratified the *Framework Convention for the protection of National Minorities* in January 1998. The *Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems* has been signed but not yet ratified. Provisions specific to minorities are, however, insufficient in domestic law. Furthermore, a number of related laws only apply to Ukrainian citizens. The Convention itself is applicable to all people on Ukrainian soil, regardless of their citizenship.

54. Domestic legislation contains a series of provisions designed to counter the incitement to racism, ethnic and religious hostility. In particular, incitement to racism or religious hostility is punished by Art. 161 of the Criminal Code. The sentences are rather heavy, five years of imprisonment or two years of corrective work or 50 months wages. This piece of legislation requires the proof of "direct intention", but such proof is virtually impossible to administer. As a result, the ECtHR has received numerous complaints regarding this law. Another legal provision, Art. 18 of the *Law on Printed Mass Communication Media in Ukraine* allows for the suspension of publication for "stirring up racial, ethnical or religious hostility".

2. Racism and Discrimination

a) Roma

55. According to the latest 2001 official census, there were 47,600 as compared with the NGO count of approximately 400,000. According to Roma NGOs it is difficult to present exact figures because a great number of Roma are registered as Slovaks, Hungarians, Moldavians or Romanians in the border areas.

56. Mr Dmytro Grygorychenko, who is a member of the All-Ukrainian Union of NGOs "Congress of Roma of Ukraine", founded in 2002, participating in the Council of Europe Experts' Committee on Roma, Gypsies and Travellers (MG-S-ROM), presented the Commissioner with some background information about the Roma's regrettable situation in Ukraine. Key problems reported were the following: violence from state and non-state actors, racial profiling and racial discrimination in criminal justice matters, racial discrimination in social matters such as health care, housing, education and employment and lack of personal identification leading to non-participation in public life. These problems were discussed and for the most part confirmed when talking with a Roma community near Odessa.

57. The Commissioner visited a Roma village in the outskirts of Odessa. The living conditions there were miserable. The Commissioner's interlocutors reported systematic power cuts, which result in a lack of heating and electricity at night. The food in the refrigerators goes bad, and the families then suffer from food poisoning. The community complained that in such conditions the children were unable to do their homework. The dwellings allegedly had half the water-supply facilities of those used by the rest of the population in the region.

58. It was reported that hostility directed toward the Roma population leads them to leave the region, and when the communities are not driven away they are relegated to remote areas. The physical location of the community reflects the general mentality of exclusion with regard to the Roma. The Roma are far away from areas where they can stock up on food supplies. They have to walk at least seven kilometres to reach a market. The children must cover that same distance to get to school. During their journeys, the Roma are often subject to arbitrary questioning by the police. They must submit to random digital testing. Fraudulent behaviour by the police was also reported. Thus, recurrently when the Roma, most often women, come to the market, the police place illegal substances in their clothing and then arrest them and ask for money in exchange for their release. From time to time, the police also conduct raids in villages and justify such operations by characterising them as "prophylactic action" due to increased criminality. These are clearly discriminatory practices that must cease.

59. One of the most alarming problems is education: 68% can neither read nor write; only 2% have a higher education. The lack of access to education leads to discrimination, thus participation in mainstream economic and social activities becomes quasi impossible. This is a disadvantage that has life-long consequences and presupposes a form of segregation toward the Roma, whose children will not have the same opportunities as their neighbours. Thus, according to NGOs, more than 90% of Roma are jobless. This unemployment level can only lead to further problems. One relates to the fact that medical treatment is expensive. It was reported that to deliver a child in a hospital costs USD 500; to undergo a hernia operation costs USD 2000; the Roma cannot afford medical treatment.

60. The project "Protection of Roma in Ukraine and ensuring their access to justice" supported by EC and Renaissance Foundation and coordinated by the European Roma Rights Centre (Budapest) has been implemented since 2004. Fifteen Roma rights advocate centres are working under the auspices of the project throughout Ukraine. The State set up a State Roma Programme to counter violence and promote education and culture. However, this project lacked the sufficient public funding for its implementation. The failure to integrate the Roma socially as an ethnic minority of Ukraine is of great concern to the Commissioner. He strongly encourages a serious undertaking of a realistic "Roma programme" to ensure their societal integration. This includes: support of small-scale businesses, ensuring work places, ensuring access to schools for all and a quota for access to higher education, the assembly and publication of textbooks in Romani, and access to infrastructures.

b) Crimean Tatars

61. The Crimean Tatars represent a unique case in Ukraine of an entire ethnic minority that was deported during Stalin times. Their safe return was only allowed after independence, but problems persist. In April 2000, a recommendation was passed by PACE¹⁰ for the return of the deported Crimean Tatar people. The Commissioner met with a representative of the Parliamentary Committee for Human Rights, National Minorities and Interethnic Relations, Mr. Refat A. Chubarov, who is an activist of the Crimean Tatar movement and a member of the Verkhovna Rada. The latter explained that the authorities fail to understand the spirit of the resolution, in the sense that they allow the return, but then do not facilitate a social re-integration into society.

62. After deportation to Central Asia, 98% of the Crimean Tatars who returned to Ukraine have received citizenship. The return is slow and comprises practical difficulties mostly of an economic nature. Despite the return of a great number of Crimean Tatars, out of the 260,000, 100,000 still remain outside Ukrainian borders. The Commissioner was informed that 250 to 4,000 return every year. Attribution of land remains one of the most sensitive problems. It is a point of tension with the local populations, represented by local authorities, where the Crimean Tatars are poorly represented due to lack of participation. Land remains the most acute economic issue together with a 60% unemployment rate.

63. Access to education constitutes another difficulty. The Crimean Tatars suffer from a shortage in the number of schools: 15 Crimean Tatar schools for 40,000 children of school age. In addition, they complain of the increasing use of Russian. They are only taught in Crimean Tatar from the first to the fourth form, and it remains the second language taught after Russian. In Sebastopol, there are only two universities where teachers can train to teach Crimean Tatar literature and they would like to extend the training to the humanities in general. According to the interlocutors of the Commissioner, the textbooks appear to be of poor quality. As a result, the deficiency in education does not allow the Tatar minority to exercise its rights as such. Without education, an ethnicity can easily disappear, according to certain NGOs.

64. In June 2004, the Verkhovna Rada, (360 members of Parliament in favour), adopted a draft law on the recovery of the rights of peoples deported on the basis of an ethnic feature. This law encompassed provisions aimed at social reintegration of the Crimean Tatars, but it was vetoed by the President. The redrafted law is still pending before Parliament and is awaiting a second reading by the Committee that works on minority issues. The Commissioner insists on the adoption of laws enabling societal integration, more particularly through the restitution of land, of the Crimean Tatars.

c) Anti-Semitism

65. When meeting with representatives of the Jewish community, the Commissioner's attention was drawn to the fact that anti-Semitic movements seem to be a worrying trend in Ukraine. Skinhead groups are starting to emerge. During meetings with NGOs, it was reported that MAUP (Interregional Academy for Personnel Management) fosters anti-Semitic hate language and slogans. While being a *bona fide* university, the MAUP also seems to be a centre of anti-Semitic propaganda, which is headed by a leader of a far-right party. The main problem with this institution is the close ties it has with individual politicians, from different political blocs. There is a true risk of the anti-Semitic epidemic advancing beyond individual politicians.

66. According to the Commissioner's interlocutors, there was no actual response to the phenomenon because the problem was deemed to be of minor importance. The Commissioner was informed of the legislative gap that exists; the Jewish community has no specific tools at its disposal to counter anti-Semitic propaganda. A more general tool could be Art. 161 of the Criminal Code but, as it was remarked upon above, it is inoperative. The Commissioner stresses the fact that a supportive legal environment is the first step required to bring about change needed to fight anti-Semitism. The Commissioner fears that the old demons will reawaken.

d) Foreigners originating from Africa and Asia

67. As in a number of other European countries, the spread of xenophobic trends in Ukraine is endangering ethnic minorities. Following the pattern of neighbouring countries, Ukrainian racist movements are attacking dark-skinned foreigners, eliminating their hope for a better, more secure life in a potential host country. Most of the time the criminals are arrested, but rapidly released by the police, who was reported to take bribes. In other cases, the attacks are judged not to be xenophobic, but the doings of hooligans, in order to cover up the true current situation from the eyes of the international community and of the Ukrainian population.

68. As mentioned above, the legislative gap is one of the reasons for the lack of tackling of this problem by the police. Indeed, there is no specific legislation on racism and xenophobia, but discrimination on this basis is prohibited by the Constitution. Therefore, in this context, the responsibility of law enforcement agencies and of the courts is of particular importance. These structures should be sensitised at all levels to react firmly to any expression of this unacceptable scourge in society. Ukrainian society and most especially its elite cannot stay blind to this problem. Thus, the Commissioner was pleased to witness the strong will of the Minister of Interior to forbid racist acts to go unpunished. The legislative gap might be an explanation but not an excuse. Indeed, the ECtHR as well as the case law of the court prohibit hate speech, racism and xenophobia.

69. In February 2006, a presidential decree set up inter-ethnic relations based on Council of Europe standards but it still needs to be implemented. The Commissioner considers that the problem of insufficient knowledge and awareness of discrimination issues among law enforcement authorities and the judiciary should be remedied by proper training of the employees of these bodies. Proper training is the keystone for change.

3. The language problem, with particular reference to the Russian minority

70. On 2 May 1996, Ukraine signed the European Charter for Regional or Minority Languages and ratified it on 19 September 2005. The principles enshrined in the Charter can be found in Ukrainian legislation but Ukraine needs to bridge the gap between the legislative provisions and their implementation. The Commissioner deplores Ukraine's delay in submitting its second state report to the Secretariat of the *Framework Convention on National Minorities* (submission was more than two years late).

71. Legislation concerning the use of a minority language as a language of instruction in education seems appropriate. However, the criterion of "compact living" used for secondary school is rather vague and has to be better defined. For university, the requirement is somewhat clearer because the minority must constitute a majority of the population or the minority language has to be used by the majority of the population. The *Law on TV and Radio broadcasting*, in Art. 10 provides that at least 50% of the nation-wide public service and private broadcasting must be a Ukrainian product, i.e. national audiovisual or Ukrainian artists. The minority language broadcasting can only be used in certain regions if the numerically prevalent local ethnic minority lives closely grouped together. This wording is not clear and leaves a great deal of discretion to the licensing authority.

72. The language issue is of significant importance in Ukraine. It is therefore essential to have a set of clear rules with regard to the use of minority languages. Improvements to the existing legislation would be welcome. They would provide greater legal certainty and sustainability to existing arrangements.

73. According to official statistics, in Ukraine, approximately 17% of the population is ethnically Russian. The industrial eastern and southern parts are mostly Russian-speaking. In the Western part of Ukraine, Russian is a minority language. In the city of Lviv, visited by the Commissioner, there are five Russian minority schools and two Polish schools. The Commissioner was received there in Russian-language school n°52. The level of education of that school was reported to meet very high standards. The Commissioner was able to make that observation himself from speaking to the pupils about the excellence of the education. Subjects are taught in Russian and Ukrainian is taught as the national language from the first form.

74. The diversity of the pupils was impressive. They comprised Russians, Ukrainians, Jews, Poles, Tatars and Bulgarians. Besides its multi-cultural attributes, the school had established a highly sophisticated system of student representation. Students of all ages participated in the drafting of a school Constitution. A legal bureau was put in place in 1998 in order to acquire and transmit more human rights knowledge. A "parliament" with different committees, whose members are elected after an election campaign, ensures the respect of human rights and represents the student body at the student/teacher Council. The Commissioner was highly impressed by the organisation of this school and hopes that it is a reflection of minority schools in the rest of the country. He considers it a model that could usefully be replicated elsewhere.

75. At the same time, the delegation received some indications that pressures and threats were occasionally exercised on Russian-speaking media and Russian cultural centres in the Western part of Ukraine by some nationalist extremist groups, with a view to opposing the use of the Russian language. Any attempt to politicise the use of minority languages or to instrumentalise that question in order to revive tensions should be strongly resisted.

VIII. ASYLUM SEEKERS AND MIGRATION

1. General Observations: Migration trends in Ukraine

76. The May 2004 European Union (EU) enlargement brought Ukraine to the forefront of international migration. Not only is it a transit country, but it is also a country of destination. In January 2002, Ukraine acceded to the 1951 Convention for the protection of refugees and its 1967 Protocol without any reservations. Thus, Ukraine became the 143rd state party to the Refugee Convention, but has not adopted any of the other United Nations (UN) conventions for the reduction of statelessness and for the protection of refugees.

77. As the first important step in increasing governmental support to refugees, in February 2004, the Cabinet of Ministers approved a plan of activities to facilitate the adaptation of refugees in Ukraine. This plan provides various legislative amendments to create an environment favourable to the integration of refugees. Ukraine is an appealing transit country for asylum seekers trying to find refuge in the EU and for migrants on their way to the west. It is a strategic point between Asia and Europe. According to governmental statistics, 2,346 recognised refugees resided in Ukraine at the beginning of 2006. Almost 52% of them originate from Afghanistan, 28.3% from the former Soviet Union and 13.3% from Africa.

78. On the western border of the country, a great number of migrants fail to enter the EU and are turned away by Slovakia, Hungary or Poland. The three abovementioned EU countries have signed bilateral readmission agreements with Ukraine. A readmission agreement with Russia is also expected to be concluded. Furthermore, negotiations have also been launched between Ukraine and the European Union. Ukraine is willing to have readmission agreements in exchange for facilitating the issue of entry visas for certain categories of citizens. These negotiations are ongoing, but in practice it seems impossible for Ukraine to cope with the increasing number of illegal migrants.

79. Since November 2004, Slovak border guards have handed back migrants to their Ukrainian counterparts on a fast track, not allowing the migrants to undergo proper procedures. It was reported that there were no interpreters, no legal council and no way to challenge the decision. In 2004, 3,987 out of 4,013 migrants were sent back from Poland. The Polish authorities said that the non-refoulement procedure was always followed, but this is hard to imagine in 48 hours. Once back in Ukraine, the migrants are detained for 13 days in an unidentified location on the Ukrainian border. They are then moved for a month to the Transcarpathian (*Zakarpattja*) accommodation centre, *Pavshyno* (for men). According to NGOs, the refugees suffer there from harsh living conditions.

80. The main challenge to refugee protection is a lack of understanding of asylum seekers and refugees by the host community. During the NGO meetings, it was reported that Ukrainians view migrants as illegal economic threats to them. This general mentality can perhaps explain the dysfunctional reception procedure for migrants in Ukraine. It was mentioned that an overwhelming majority of migrants are economic migrants, their purpose is not to seek asylum.

2. Legal standards and their limits

a) The current legislative framework

81. Ukraine faces a double challenge: firstly, the internal legal system affecting migrants is dysfunctional, and secondly, there is an increased number of migrants. It is difficult for a country that was part of the Soviet Union to establish laws on migration because migrants were non-existent for so long. This having been said, 15 years have passed since the end of the Soviet Union, it is therefore difficult to blame the shortcomings of the system on the past.

82. In the past five years, Ukraine's immigration laws have undergone improvements. In 2001, the amendment to the law on Refugees introduced the notion of family reunification and special treatment for unaccompanied children. It also provides that the same social and economic rights should be afforded to refugees as to Ukrainian nationals.

83. Draft laws on *Refugees and Persons Eligible for Subsidiary and Temporary Protection and on Introduction of Amendments to the Law on Legal Status of Foreigners and Stateless Persons* have been elaborated and are now being reviewed by relevant institutions. These two draft laws recognise the shortcomings of the current laws. They introduce complementary protection, a definition of legal representation, an Identification Card for the whole asylum procedure period, no delay for the consideration of unaccompanied minor applicants, and they provide for the submission of application in the languages of refugees, better access to an interpreter, greater role for the United Nations High Commissioner for Refugees (UNHCR). These draft laws, however, fail to include provisions on United Nations High Commissioner for Refugees (UNHCR) access to refugees' individual files and a time frame for the transmission of asylum to Migration Service bodies. Finally, there is no provision ensuring protection against torture or loss of life in case of a failed procedure of an asylum seeker.

b) Structural limitations in the system

84. There is a State Committee on Nationalities and Migration (SCNM). During the Commissioner's visit it was still part of the Ministry of Justice, but was expected to be transferred to the Ministry of Interior. Unfortunately, constant reform and restructuring together with changes in personnel and the lack of training to treat the migration cases, results in a lack of coherence in the approach taken by the different agents in charge of migration issues. This was strongly highlighted by the people the Commissioner met at the SCNM.

85. They identified two factors that cripple the proper functioning of the migration system, corruption and the lack of communication between the bodies in charge of migration. Corruption can be explained by the lack of sufficient funds allocated to the civil servants in charge of migration issues. As a result, migrants stand a better chance of shortening the time of their detention if they have enough money to bribe the officials. The lack of communication between the different bodies in charge of migration issues might also suggest that the task is divided between too many different entities.

86. The *Law on Refugees* obliges the State Border Service (SBS) and the Ministry of Interior officials to transmit asylum applications (including those filed in detention) to the Regional Migration Services (RMS) for processing. After the RMS adopts a decision to admit the application and issues the asylum seeker with the appropriate ID, she/he should be released from detention.

87. The *Instruction on the procedures of handover of applications for granting the refugee status by bodies of the SBS of Ukraine and forwarding them to the bodies of the migration service*, approved by the SCNM and SBS in 2004, facilitated the implementation of the transfer of obligations by the SBS officials. When the Commissioner met with a representative of UNHCR, his attention was drawn to the fact that in practice, the transfer does not take place. The corruption issue arises here again. The asylum seekers who can bribe the officials stand a better chance of having their applications transferred to the RMS. The migration services are also faced with an understaffing problem. According to them the delays in sending a great number of applications is due to the heavy workload, mainly because the translation of applications is time-consuming.

88. With the restructuring of the SCNM that was launched in November 2006, whereby the asylum function will most probably be taken away from the SCNM, the issue of transfer remains unresolved. The interlocutors the Commissioner met at the SCNM were unable to tell him what the restructuring entails and how it is going to enhance the handling of the migrants' cases. As aforementioned, they stressed the point that constant restructuring does not allow for an organised and coordinated handling of migration cases. Instead of constantly restructuring the migration services, the Commissioner therefore urges the authorities to allocate the appropriate funding to those in charge of the application process, thus, by the same token addressing the corruption issue. The Commissioner welcomes the creation of public councils and urge the authorities to make them fully operational. The anti-corruption plan of action for 2007-2008 should be properly implemented and monitored in cooperation with the civil society.

c) The Procedure

89. The right to seek asylum is secured by Art. 26 of the Constitution, following the procedure established by law for stateless and foreign people. In practice, this provision is inapplicable. Indeed, initially, Art. 9 of the *Law on Refugees* merely granted three working days for asylum seekers as illegal entrants to apply for asylum and five days for legal entrants. In May 2005, the provision "three working days" was replaced by "without delay". The time frame appears to be couched in very vague terms; nevertheless, the State Committee informed the Commissioner that this new provision is efficient. Art. 12 of the same law allows the authorities to reject a claim that is manifestly unfounded.

90. The State Committee explained that it must hand down its decision within a three-month time frame, if the procedure does not result in the granting of the refugee status, the decision can be contested by an appeal. If the refusal of the refugee status is deemed lawful, the migrant is then subject to the law of Ukraine and can be deported. The State Committee also highlighted the problem of the difference in status between refugees and asylum seekers. The Commissioner strongly encourages a specific protection procedure to be put in place for asylum seekers taking into account a realistic timeframe in order to avoid delays.

(i) Access to counsel

91. Legal aid is not ensured for asylum seekers in Ukraine, even if in theory they are supposed to have access to legal representation at no cost via UNHCR. In order to have that possibility, they have to undergo the Refugee Status Determination (RSD) procedure. It is difficult for the asylum seekers to get in touch with UNHCR legal council, and the lawyers are faced with a number of cases that they cannot handle due to work overload. In addition, a major challenge faced by NGOs and *pro bono* lawyers is the remoteness of the detention centres and their difficult access.

92. The Commissioner was informed by the NGOs that free legal aid laws are expected to be adopted by 2007-2008. The associated expenses would be covered by the Ministry of Justice and would depend on each case (seriousness of accusations and punishment, hardship of the living conditions of the individuals, etc.). The Commissioner was told by UNHCR that the refugees are encouraged to hire private lawyers (friends of the officials) at very high costs to speed up the procedure. This is unsatisfactory, even if realistic.

(ii) Interpretation

93. There are very few interpreters. Consequently, asylum seekers frequently serve as interpreters for their peers. This represents a problem because some people are provided with no assistance, if there are no fellow asylum seekers who speak their language. When there is a lack of interpretation services, the principle of due process is breached. European standards are not respected. It is necessary to rectify this situation. One can imagine that the migrants coming from Asia or Africa would experience extreme difficulties in understanding the documents handed to them or the language spoken to them.

d) Detention

94. Detention seems to be the main control procedure for migration. Potential asylum seekers have difficulties in respecting the deadline and therefore become illegal. This type of administrative detention can lead to serious human rights violations and is a clear denial of the right to seek asylum. This right is enshrined in the European Convention for Human Rights, which has been ratified by Ukraine. It seems that in Ukraine, detention represents a first resort instead of being a last resort. The UNHCR has drafted a set number of comprehensive guidelines for the cases where detention can be accepted: to verify identity, to determine elements on which the claim is based, when travel papers have been destroyed or to protect national security or public order. Apparently, in Ukraine, detention is used much more often, overlooking these recommendations. In any case, detention should never be used to discourage asylum seekers.

95. The conditions of detention were not discussed with the Commissioner but reports from NGOs say that the conditions are poor due to lack of resources. Conditions similar to those in prisons mentioned above also apply to vagabond centres. The centres are reported to be overcrowded and consequently not fit to accommodate detainees: they lack sufficient beds, linen and pillows. The situation is the most complex in the Western part of the country, in the Transcarpathian (*Zakarpattja*) region. There is an increasing number of illegal migrants trying to cross the Western border and the largest facility for the detention of irregular migrants is in the near vicinity of the border. Efforts have been made to improve the conditions in *Pavshyno* but there is a definite lack of space. The accommodation limit should be 220 but the centre often houses 400 individuals. There is also a problem concerning the splitting up of families. The facilities do not allow for special units to try to keep the families together. In 2006, the SBS was willing to open a detention centre in *Chernivtsi* in order to alleviate *Pavshyno*'s overpopulation. The plan was not carried out due to the fears of the local population about the spread of diseases and worsening of security in the region. The perception of migrants by the local population resurfaces here and illustrates the necessity to change the general mentality vis-à-vis migrants.

96. The Commissioner deems that detention should be used as a last resort, when it is an absolute necessity following the UNHCR guidelines. He also encourages the introduction of alternatives to detention. In addition, he trusts that the construction of new centres is a priority and will be carried out in order to provide suitable conditions for those migrants who are in detention.

97. When examining the problem of the detention of migrants, the Commissioner observed that two elements required particular attention: prolonged and arbitrary detention and the lack of protection against torture.

(i) Prolonged and arbitrary detention

98. Asylum seekers should be promptly brought before a judge and should not be detained for excessive amounts of time. Art. 5 of the European Convention for Human Rights does not prescribe a length of time, but the Court's case law says that the procedures should be conducted with due diligence.

99. UNCHR informed the Commissioner that Art. 263 of the Ukrainian Code of Administrative Violations provides that, when foreign nationals are apprehended in Ukraine, the State Border Guard Service must issue a detention order. The Prosecutor must be informed within 24 hours and confirm the order. Administrative detention can last 10 days. The detainees should be able to challenge the order before the competent authority within 15 days. In practice, the procedure is almost never followed. UNHCR also informed the Commissioner that in Ukraine, a number of people, who had been detained beyond the delays set by law, could be considered to be in detention indefinitely because they had no idea how much longer they would be in custody. The Commissioner was also told that the lack of resources did not always allow the authorities to proceed to deportation. The lack of funds contributes to the prolonged detentions.

100. In theory, the proper legal framework is in place but the implementation is not effective. Several of the Commissioner's interlocutors complained of the non-respect of these rules in practice. Proper funds should be allocated to the migration services in order to avoid these unacceptable delays that lead to a legal "no man's land".

(ii) Lack of protection against torture

101. The *Law on Refugees* (Art.3) contains specific safeguards to protect people at risk, upon return to their country of origin, against torture or other forms of ill-treatment. Moreover, the *Framework Convention for the Protection of National Minorities* (Art. 3) as well as the European Court's case law do provide for such a protection. Consequently, the Ukrainian authorities should ensure that this provision is implemented. The failure to implement this provision represents a problem for the Chechens, nationals of the Russian Federation in particular, but also to other asylum seekers, such as Uzbeks. The Uzbek government requested extradition of certain Uzbek nationals who took part in the Andijan events in May 2005. The Ukrainian authorities accepted this extradition request. However, asylum-seekers should not be sent back if they are at risk of being tortured or ill-treated. Torture and excessive use of force are reported to be an established practice in Uzbekistan. It is an international obligation for Ukraine not to send back asylum seekers that could be subject to that kind of ill-treatment. The SCNM swept the issue under the carpet when the Commissioner inquired and said that the Uzbeks had been in Ukraine for months before even starting the procedure to seek asylum. The Commissioner is concerned about these recent events that illustrate that Ukraine is turning a blind eye to the human rights situation in Uzbekistan and possibly in other countries.

3. Integration of Migrants

a) Reception

102. A certain number of financial subsidies are provided. Migrants benefit from 17 UAH (2.5 euros) as initial financial assistance. This amount is incredibly low; according to the SCNM it should be at least 375 UAH (57 euros). There is only one operational reception centre or Temporary Accommodation Centre (TAC) in Ukraine, which is in Odessa. The reception capacity is estimated at 330 spaces when 1,700 asylum seekers were registered by the asylum authorities in 2005. Currently, the centre in Odessa can only accommodate 100 people instead of 330 (according to the UNHCR update of its operations in Ukraine from January- July 2006).

103. The *Mukachevo* TAC (80 person capacity), initially scheduled to open in 2006, will not be operational until some property issues are resolved. In the meantime, the SCNM initiated the construction of yet another TAC in Transcarpathian (*Zakarpattja*) region (with a capacity of 50 persons) in the *Perechyn* District. During the last visit of the UNHCR to the region, it was informed that the construction work is expected to be completed by the beginning of 2007. It is self-evident that asylum seekers and migrants need to have their basic needs provided for, as they are not permitted to be employed. If the state does not provide these basic needs, such as housing, food, water, the newcomers are forced to resort to illegal work. The Commissioner considers that the reception mechanisms for migrants should be strengthened.

b) Integration

104. The naturalisation process seems to function quite well in Ukraine. Since 2002, 725 refugees have been naturalised. The *Law on Refugees* guarantees social and economic rights to refugees on a par with Ukrainian citizens. Different mechanisms are in place for refugees. Committees of refugee women, jointly with the NGOs *Rokada* and *Sympathy*, provide venues for counselling, day-care, pre-school education, language lessons, etc. The Government has not implemented any national action plan for integration. This process is covered by national NGOs and UNHCR. The above-mentioned NGOs also provide monthly allowances to those most in need. Although refugee children and asylum seekers have access to education, their scarce economic resources diminish their actual attendance. The Commissioner urges the authorities to raise awareness with regard to migrants and to promote educational programmes conducive to their improved integration.

IX. FUNDAMENTAL FREEDOMS

1. Freedom of expression and the Right to Information

105. Freedom of expression is an essential measure of the level of democracy in a country. It is protected by Art. 32 and 34 of the Constitution. Since the Orange Revolution, media outlets have been undeniably freer and offer political diversity. All NGOs the Commissioner had discussions with seem to agree about the progress in this domain since 2004. According to them, state manipulation of the media, which was systematic in the past, has considerably diminished. One should, however, bear in mind that the main influential radio stations and TV channels are under the control of the state or financed by a group of wealthy oligarchic investors.

106. Despite a true improvement of the situation, a certain number of problems persists. At the NGO meetings in Kyiv and Odessa, several NGO representatives reported cases of journalists that had been beaten up and cases of political influence that led to self-censorship. These types of attacks tend to take place at the local level rather than at the national level. This illustrates certain inertia in behaviours and resistance of local administrations to the liberalisation of the media. NGOs also underlined the fact that journalists do not undergo proper training they are not fully familiar with ethical standards. They are also unfortunately in a vulnerable position in society because they most often do not benefit from contracts and receive extremely low salaries.

a) Specific legal issues

107. A first problem stems from a law passed on 11 May 2004 (Art. 195.5 and 212.5) restricting the right to information. This law comprises a certain number of amendments to a series of laws in the Code of Administrative Offences. It limits the right of the press to receive, use, disseminate and retain information. The press is restricted to information "open to all". Criminal and civil liability can be held against journalists in case of disclosure of confidential state matters. This kind of sword of Damocles hanging over the journalists' heads is conducive to self-censorship and limits access to information.

108. In the same vein, the new government had pledged to govern in total transparency. The government, however, still resorts on a regular basis to the adoption of secret decrees *temniks* PACE and the Helsinki Federation noted that in 2005, 40 secret decrees were adopted and had a "not subject to publication" inscription. This practice is associated with the former president Kuchma era but it is reportedly still used on a smaller scale.

109. According to the NGOs there is an accreditation problem. Instead of being an operational process, it seems to be an authorisation procedure only in favour of certain people. If need be, a law or a decree should be introduced to clarify the situation and ensure equality of treatment of journalists.

110. Specific legislation in relation to election periods is also of concern. On 7 July 2005 a *Law on the Election of People's Deputies of Ukraine* was adopted. The section on the right to freedom of expression considerably limits the possibility for political debate during electoral campaigns. This law does not encourage any political debate: the failure to ensure debate in the public sphere leads to unconstructive and uninformed votes. The Venice Commission has recommended changes, which the Commissioner urges Ukraine to implement. The July 2005 law on parliamentary elections and the right to information prevented the publication of opinions about the political parties running for election without their consent. The candidates could therefore suspend all such publications during their electoral campaigns. This law was subsequently amended, transferring the right to suspend to the judicial authorities.

111. Although it is unquestionable that the situation has improved considerably in the sphere of freedom of expression, the Commissioner encourages a continuing openness, most particularly at the local level and changing of legislation that still contains provisions that do not fully ensure full freedom of expression. Self-censorship can only be avoided if there is a change in the general structure of the broadcasting services and protection of journalists' and publishers' rights.

b) The broadcasting structure: National Council on TV and radio Broadcasting (NCB)

112. Questions also arise in connection with the appointment and independence of the members of the NCB, which is in charge of delivering licenses and of allocating frequencies¹⁴. It is made up of eight members, four of whom are appointed by Parliament and the four others by the President. The operation of this institution should be reviewed. At present, a single person's veto can block the activities of the media. The Commissioner was told that recent amendments have led to a reduction in the numbers of reasons for dismissal of the Council members, which appears to be positive. However, members of the Council can still be dismissed if the President or the Parliament is not satisfied with their work. This possibility of dismissal does not comply with the requirements of independence of the media. The Commissioner wishes to underline that an NCB that is not independent is likely to slow down the full democratisation progress of Ukraine.

c) The Particular case of Gongadze

(i) Brief summary of the facts

113. Georgy Gongadze, a journalist known for the critical slant he took on the actions of the Government, was found dead in November 2000, after his disappearance two months earlier. His murder followed a severe criticism of the regime and of the way the April 2000 referendum had been organised. He was mainly published in the Internet paper *Ukrainska Pravda*.

114. The investigation behind this affair created a political crisis because there were rumours that it implicated high ranking officials. The Government tried to cover up this incident and slowed down the proceedings by withholding forensic evidence. These attempts to slow down the investigation contributed to the climate of debate of the public at the eave of the Orange Revolution. Officially, the investigation of Georgy Gongadze's killing is ongoing and it is President Yushchenko's pledge to bring the perpetrators of this heinous crime to justice.

(ii) The inquiry under the new Government.

115. The Legal Affairs and Human Rights Committee of PACE deemed the Gongadze case of such significant importance that it designated a Special Rapporteur, Mrs. Sabine Leutheusser-Schnarrenberg to investigate the matter in depth. She stated: "the investigation of the murder of the journalist is a test case for democracy in Ukraine. It has also become important for the freedom of expression in Europe as a whole. If journalists cannot feel safe when they are doing their job, freedom of speech will be chilled"¹².

116. The Government asserted that it was conducting a full-scale investigation into Georgy Gongadze's disappearance. An evaluation of the investigation by the Council of Europe released in May 2005 concluded that the efforts had been sincere and in conformity with general standards in democratic societies. The proceedings are, however, dragging on.

117. On 1 March 2005, President Yushchenko announced that the three persons responsible for the killings had been found and arrested. All three were public servants of the Ministry of the Interior at the time. To have found those responsible for murdering Georgy Gongadze is a major step; however, the investigation should go deeper and find the mastermind and the reasons for which such an event was not prevented.

118. An *ad hoc* commission was set up in Parliament for the investigation of this case. It has been attempting to present its concluding remarks to Parliament but has encountered obstacles for reasons of political expediency. Furthermore, it is a procedural obligation in Parliament to present a commission report after a 6 month period regardless of whether there is a vote on it or not. Mr. Moroz, Parliament Speaker, when speaking to the Commissioner, declared that he sees the proper investigation of this incident as a personal responsibility.

119. The Commissioner met Georgy Gongadze's widow upon his return to Strasbourg. Mrs. Gongadze as well as her lawyer complained about the lack of actual political will to investigate the chain of events that led to this heinous crime. She filed a complaint at the European Court and judging on the merits of the case, awarded Georgy Gangadze's widow 100 000 euros. She had alleged a breach of Art. 2 because the state did not conduct a proper investigation and protect Georgy Gongadze's right to life and contended that due to the atmosphere of uncertainty and fear she had been driven to leave the country, breach of Art. 3. The fact that Ukraine has executed the European Court for Human Rights' judgment, i.e. the award of 100 000 euros cannot be considered as a resolution of the case, according to them.

120. The Commissioner deems that light must be shed on this affair. Ukrainian democracy cannot spare the truth as difficult and discouraging as it might be to divulge. The Commissioner strongly urges the judges and the Prosecutor General's Office to continue with these proceedings, following the principles enshrined in Art. 6 of the ECtHR. Despite the controversies the case is stirring, the Commissioner recommends that Ukrainian authorities truly endeavour to come to the end of this case by finding the individuals who conspired to perpetrate this murder, not only in the name of freedom of expression in Ukraine but also to install trust and transparency in the Government.

121. The Commissioner's recommendation goes beyond the Gongadze case. Violent attacks against journalists as well as their harassment must stop and should not go unpunished (ref: killing of Ihor Aleksandrov, director of the Donetsk regional television station (one of the only cases that have been investigated) and the death of Volodymyr Karachavtsev, head of the Melitopol Independent Journalists Union and the disappearance of Mr. Mykhailo Kapuliak, editor of the newspaper *Svit molodi*).

2. Freedom of conscience and religion

a) The General Situation

122. Freedom of conscience and religion is protected by Art. 3 of the *Law on Freedom of Conscience and Religious Organisations*. The right to have and change any religious beliefs or to be an atheist is guaranteed. Any discrimination on the grounds of such beliefs is prohibited, as is the compulsory disclosure of religious affiliation. The right of parents to raise children in accordance with their religious beliefs is also affirmed.

123. The current legislation guarantees strict separation of church and state and equal treatment of all faiths. The policymaking authority in this area had been the State Committee on Religious Affairs (SCRA), subject to the Cabinet of Ministers via the Minister of Justice; the Committee Chairman had been appointed by the President. The SCRA was abolished by presidential decree on 22 April 2005, because it was viewed as a Soviet style organisation. The functions of the SCRA were transferred to the Ministry of Justice and the Presidential Secretariat, and it was renamed the State Department for Religious Issues.

124. Faith-based organisations may be either informal or incorporated. In general, registration procedures do not seem too burdensome. A religious group must accede to the status of juridical entity. In order to do so, it must have at least 10 members. This status allows everyday dealings such as banking or property transactions. The denial of a registration can be appealed in court.

b) Difficulties reported by different religious denominations

125. During his visit, the Commissioner met representatives from different religious faiths. They pinpointed the human rights problems that the religious groups encounter. They also condemned the occurrence of religious extremism. The Commissioner supports the efforts aimed at the strengthening of religious dialogue and cooperation among various faiths. It seems that religious faiths cooperate at the practical level but encounter certain difficulties when it comes to official contacts and cooperation.

(i) Religious Education

126. When in Lviv, the Commissioner met the Major Archbishop of the Ukrainian Greek Catholic Church, Cardinal Ljubomyr Huzar. The first point that was highlighted by the Cardinal was the tug of war that is taking place between the State and the Church because this particular religion is not permitted to have church schools, meaning that basic Christian ethics are excluded from school curricula. He also complained about the fact that the state had proven to be reluctant to recognise theological education.

127. During the Commissioner's meeting with Metropolitan Vladimir (Volodymyr), head of the Ukrainian Orthodox Church¹³ (Moscow Patriarchate), the same educational issues as the ones evoked by the Cardinal were raised. The Cardinal proposed to the Government ruling criteria similar to the first amendment to the US Constitution, which provide that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"¹⁴. The Commissioner wishes to encourage active work between the State and the different religious denominations in order to find a solution acceptable to both. The Commissioner considers that religious education could be introduced in schools under the condition that it would not be mandatory, that it would be approved by the parents and that it would respect religious diversity.

(ii) The Restitution of Property

128. To own property is vital for any denomination. Not least, property allows a religion to have places of congregation. The Greek Catholic Church and the Orthodox Church shared the same fate of confiscation of property. It seems that today the positions of the main denominations vary on the issue of property restitution. The search for an acceptable solution should be actively pursued. The Metropolitan of the Orthodox Church brought to the Commissioner's attention that numerous properties that belong to the Church are employed for other purposes than places of worship and complained of the failure to execute court decisions on restitution of property.

129. The Greek Catholic Church's plight is worse, due to its liquidation in 1946. It faces a true rehabilitation problem. The Cardinal indicated that discussions have taken place and promises have been made, but there is no consistent effort on the part of the government. He contends that the Greek Catholic Church has asked for a stable mechanism but no results to facilitate rehabilitation have yet been achieved. In addition, at the local level, local authorities wrongfully sell properties that originally belonged to the Church. The Commissioner recommends that a formula be found for collaboration at the local level if nothing is yet in place at the state level.

(iii) Intolerance and Discrimination

130. It is widely reported that there is an increase of islamophobia throughout Europe, and Ukraine is no exception to this growing trend. The Commissioner met with the Chief Mufti, Sheikh Akhmed Tamim who confirmed this. The Chief Mufti conceded that this intolerance can be explained by the events that have taken place over the past few years. The regrettable, however unjustified, fear felt by some does not justify the existing level of intolerance in Ukraine. The Chief Mufti referred to publications insulting to Muslims emanating from the Ministry of Education. He also raised with regret the exclusion that the representatives of the Islamic faith face when they are not invited to inter-religious gatherings, while conveying their desire to enter into dialogue with other faiths.

131. The complaints voiced by the Chief Mufti were confirmed by what the Commissioner saw during his visit. When the Commissioner went to the mosque in Kyiv, he was pleased to see that the Islamic denomination had been granted a construction permit. According to the Chief Mufti, unfortunately, this permit carried a heavy cost. The mosque had to be built three meters below ground level in order to be less noticeable. Consequently, the whole surface had to be dug out before the construction could start. The Commissioner was alarmed by the poor location of the building. The mosque is far from the city centre. It does not even have a minaret due to lack of funds. The classrooms of the religious school inside the building are below ground level, with no access to light and there is a musty smell, which is unhealthy for the children. This brief description of the place of worship gives some indication of the difficulties the Muslims have to deal with in Ukraine.

132. The Commissioner considers that all forms of intolerance and discrimination, including islamophobia should be fought against by the authorities. The authorities must build a strong relationship with the religious denominations and strive to alleviate the suffering that they encounter daily.

X. Discrimination and vulnerable Groups

1. Women

a) Participation in the workplace and in public life

133. Ukraine has ratified all the major international documents that protect discrimination against women. On the domestic level, gender discrimination is prohibited by Art. 24 of the Constitution and Art. 2 (1) of the Labour Code. Such legal provisions constitute a good basis for gender equality. In addition, during the Soviet era the emancipation of women policy was quite successful and laid down the premises of the road to equality.

134. On 8 September 2005, President Yushchenko signed a law mandating equal legal rights for men and women and establishing legal protection against gender discrimination. However, human rights observers and women's groups noted that discrimination against women continued to be a common problem in the workplace. It seems that Ukrainian employers discriminate against women job seekers in the way they announce vacancies and interview applicants. Both government agencies and private businesses regularly request male applicants more frequently than females in their job advertisements. Employers also use information on women's family circumstances to deny women employment. In this context, the Commissioner suggests that the Ministry of Labour have inspectors come and supervise interviews or the recruitment process, and gender-specific training be provided.

135. Close investigation into the situation of women shows that representation in Parliament has decreased since the days of the Soviet Union when they used to enjoy a 30% quota. In 2006, only 8% of Members of Parliament were women. At the same time, there exist certain striking facts that have a symbolic value when it comes to women's role in society. Indeed, Ms. Yuliya Tymoshenko, served as Prime Minister and is currently head of the parliamentary opposition. President Yushchenko also appointed the first female governors in modern Ukrainian history, Ms. Nadiya Deyeva in the Dnipropetrovsk region and Ms. Nina Harkava in the Sumy region. Finally, Mrs. Karpachova is currently serving as the Ombudsperson. These examples seem worth mentioning but they are still perceived as exceptions. The industries dominated by female workers are the ones with the lowest wages. As a general rule, top managerial positions are not held by women.

136. The Minister of Family, Youth and Sport explained to the Commissioner that the law on gender equality has only been in effect for a year. He informed the Commissioner that the government is working on mechanisms to properly implement its

provisions. On 12 April 2006, the Cabinet of Ministers of Ukraine adopted *Decree on Gender-Legal Expertise*. The decree is issued according to Article 4 of the *Law of Ukraine on Ensuring Equal Rights and Opportunities of Women and Men*. The Commissioner advises active recruitment of women for public office and the prohibition and policing of discriminatory job advertisements.

b) Violence against Women

137. Violence against women remains a serious problem in Ukrainian society. Spousal abuse is illegal but common, and the authorities often pressure women not to press charges against their husbands. Domestic Violence is punished by the Code of Administrative Offences, Art. 173.2, but the NGOs met by the Commissioner estimated that at least 50% of all Ukrainian women have been or are subject to physical violence or psychological abuse at home.

138. When the Commissioner visited the ITT in Brovary, he was told by the administration of the centre that domestic violence is indeed a problem and it often results from excessive consumption of alcohol. Endemic social difficulties such as drug addiction or alcoholism increase the occurrence of domestic violence.

139. State-run hotlines and other forms of practical support for victims of abuse are few. NGOs attempt to provide services for battered women through the establishment of shelters. Violence against women does not receive extensive media coverage despite the efforts of human rights groups to highlight the problem. However, there has been relative progress in the sense that there has been an adoption of a Law on Domestic Violence and the establishment of rehabilitation centres. These centres cater unfortunately only for women under the age of 35. The Commissioner is also concerned about the fact that officials can give warnings to the victims about provocative behaviour.

140. Rape under Ukrainian law is a crime but the law does not clearly include spousal rape. A law against "forced sex with a materially dependent person" may allow prosecution for spousal rape. This possibility does not suffice. Indeed, a husband could escape prosecution depending on the interpretation given to a "materially dependent person". The Ministry of Interior underlined the fact that there is a special unit in charge of domestic violence and assured the Commissioner that countering family violence is a priority.

141. However, the Commissioner observed a certain degree of embarrassment on the part of the law enforcement representatives encountered during the course of his visit when broaching this serious and painful subject. The dichotomy between the private and the public domains is used to avoid addressing the problem. Being in complete disagreement with this wrongfully traditionalist approach, the Commissioner deems it is high time that the State no longer accepts the existence of impunity in matters of family violence and considers that the State should implement the legislation in place to put an end to these practices that are still widely found.

142. The Commissioner invites a change in the legislation with regard to marital rape. The lack of legal sanction encourages that kind of deviant behaviour. The Commissioner urges the government to adopt and implement adequate repressive measures to combat domestic violence. There should be a gender-focused approach to all forms of institutions. One should bear in mind that solving the problem of domestic violence implies interference with private life; therefore, all members of society have to be involved. To this end, one of the strongest tools is preventive education, i.e. making society as a whole aware of and responsible for the fact that domestic violence should not be permitted. If there is a general consensus to that effect, it would be a first substantial leap forward to ending this kind of abuse.

c) Trafficking in human beings

143. Human Trafficking is construed as the acquiring of an individual for the purpose of any kind of profit making. Human Trafficking is one of the most alarming issues for Ukraine's society today. It can be explained by: the growing destitution of the poor, discrimination in employment against women and insufficient penalties against traffickers. To combat this problem, Ukraine has taken a number of important steps.

144. In March 1998, Human Trafficking became a criminal offence under Art. 149 of the Criminal Code, punishable by 3 to 15 years of imprisonment. Ukraine has made progress in strengthening institutional capacities against trafficking in human beings. In August 2005, a specialised department within the Ministry of Interior was set up charged with dealing with this crime at the national and regional level. Specialisation was also introduced in the Prosecutor's Office, where "methodical recommendations" have been produced on detection and investigation of cases of trafficking in human beings. However, international cooperation appears to be insufficient. Ukraine actively participates in anti-trafficking cooperation activities of the Council of Europe and benefits from the CoE/EC project *International cooperation in criminal matters*. On 17 November 2005, Ukraine signed the Council of Europe *Convention on Action Against Trafficking in Human Beings*. It was expected that after the 2006 elections, the President would carry out the necessary formalities to present the draft law for ratification. The Commissioner expects that the *Convention on Action Against Trafficking in Human Beings* will be made operational domestically without delay.

145. The practice of trafficking, however, still exists on a rather wide scale and affects the most vulnerable groups in society, women and children. Corruption does not help the gradual eradication of trafficking. Corruption in the judiciary and police continues to hamper the Government's ability to combat trafficking. NGOs asserted that local police and border guards received bribes in return for ignoring trafficking.

146. Due to the socio-economic climate, the overwhelming majority of trafficking victims are women, who are used for prostitution. Recruiters use different advertisement media or intimidate destitute women into prostitution within Ukrainian borders or send them abroad where they are promised a brighter future. Ukraine is one of the primary countries of transit in the global trade in human beings. The government fails to provide adequate protection and services to the victims. Robust measures should be put in place to correct this situation.

147. The main part of the rehabilitation process and follow up work for Human Trafficking victims is carried out by NGOs and funded by the international community. There is a sophisticated clinic system that has been set up in Kyiv by the International Organisation for Migration. It helps the victims of trafficking to reintegrate society. This centre aims at helping people who have been victims of trafficking. They bring psychological assistance in order to ensure a better reinsertion into society. Even if the Commissioner encourages the work carried out by this organisation, such work does not exempt the State

from taking measures of the same nature. The State must dynamically reinforce its fight against this particularly heinous crime.

2. Children

148. Ukraine ratified the United Nations *Convention on the Rights of the Child* (CRC) on 21 August 1991. The importance of this text cannot be overestimated and its use should ensure full protection for children.

149. Children in Ukraine are suffering from the economic crisis that has been going on since independence in 1991. There is a great deal of poverty that stems from the economic conditions, as a result of which people resort to illegal methods to palliate their unfortunate circumstances. According to Mrs. Karpachova, the Ukrainian Ombudsperson, 33% of adolescents under the age of 16 are self-sufficient earning their own money.

150. Abuses against them persist because children have few mechanisms for reporting violence and other human rights violations. They may be reluctant to speak out for fear of reprisals. The Commissioner's interlocutors also emphasised the tragic situation of street children exposed to all manner of dangers. The majority of them still have their families but have been abandoned by drunken parents or by parents who were not able to overcome some of life's hardships. This tragedy should be a subject of interrogation for Ukrainian society as a whole.

a) Orphanages

151. There are still a great number of orphanages in the country. The majority of them are run using Soviet style methods. Consistent with the views of the UN Special Rapporteur for the sale and pornography of children, who visited Ukraine a couple of weeks before the Commissioner, the NGOs asserted that the orphanages are too big and self-sufficient, meaning that they do not challenge children to seek anything from outside the walls of the institution. They do not allow children to face the outside world until they are no longer minors. This form of institutionalisation is not beneficial to their future integration into society and often leads them to prison shortly after their insertion in society. The Commissioner was informed that family type establishments are starting to be created and encourages the government to double its energy to achieve this.

152. The general consensus among civil society is that the responsibility related to orphanages falls under too many different ministries. This separation of tasks ends up spreading responsibility between too many entities leading to a dilution of responsibility.

b) Street children

153. The phenomenon of abandoning children does not limit itself to Ukraine, it can be found in all post-Soviet countries. The harshness of economic reforms, the loss of traditional points of reference, the withdrawal of state funding, the decrease in social protection, the downswing in the economy as well as the increase of unemployment rates have widely contributed to the spreading of this epidemic. Some adults, who were not able to deal with the new realities of the socio-economic climate, sank into alcoholism and drug addiction and abandoned their children. Others unable to find work opted for emigration and could not take their children along with them.

154. The NGO community in Lviv, informed the Commissioner of the fact that a great number of parents are migrant workers who go abroad to seek employment. Their children are left behind. The children's upbringing is most often relegated to their grand-parents but in some cases they are left alone. These abandoned children, once the maternal parental figure leaves, tend to get involved in petty crimes, prostitution and become drug users. These children end up on the streets and tend to go to prison (criminal liability starting at age 14), once they face the challenges of the real world. The key problem in this context is the lack of a system of community care. There are no rehabilitation centres or ways to rehabilitate these children. There is no campaign to raise awareness about drugs for the youngsters and the use of drug substitution; methadone remains illegal. In addition, they are at great risk of contracting the HIV/AIDS virus.

155. The NGOs in Odessa, drew the Commissioner's attention to abandoned children who have no identification papers. From absence of papers usually stem all the other problems that they encounter such as: lack of education, non-access to health or drug treatment, prostitution, etc. NGOs bear the heavy burden of trying to obtain papers for the children but it is a costly and lengthy procedure. In Odessa, they only manage successfully for two or three youths per year.

156. The Commissioner visited a centre for juvenile delinquents and homeless children in Kyiv. This institution caters to children for thirty days after they are found on the street. They are then sent to a foster home or to an orphanage. The staff strives to help them undergo a rehabilitative process during this transitory stage. The Commissioner was impressed by the devotion and quasi-maternal attention given to the children, not least by the Director himself. However, he was alarmed by the fact there is a manifest lack of funds. There is an influx of street children with no matching increase in the budget allocated to them. The material conditions in the centre were strikingly primitive. The Commissioner was pleased to hear that the Ministry of Interior pledges to try to improve the allocation of funds for such institutions. The Commissioner encourages the further development of such institutions and community care systems, including youth rehabilitation centres.

c) Violence against children

157. Violence in the family persists because it is hidden behind the closed doors of the right to privacy. Mrs. Karpachova, the Ombudsperson alleged that the phenomenon is on the rise. It should no longer be kept in the conspiracy of silence.

158. Art. 52 of the Constitution states that "any violence against a child, or his or her exploitation shall be prosecuted by law". Legislation prohibiting violence against children is in place. Indeed, corporal punishment is prevented in the home under the *Law on Prevention of Domestic Violence* of 2001. The *Law on Protection of Childhood* of 2001 prohibits all sorts of violence (physical and psychological) and exploitation of children including that inflicted by parents. Art. 150 of the Family Code 2003 in force as of 2004 prohibits all corporal punishment of children by parents. Corporal punishment is also unlawful in schools. Art. 126(1) of the Criminal Code specifically penalises domestic violence against children: this provision does not include

psychological violence. The failure to include such a provision is regrettable as children can be particularly sensitive to psychological mistreatment. A free hotline has proven to be a successful experience in a certain number of countries. Such a facility gives the children a forum to voice their complaints. The Commissioner recommends that the authorities institute this useful tool. Children are also exposed to sexual violence in Ukraine. Child pornography is widespread. Art. 301 and 302 of the Criminal Code punish the production, use and saving of pornographic materials. The proper implementation of these provisions still needs to be scrutinised.

159. No complaints are brought before the Ukrainian police. When visiting police stations, the Commissioner was not informed of any complaints. This leads the Commissioner to question whether there are sufficient mechanisms in place for children to voice their complaints without fearing repercussions.

d) Education

160. Education in Ukraine is free and mandatory until the age of 15. More and more children are compelled to leave school because their families cannot afford the financial burden of having a child in school. Illiteracy is therefore on the rise¹⁵. The Roma children are the most affected as they are partially cast out of society. There are positive initiatives for the other minorities. Indeed, there are plans to ensure the publication of textbooks in Hungarian, Slovakian and Romanian. In addition, the Minister for Education highlighted the fact that there is an exceptional three-sided agreement on the cooperation for the organisation of the educational process. It involves the Ministry for Education, an association of parents and a group of senior students. The Commissioner can only encourage such a participatory approach to education.

161. In order to keep children in school, it is important to have legislation that limits the right of children to work. While the minimum age for working is 16, this age can be reduced in exceptional circumstances and in certain industries with parental consent. The Ombudsperson reported that 33% of children under the age of 16 work full time.

162. The Commissioner focused his attention on institutions that cater to children with disabilities. The financial situation of the institutions that host these children has worsened and the majority are not placed in special institutions and are therefore denied a right to an education. Indeed, the general educational system does not provide reasonable accommodation for children with disabilities.

163. Currently, there are very few special educational institutions for mentally disabled children in Ukraine, and the public school system is ill equipped to teach them. Thus, disabled young adults have difficulty finding jobs. Many children with disabilities also grow up in single parent families, and single mothers have trouble balancing work and the children's special needs.

164. Initially, President Yushchenko vetoed the ratification of the Social Charter as, in the President's opinion, Ukraine would not be able to comply with the financial obligations which are connected with the Charter's provisions due to shortages of budgetary means. The ratification instrument was, however, later deposited in December 2006 and ratified on 21 December 2006.

165. During his visit the Commissioner did not have the opportunity to go to institutions for children who are considered unable to receive any kind of education. According to NGOs, children are merely washed and fed in those kind of establishments. They are fed off the floor and kept in restraints. One of the main problems identified by the NGOs in such places is malnutrition. The malnutrition factor can easily be explained by the lack of staff in cases where children usually experience difficulty swallowing and particular feeding problems due to their disability. They are not able to have any physical exercise also because of inadequate staff to supervise them. The Commissioner was told that the state provides a lump sum of money for each disabled child. This money is kept in a bank account and managed by the director of the institution. The latter usually uses this money for the institution and not for each individual case. The Commissioner, understands the financial difficulties faced by the staff. He highly recommends a better allocation of resources for children in such institutions. Indeed, a disabled child can already make some progress when fed properly.

166. The Commissioner was able to visit a school for children with learning disabilities, (school n. 88 for disabled children in the outskirts of Odessa). This school comprised orphans as well as children who have families. The Commissioner was impressed by the commitment and dedication of the staff working there. Although they had very few means at their disposal, the staff had managed to create a homelike environment. They suffer from a lack of running hot water but are able to serve the children five meals per day. The children are very much encouraged to develop their artistic and manual skills. Such schools can serve as models for other establishments. The school personnel reported to the Commissioner that work plans had been drawn up to improve the dilapidated state of repair of the buildings. Unfortunately, the funds were not allocated by the local authorities. The Commissioner urges the competent authorities to seriously look into the matter and do everything in their ability to find the necessary funds for the undertaking of the repairs, which are evidently necessary. In addition, more generally, the Commissioner recommends the establishment of a system of special care for disabled children and socially unprotected children. In parallel, it is necessary to provide proper training for the staff destined to work in such institutions.

e) Sexual abuse

167. Child pornography is a great problem in Ukraine. In 2005, measures were taken to try to reduce the rate of child pornography, especially on the Internet. Sexual violence against children is only criminalised when the victims are under the age of 16. The NGOs contend that the legislation in this regard is more declarative than operational and there are no monitoring systems to keep track of the sexual abuses that take place. Finally, it is evident that street children are a special target for sexual abuse and trafficking, be it for sexual or labour purposes. The UN Special Rapporteur for prostitution sale and pornography of children, Mr. Juan Miguel Petit, after finishing his 6-day visit in Ukraine recommended that Ukraine build a new "model" for the protection of children with more NGO involvement. The Commissioner fully associates himself with the conclusions reached by the UN Special Rapporteur concerning the protection of children.

3. Elderly People

168. During his visit, the Commissioner's interlocutors from civil society remarked with a certain degree of bitterness that elderly people and children are the two most underprivileged sections of the Ukrainian population when it should be the opposite. Indeed, the situation of elderly people is most difficult, while tangible signs of improvement are yet to come. As in many other post-Soviet states, the Ukrainian social protection scheme came out of the communist era particularly weakened,

affecting the most vulnerable sections of society, namely elderly people. Pensions dropped, medical services that used to be quite efficient were dismantled and social assistance has become invisible. In addition to these difficult changes, financial savings have been swallowed up by successive devaluations. The consequences of these events did not take long to show, average life expectancy catastrophically decreased by approximately ten years, mortality increased and the poverty level of the elderly substantially increased. All of this has resulted in a psychological crisis because elderly people feel that their lives were not worth much. Yet, it is important to recognise that Ukraine's current accumulated wealth is rooted in the hard work of the older generations. Such work deserves a certain degree of acknowledgment. Consequently, considering their present situation, remedial action in this field should be a high priority.

169. Many challenges have to be taken up, particularly in the area of health care for older people. The average life expectancy in Ukraine is only 67 (75 for women and 65 for men). According to the Economist Intelligence Unit Report, Ukraine is ranked 113th in the world with regard to life expectancy¹⁶ and those who achieve old age often live in poverty.

170. The Pension system in Ukraine is a Pay-As-You-Go system. In 2003, the government enacted legislation with the objective of reforming the system by adding to it a second mandatory pillar and a third voluntarily funded pillar. This legislation was not implemented because the administrative and institutional groundwork was not ready. Yet, the improvement of the pension schemes is necessary and should be given priority. Not only will it help improve the current standards of living but it will also ensure the future generations of elderly people.

171. A strong emphasis was put on the fact that Ukraine is not a rich country, 11.5 million pensioners live below the poverty level. The drop in the effectiveness of the social security system is deeply problematic. The gratuity of treatment remains the principle. It is, however, public knowledge that any surgical operation requires supplementary payment for a decent treatment. Hospitals are lacking in free medication, food, sometimes even linens. Therefore, patients have to contribute to their treatment. Thus, elderly people become the primary victims of the system because they have so few resources at their disposal. They are faced with corruption, do not receive the treatment therefore tend to need and they mistrust the whole system.

172. The situation of Ukrainians who work abroad was also highlighted. They usually cannot benefit from a full pension scheme due to the lack of bilateral agreements between the two countries. Another problem according to the Commissioner's interlocutors is that, the current legislation concerning pensions does not allow for people who have worked and contributed in Ukraine and acquired a right to a pension to receive their pension if they decide to live abroad after they retire. This situation is at odds with the principle of equality between citizens. The Commissioner urges the authorities to reinstate the payment of the pensions of all those who have been deprived.

4. LGBT

173. The Constitution of Ukraine contains a set of basic anti-discrimination provisions and everyone can appeal to a court on the basis of the Constitution's provisions (Article 8 of Ukraine's Constitution). The notion of "sexual orientation" is not to be found in any Ukrainian legislation. It is essential to bear in mind that in the Soviet Union homosexuality was regarded as a crime and a serious mental disorder. Until 1991, Art.122 of the Criminal Code deemed non-violent homosexual sex between adults to be a crime. Ukraine was one of the first countries to repeal the criminal responsibility attached to homosexual sexual intercourse. A change in mentality did not follow this piece of legislation. Labour legislation, in Art. 22 of the Labour Code, lists anti-discriminatory factors, but sexual orientation is not mentioned.

174. *Nash Svit/Mir*, the Ukrainian gay and lesbian NGO met by the Commissioner, conducted a study and came up with the following results. Out of 1,200 people polled, 37% think that associations and clubs for sexual minorities should be banned, 21% disagreed entirely with that stance and 44% had no definite opinion. *Nash Svit/Mir* identifies certain areas that are more problematic than others. Discrimination is present in those spheres that are most important for a normal standard of living, and especially in relation to employment and salary, medical services and social protection. Homosexuals who are employed often experience discrimination in the workplace. At the same time, the most frequent instances of discrimination they experience relate to unequal rights to medical and social services. Among respondents who indicated sexual orientation as grounds for discrimination, the spheres of employment and education were named as particularly problematic.

175. It is also important that the people interrogated most often indicated difficulties in defending rights in dealing with government bodies, including law enforcement bodies. Violations of the rights of gay people are most often carried out by law enforcement agents. In addition, it is not uncommon to encounter hate speech with regard to LGBT in the media, and this is inadmissible.

176. The Commissioner concurs with civil society on suggestions that might stem from homophobic tendencies: clarification that the anti-discrimination legislation also covers the LGBT community, improvement of awareness of individual rights and an increase in education of public servants, legal recognition of same sex partnerships, introduction of state-level programs of social support for the gay community, and taking into account the needs of the gay community while drafting legislation and implementing normative acts.

5. Homeless people

177. The standard of living of people in Ukraine has become lower. As the Ombudsperson mentioned to the Commissioner, 70% of the people have incomes that do not cover their basic needs. Most of the time, they cannot afford proper housing. As a result, 0.5% of the adult urban population has become homeless. Such a situation is difficult even if not taking into account dramatic and harsh conditions in Ukraine. On a positive note, the President has recognised the urgent need to tackle the problem of the homeless. The Prime Minister ensured the Commissioner that the elaboration of a special programme is underway.

178. Recently the *Law on the Basics of Social Protection of Homeless Persons and Street Children* was adopted. This law provides a definition of a homeless person and the basic rights she/he is entitled to. This is the first basic step to be taken in order to help the homeless. The Commissioner visited a shelter for the homeless in Odessa. The shelter provided accommodation only for the night, except for those who are ill. Drug users must be reported to the police. The shelter contains 150 beds, but there are peak periods, mostly when it is cold, when beds are scarce and people are turned away. Due to budget constrictions, the staff cannot provide shoes for the homeless. There are time limitations: a person from Odessa

can stay 4 days and an outsider can stay 6 days. The homeless are fed twice a day. The funding of 4.72 UHA per day per person comes from the municipality.

179. Women are not accepted, but sent to a convent. The staff has to reshuffle the homeless every few days to avoid violence and face significant problems when trying to help these homeless people as a large number of them are mentally disturbed. This type of institution is not common in today's Ukraine and those existing suffer from lack of sufficient funding. It is necessary to allocate the proper funding in order to provide these centres with the means they need.

XI. THE HEALTH SITUATION

180. Art. 49 of the Constitution provides that everyone has a right to health care. However, there is a manifest lack of funding of medical establishments; local private general hospitals, just as well as public hospitals, thus affecting the whole system. The rural areas and small towns suffer even more than the large agglomerations. Free treatment suffers most particularly. Complementary funding is required even in public hospitals.

181. Another issue worth mentioning is the low wages received by doctors. According to the ones met by the Commissioner, it is quasi-impossible to live decently with their meagre salaries. Consequently, new generations are not attracted by the medical field. This having been said, the most complex area is the medical institutions.

182. There is a legal framework for people with disabilities. The first legal action was taken in 1992, when the Ministry of Health approved the *Provision on the Individual Program of Rehabilitation and Adaptation of the Invalid (IPRI)*, and the *Method of Formulating the Individual Plan of Rehabilitation and Adaptation of the Invalid*. The IPRI plan represents a significant step towards a state system of rehabilitation but it faces a funding problem.

183. In 2001, the *Law on the Basis of Social Protection of Invalids* (No. 2606-III) was adopted with the aim to facilitate the employment of disabled citizens, establishing certain quotas that depend on the size of the enterprise. In theory, employers, who do not respect the law, have to pay a fine to the All-Ukrainian Fund of Social Protection of the Disabled. In practice though, businessmen hire disabled persons in a "fake" manner – they pay them without their working to avoid changing their infrastructure. This method of cheating the system does not enable the disabled to integrate into society.

184. On 1 June 2005, President Yushchenko signed a *Decree on Immediate Measures for Creating Favourable Conditions of Living for Persons with Limited Physical Capabilities*. The purpose of the decree was to increase access to public facilities for handicapped (public transport, parking and, state institutions). The situation has not changed substantially, owing to the lack of governmental efforts and the scarcity of financial means that are necessary in order to build the adequate facilities.

1. Mental Institutions

185. Committal to a psychiatric social protection or special education institution is governed by the 2000 *Law on Psychiatric Care*. Under Sec. 23 of the law, committal requires a personal request on the part of the patient (or, in the case of minors and incapacitated adults, their parents or legal representative) and the conclusions of a panel of doctors, including a psychiatrist. Once committed, the patient must be examined at least once a year by a panel of doctors, including a psychiatrist and by a panel comprising a psychiatrist, a psychologist and a special needs teacher to determine whether he or she should continue to be held in the institution. Under Sec. 24, the person may be discharged at his or her request if a panel of psychiatrists concludes that he or she is able to support himself or herself; the person may also be discharged by a court decision if it rules that the person in question was committed to the institution illegally.

186. With regard to involuntary internment, Sec. 16 of the law foresees that a person can be referred to a psychiatric hospital by decision of a psychiatrist and, thereafter, must be examined by a committee comprised of at least two of the hospital's psychiatrists within 24 hours of admission. If the committee finds that involuntary hospitalisation is necessary, a demand for involuntary internment, on the grounds that she/he suffers from "severe mental disorder" (might endanger himself or others) must be addressed to a judge within 24 hours.

187. In the case of judicial placement, the hospital's board of psychiatrists must organise a monthly review of the placement in order to determine whether to terminate or extend it. An extension beyond six months requires a further court decision. The patient can challenge the court decision. The judge has to be in contact with the patient before reaching his decision. This requirement implicates that the judge must travel to the institution where the individual has been placed or manage to bring the patient to the court. According to the NGOs, the transportation is almost never available, thus the judge bases his decision merely on the committee's opinion. This is a formalist approach that does not answer the spirit of the law and does not provide the necessary guarantees.

188. The second issue that was raised was the one of the quasi-impossibility to obtain an independent evaluation. There is a general reluctance to appeal the court decision out of fear of the impossibility, in practice, to change the outcome of the original decision. It would appear that the proper mechanisms are in place, but inapplicable in practice.

189. The Commissioner was able to visit a psychiatric institution in Zaklad, a village near Lviv and another in Odessa. His overall impression was the lack of means at the disposal of the staff to dispense proper treatment. The hospital in Odessa comprised 75 beds left to three doctors and one intern.

190. The hospital salaries of the staff, including 5 UHA per day for food per person, and 2 UHA for medication, are exceedingly low. A doctor barely earns more than the minimum average wage. There is also a problem of understaffing and staff with poor medical training. They also complained of the absence of contact between the judge and the potential patient in cases of involuntary placement. Another problem is the fact that there is no national registry even if information is kept at the regional level. The Commissioner considers that a re-examination of the law is necessary in order to harmonise theory and practice, and that new methods of treatment of patients in mental institutions should be introduced.

2. HIV/AIDS

191. According to NGOs, Ukraine is facing an HIV/AIDS epidemic that is infiltrating all social categories nation-wide. The increase in the number of reported cases of HIV infection in Ukraine is distressing; it has increased 20 times in the past five years, with estimates of up to 400,000 people already infected. This infectious disease triggers an increase in the number of TB cases due to the weakening of the immune system. It is difficult to confirm figures because few people are tested and

diagnosed. The NGOs informed the Commissioner that TB is the main cause of death for people living with HIV/AIDS. The situation is particularly critical in prisons: 7 percent (14,000) of Ukraine's 200,000 inmates have active TB, and more than 40 percent of prison deaths are attributed to TB.

192. The chilling increase in the number of drug users, combined with unprotected sex, are the causes that account for HIV/AIDS being on the rise. Drug users are often involved in prostitution and therefore infect women who are not necessarily drug injectors. The most difficult areas seem to be Dnipropetrovsk, Donetsk and Odessa.

193. Ignorance about the basic facts of HIV/AIDS is widespread in Ukraine, a problem that the national and local authorities acknowledged. Lack of knowledge also contributes to discrimination faced by people living with HIV/AIDS. Ignorance about the illness can easily lead to violations of rights of the infected in relation to employment, education, health care, or privacy because of fear with regard to the virus.

194. The transmission of the virus does not only take place because of prostitution. It is also linked to the use of drugs. It was pointed out that drug users fear arrest. The Criminal Code in Art. 307-309 and the Code of Administrative Offences in Art.44 do not prohibit actual consumption but purchase, storage and consumption of narcotics. This drives addicts away from seeking devices such as clean, sterile syringes for the injection of the illegal substances. By acquiring this equipment, which reduces the spreading of the epidemic, they feel that they will be identified and immediately arrested.

195. Few doctors are specifically trained in antiretroviral therapy but the main problem faced by infected people is the discrimination they are subject to when seeking treatment. There is a social stigma attached to HIV/AIDS, which tends to influence doctors' better judgment. Several NGO representatives alleged that a number of doctors deliberately refuse to treat HIV/AIDS patients. They refuse to treat TB patients if they are infected with the virus. According to the NGO community, another form of discrimination is the illegal demand for payment for treatment (health care should be free).

196. The illegality of the use of drug substitution such as methadone does not increase the chances of reducing the number of HIV/AIDS. The Commissioner is alarmed by the spread of the virus and sees this as a potential catastrophe for Ukraine. Ukraine must not surrender to HIV/AIDS "fatigue". He was pleased by the pledge of the Prime Minister to launch a national action plan in this area. It is seen as a top priority on his agenda. It is the duty of Ukraine to provide treatment, establish rehabilitation and social reintegration services. The HIV/AIDS problem should be addressed urgently. The Government should ensure an accelerated implementation of a national strategy. The Commissioner suggests a gender-based approach because women and young girls are the most vulnerable group in the sex industry.

XII. NGOs and Civil Society

197. The Commissioner attaches great importance to the NGO community. He believes that Ukraine could be proud of the extensive NGO activities and of the quality of their work. He was impressed by the dedication and hard work with which their contribution to enhancing respect for Human Rights is carried out. He does, however, remain concerned by the fact they are left with such a heavy burden due to lack of programmes on the state-level. He was, however, pleased with the welcome that the NGO workers receive when they try to get involved with state-run institutions. This was most particularly noticed during his visit to the penitentiary colony in the village of Zaklad. There was a person who was able to come in weekly to give the inmates HIV/AIDS education. There were also volunteers, who came in to dispense religious education.

198. The Commissioner was, furthermore, pleased to observe that several regional administrations actively assist the NGO community, including financially.

199. He was, however, disappointed by the fact that, a respected and renowned NGO in the Odessa region, LIFE+, had been evicted from its premises and therefore not able to pursue its useful activities. The Commissioner recommends that certain premises be set aside for such volunteers to enable them to carry out their difficult tasks.

XIII. Recommendations

Ukraine has experienced profound changes and improvements since its independence. The Commissioner wishes to pay tribute to the efforts made, while remaining concerned about a certain number of issues. Indeed, the reforms that have been undertaken, more particularly in the judicial domain must come to completion as quickly as possible. In addition, in the areas where reforms have taken place, the Commissioner underlines the necessity of bridging the gap between theory and practice. The Commissioner hence has formulated the following recommendations:

Justice, police and the penitentiary system

1. Justice

- As a matter of priority address the issue of corruption, which penetrates the judiciary, the police as well as the penitentiary system;

- complete the reform of the judiciary so as to ensure its full independence, impartiality and effectiveness in line with European standards. All related reforms, i.e. those of the public prosecutor's office, pre-trial investigation, legal aid, the system of execution of judgments, admission to the legal profession, notary system, and the penitentiary system should be implemented in a coordinated manner;

- actively use the opportunities offered by on-going EC/Council of Europe technical cooperation project designed to implement change regarding judiciary;

- introduce a system of juvenile justice

- set up the local and appellate administrative courts foreseen under the Code of Administrative Justice;

- ensure the efficient and independent functioning of the Constitutional court
 - strengthen the independence of judges, increase their salaries and take measures to prevent improper influence and pressure.
 - review the system of selection and appointment of judges, focusing on integrity of candidates, their practical abilities and knowledge of human rights;
 - consider the establishment of a National School for Judges;
 - increase funding of the judiciary and secure better conditions for proper administration of justice;
 - encourage the establishment of a professional bar association independent from the State; ensure the application of codes of ethics for legal professions and take measures to prevent undue pressure on advocates
 - ensure effective system of legal aid to ensure equal access to justice;
 - take urgent measures to improve proper enforcement of judicial decisions;
- allocate more resources to the State Enforcement Service;
- continue the reform of the Prosecutor's Office; remove from it the functions of general oversight and pre-trial investigation;

2. Police

- Address police violence through a comprehensive policy to counter torture and ill-treatment, including appropriate training and control measures, stop using guilty plea as the main evidence in court; systematically investigate all cases of abuses and bring the perpetrators to justice;
- review the systems of police performance, recruitment and promotion; ensure proper training of police personnel, provide the police personnel, in particular police stations, with adequate working equipment, increase salaries for police officers ;
- improve the system of management of police information; ensure proper and timely treatment of complaints from the public;
- ensure proper functioning of public councils and mobile squads;
- ensure an effective enforcement of the right to legal counsel;
- ensure that the arrested and detained persons are explained their rights systematically and without delay by law enforcement agents and that their relatives are timely informed about the places of detention;
- provide further improvements to medical and sanitary conditions in pre-trial detention facilities;

3. Penitentiary system

- Renovate dilapidated facilities housing prisoners, more particularly, the remand centres (SIZOs);
- take steps to reduce the prison population; provide alternative forms of punishments;
- improve conditions of detention for juveniles, ensure that they are kept in separate centres, provide them with schooling and appropriate food throughout the country;
- provide occupational activities and efficient measures of re-socialisation particularly for men who seem to be more vulnerable in this respect;
- further develop the cooperation between the prison administration and the civil society;
- improve medical capacities for the penitentiary; ensure tuberculosis and HIV/AIDS testing and proper medical care to all inmates; improve sanitation; ensure that inmates infected with contagious illnesses are separated from other inmates;

Minorities

- Introduce specific guarantees into the law on minorities and remove restrictions concerning the scope of application (citizens only);

- implement the existing Roma program and develop further similar programmes in the future to ensure their social integration, notably through support of small-scale businesses, access to education and access to infrastructures;
- adopt legislation enabling societal integration of the Crimean Tatar. Ensure their participation in public life; facilitate the participation of the Crimean Tatar population in the process of land privatisation;
- reinforce efforts to forcefully combat racist, xenophobic, and anti-semitic behaviours;
- take significant action for the effective implementation of the European Charter for Regional and Minority Languages; develop clear and lasting criteria relating to the use of minority languages in education and legal proceedings.

Refugees and asylum seekers.

- Enact specific legislation on asylum seekers;
- provide legal guarantees against discrimination of refugees on grounds of race, religion or country of origin; ensure legal representation of refugees by NGO staff; and a time frame for illegally entering migrants;
- resort to detention only as a very last solution; put an end to the unacceptable situations of asylum seekers who, after some time, find themselves in a legal limbo and are kept in detention of indefinite duration;

Freedom of expression

- Remove outstanding obstacles to the right for the media to seek and publish information in some administrative areas and relinquish any attempt by authorities at regional level to give "guidance" to the press;
- ensure the full independence of the NCB;
- successfully complete investigations in the case of Georgy Gongadze's killing and bring the perpetrators to justice; give priority to investigations of murders of other journalists.

Freedom of religion

- ensure that religious denominations possess the status of full legal entities;
- execute court decisions ordering the restitution of property to religious denominations;
- strengthen the ongoing dialogue between religious denominations and the State as a means to forcefully combat intolerance, discrimination and islamophobia.

Social sphere and vulnerable groups

1. Women and Children

- Actively promote gender equality; prohibit discriminatory practices in employment;
- reinforce measures adopted to combat domestic violence; encourage the setting up of shelters for battered women; provide gender-based training for members of the police corps and the judiciary;
- adopt legislation criminalising spousal rape;
- implement legislation prohibiting violence against children, child pornography and exploitation;
- adopt measures to address the spreading phenomenon of street children; implement a system of community care for them through rehabilitation centres;
- encourage foster care for children without families;
- provide for smaller orphanages open to their societal environment in order to equip children with the skills to integrate in society when they grow up;
- provide adequate funding for institutions that accommodate children with disabilities.

2 Trafficking in human beings

- ratify the Council of Europe *Convention on Action Against Trafficking in Human Beings* and make it operational as soon as possible;

- further promote anti-trafficking policies, introduce campaigns to raise awareness;

- provide adequate protection for the victims and ensure prosecution of the traffickers;

- address the problem of corruption in the law enforcement agencies.

3. Elderly people

- ensure that all pensioners receive pension allowances to benefit from decent living standards;

4. The LGBT community

- Ensure that anti-discrimination legislation clearly includes the LGBT community;

- promote tolerance and awareness of individual rights, introduce a state-level program of social support to the LGBT community and increase education of public servants in this field.

5. The homeless

- Promote and fund shelters for the homeless:

- raise awareness through information campaigns to encourage the homeless to use such establishments.

The Health situation

- Address the financial problems encountered by hospitals; renovate the dilapidated buildings, provide proper funding for medication and food, increase salaries in the public sector;

- implement the legal framework in place regulating the involuntary admission of mentally disabled people;

- urgently establish a National Action Plan to address the HIV/AIDS epidemic; raise awareness and promote HIV/AIDS education.

NGOs and civil society

- Further develop the collaboration and dialogue between NGOs and the State.

¹ *Salov v. Ukraine* of 6 September 2005; *Svetlana Naumenko v. Ukraine* of 9 November 2004

² see *Zubko and Others v. Ukraine* of 26 April 2006

³ Assembly Opinion No.190 (1995)

⁴ among more than 100 judgments the best known are *Dubenko v. Ukraine* of 11 January 2005, *Romashov v. Ukraine* of 27 July 2004, *Shmalko v. Ukraine* of 20 July 2004, etc.

⁵ see *Svetlana Naumenko v. Ukraine* of 9 November 2004 and *Merit v. Ukraine* of 30 March 2004

⁶ as required by Assembly Opinion No. 190 (paragraph 11.vi) and paragraph 9 of the transitory provisions of the 1996 Constitution of Ukraine

⁷ *Salov v. Ukraine* of 6 September 2005; *Nevmerzhytsky v. Ukraine* of 5 April 2005; *Dvoynykh v. Ukraine* of 12 October 2006

⁸ *Melnyk v. Ukraine* of 26 March 2006

⁹ *Nevmerzhytsky v. Ukraine* of 5 April 2005

¹⁰ Recommendation n°1455, report 8655

¹¹ PACE had already called upon Ukraine to improve the competition system when delivering licenses in Honouring the obligations and commitments by Ukraine. Doc. 10676 p.70 (19 September 2005)

¹² www.pravda.com.ua/en/news/2005/7/23/658.htm

¹³ Orthodox believers are divided between the Ukrainian Orthodox Church - Moscow Patriarchate (UOC-MP), the Ukrainian Orthodox Church of the Kyivan Patriarchate (UOC-KP) and the Ukrainian Autocephalous Orthodox Church (UAOC).

¹⁴ <http://www.usconstitution.net/const.html#Am1>

¹⁵ UNESCO reports that 16% of primary school aged children are out of school.

¹⁶ Economist Intelligence Unit Report, Country Profile 2006 p.21