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Ukraine and the EU: Time to put people first

In the run up to the Vilnius Summit the EU has focused its attention on the problem of selective justice. The case of Yuliya Tymoshenko highlights the lack of fair trials and independence of the judiciary in Ukraine, but the political significance of her case should not be allowed to overshadow the systemic problems that deprive thousands of Ukrainians of their rights everyday.

In March 2012, the EU and Ukraine initialled the text of the Association Agreement and its Deep and Comprehensive Free Trade Area. The Association Agreement is to be officially signed at the EU Eastern Partnership Summit in Vilnius on 28 – 29 November 2013. The EU and Ukraine have agreed an Association Agenda that lists legislative changes and reforms to be carried out in order to implement the Association Agreements. These include steps to improve the independence of the judiciary through reform of the Prosecutor General's Office, and "relevant action on the reform of the Criminal Code and the police".

Over the past year important laws have been passed and important steps taken to bring Ukraine's criminal justice system into line with Ukraine's international human rights obligations.

This progress is underpinned by Ukraine's desire to develop closer links with the EU, and the EU's insistence on such reforms. As Ukraine negotiates closer ties with the EU, it is time to take stock of the recent developments, to celebrate progress where it is evident, but also to identify priorities for the immediate future.

A new Criminal Procedural Code, in line with Council of Europe recommendations came into force in November 2012; on 8 November parliament passed at the first reading a new law "On the Prosecutor's Office" which proposes far-reaching reforms to this Soviet style institution to strengthen the equality of arms and the separation of powers. In February 2013, the law "On Principles of Prevention and Combating Discrimination in Ukraine" was passed by parliament, although it falls short of banning discrimination on the grounds of sexual orientation and sexual identity. A National Preventive Mechanism established in November 2012 under the Parliamentary Commissioner for Human Rights (Ombudsperson's Office) makes visits to places of detention and reports evidence of abuses to ministers and the Prosecutor's Office.

However, much still remains to be done. Thousands of Ukrainians every year are subjected to torture and other ill-treatment at the hands of the police and other law enforcement officials. However, effective measures to combat torture and other ill-treatment are conspicuously missing from the Association Agreement.

According to statistics from the Ministry of Internal Affairs in the first eight months of 2013 there were 987 complaints about torture and illegal use of force by police officers, and of those 231 were being investigated in September. The figures are bound to be incomplete, because in the absence of an effective police complaints mechanism, such allegations are frequently ignored, and many complainants are threatened to force them to drop their complaints. Torture victims rarely have redress and many are left disabled, or are serving prison sentences for crimes they did not commit. The eradication of torture and other ill-

treatment requires legislative changes as well as systemic reforms to the criminal justice system. The Ukrainian government has taken important steps, but until each and every allegation of torture is promptly, effectively and independently investigated, and the perpetrators are brought to justice, torturers will continue to act with impunity.

Progress to date on combating torture

The new Criminal Procedural Code significantly improves safeguards for detainees; it clarifies that detention starts from the moment of apprehension by the police; that detainees have the right to a lawyer and to an independent medical expert from that moment; and clearly states that pre-trial detention should only be applied in exceptional circumstances. It also provides for automatic review of the continuing justification for pre-trial detention at two-monthly intervals and stipulates that formal confessions made to police outside the court are no longer admissible in court thus reducing one incentive for police to resort to torture and other ill-treatment for “investigative” purposes. The numbers of suspects held in pre trial detention has dropped significantly, and a new legal aid system promises to improve access to a lawyer for detainees. The new Code also introduced limited jury trials for crimes that carry life imprisonment, and the benefits of this reform can be seen in the case of Oleksandr Bondarenko – the first verdict to be passed by a jury in recent Ukrainian history.

THE CASE OF OLEKSANDR BONDARENKO

The case of Oleksandr Bondarenko illustrates the progress that has been made, but also points out the ongoing systemic failings in the criminal justice system.

Oleksandr Bondarenko, from Stetsivka in Sumy region, was detained by police officers from Sumy district police station on 6 October 2012. They took him to an animal fodder plant in Stetsivka and tortured him to force him to confess to the murder of two elderly women in the village. Police officers attached electrodes to his legs and gave him electric shocks. They forced him to wear a gas mask and then closed off the air to repeatedly bring him close to suffocation. They forced him to write a confession under dictation which he later recanted in court.

On 25 October 2013, the Zarichny district court in Sumy, composed of a jury in accordance with the new Criminal Procedural Code, acquitted Oleksandr Bondarenko on the basis that there had been serious human rights violations in the conduct of the police investigation. The court recognized that police officers had arbitrarily detained him, tortured him to force him to confess to murder, fabricated evidence to incriminate him, and also attempted to impose a lawyer on Oleksandr Bondarenko.

In speaking to Amnesty International, Olexandra Kovalova, the lawyer defending Oleksandr Bondarenko said: “This decision is significant because it shows that we can no longer work in the old way, we have started to work in a new adversarial way.”

Amnesty International welcomes this verdict as a demonstration of the independence of the judge and jury, and their ability to robustly review the evidence presented in court. Oleksandr Bondarenko was uniquely fortunate, he had a competent lawyer, who insisted on his right to a jury under the new Criminal Procedural Code. Ukraine must strive to ensure that such cases are not the exception but the norm.

Oleksandr Bondarenko was acquitted of murder on 25 October 2013, but his initial complaint, made on 25 October 2012, about the torture he had suffered at the hands of the Sumy police was ignored and he spent a year in pre-trial detention. He had complained about the torture and other ill-treatment to which he was subjected by police officers on the night of 6 – 7 October. A criminal investigation was initiated into the allegations, but on 30 September 2013, the criminal investigation was closed. The prosecutor supervising the investigation did not take into consideration a forensic report of 7 November 2012 that found injuries

consistent with Oleksandr Bondarenko's allegations, but only referred to a much later forensic report dated 23 April 2013 which found no injuries compatible with his allegations. None of the potential witnesses were questioned, and the case was closed on the basis of interviews conducted with the same police officers who were suspected of having tortured Oleksandr Bondarenko. In an interview with Amnesty International he lamented that when he first complained of the torture there had been no interest in his case. Sadly, the torture he suffered is not unique.

While serving as a positive example of how the recent changes in the Ukrainian criminal justice system can help defend human rights, the case also highlights entrenched problems in the investigation of torture and other ill-treatment by law enforcement officers.

Amnesty International calls on the Ukrainian government to ensure that these allegations of torture and other ill-treatment and other human rights violations by the police investigators working on this case are promptly, independently and effectively investigated, and that the perpetrators are brought to justice. Oleksandr Bondarenko must be offered compensation and redress for the human rights violations he has suffered.

Continuing impunity for torture and other ill-treatment

Despite the reforms of the new Criminal Procedural Code, people in Ukraine continue to suffer torture and other ill-treatment at the hands of law enforcement officers who are acting with the knowledge of their own impunity.

The new Criminal Procedural Code removes an important incentive for torture by stipulating that formal confessions made to the police in custody outside the court are no longer admissible in court, however, as Amnesty International's research demonstrates, extracting a confession is not the only reason why police officers resort to torture and other ill-treatment. Amnesty International continues to document cases where police have tortured individuals to punish them without going to court, in retaliation for a complaint against officials, or in order to extort money. Oleksandr Popov was tortured by police officers in October 2012, as a possible witness, and was never charged with any crime.

THE CASE OF OLEKSANDR POPOV

Oleksandr Popov was detained by four plain clothed policemen at about 9am on 16 October 2012 in Mariupol. Police officers handcuffed him, forced a plastic bag over his head and drove him to a forest where they electrocuted him for several hours, using different voltages, intermittently through his feet and little fingers. He was asked a series of questions in connection with a murder investigation. Between 5 and 6pm he was taken to Mariupol City police station, but his presence in the station was not registered in violation of the Criminal Procedural Code. He was transferred to Illichivskiy District police station at about 6pm where his presence was properly recorded, and he was formally interviewed before release. On 17 October Oleksandr Popov and his brother submitted a complaint to the Mariupol Prosecutor's Office. On 21 November an investigation was opened into "abuse of power with violence" under Part 2 of Article 365 of the Criminal Code. On 13 March 2013 the prosecutor closed the case on the basis that the police officers' testimony contradicted Oleksandr Popov's testimony. Popov appealed against this decision, and in May 2013 the court of Voroshylyvskyy district in Donetsk overturned the prosecutor's decision and the case is now being investigated at a higher level by Donetsk Region Prosecutor's office.

Investigations into crimes by officials, and in particular by law enforcement officers, continue to fall short of the standards of independence, adequacy, promptness, public scrutiny and victim involvement required by the European Court of Human Rights. This failure – even when so vividly exposed in court as in Oleksandr Bondarenko's case – is a persistent and deplorable feature of the Ukrainian criminal justice system. It should be the focus of the immediate reforms, and of the EU's pressure.

The following case of two sixteen-year olds beaten by police in Ternopil demonstrates the price paid by ordinary Ukrainians because of entrenched impunity. One was detained and beaten repeatedly by police officers for no apparent reason other than the fact that he failed to present them with identification documents when he was on the street with friends at 9.30pm. A week later another youth was beaten by the same police officers as he returned home with his mother. An investigation is underway, but the police officers are still on active duty.

THE BEATING OF TWO SIXTEEN-YEAR OLDS IN TERNOPIL

Yaroslav Gizhovsky was outside a shop near his home in Ternopil with a friend at 9.30pm on 30 August 2013 when two police officers approached them and asked for their documents. The two police officers were joined by two more in a patrol car. Yaroslav did not have his documents and said that he was not obliged to carry his documents with him. He reported that one of the police officers then tried to grab his arm, and when he objected he was pushed into the back seat of the police car. Yaroslav told a local human rights group the following day that he was in shock from the pain in his arm: "The pain was unbearable, it is very difficult to explain. I shouted "help!" and the car started very quickly. They started to punch me on the head and the other punched me in the side." Yaroslav was held at the police station for 2-3 hours, and during that time he said he was repeatedly taken to the toilet and beaten. When he shouted that he wanted to phone his parents and that the police had no right to treat him in that way, he was laughed at. His parents were only notified after several hours by an employee of the Ministry of Internal Affairs Division for Children's Rights. When his parents arrived he was taken to a psychiatric hospital for assessment and then released. The police claimed that he suffers from epilepsy and that he had fallen and injured himself, although he has never suffered from this condition, and recent medical reports confirmed that he does not suffer from epilepsy. Yaroslav complained about the ill-treatment the following day, but the investigation was briefly opened and then closed. Yaroslav required treatment in hospital for concussion, and continues to suffer headaches and impaired vision. His mother told Amnesty International that one doctor told her that she would get nowhere with her complaint against the police and refused to treat Yaroslav.

Eight days after this event on 7 September, 16 year old Oleksandr Kovtun was returning home with his mother at 11pm, when he was detained by the same police officers who had reportedly ill-treated Yaroslav Gizhovsky. He was walking ahead of his mother when he was approached by the two police officers, and when he attempted to turn back towards his mother the police officers threw him to the ground and beat him. The police officers then called an ambulance claiming that he was drunk, but at the hospital they were directed to the psychiatric hospital where Oleksandr was given sedatives and made to sleep. On 8 September, when he awoke he realized that his arm was very painful. He was discharged from the psychiatric hospital and went to the emergency hospital with his mother where doctors diagnosed a broken arm and treated him. The police arrived at the hospital at 4pm and took him and his mother to the police station where he was threatened and forced to sign a statement that he had been drunk and that he had fallen and injured himself.

The Ternopil Human Rights Group started to publicize both cases, and Oleksandr Kovtun complained to a Kyiv based NGO, the Association of Ukrainian Human Rights Monitors on Law Enforcement, who arranged for a delegation from the Ombudsperson's office to visit Ternopil and investigate the allegations. During their visit staff from the Ombudsperson's office discovered that the investigation into Yaroslav Grizhovsky's allegations had been closed. Only under pressure from the local human rights group and the Ombudsperson's office did the local prosecutor resume the investigation.

Amnesty International calls on the Ukrainian authorities to demonstrate strong political commitment to fight impunity, and to build on the progress achieved with the introduction of the new Criminal Procedural Code by ensuring that police officers are given a clear message from the highest level that all offences – from minor offences to torture and other ill-treatment - will be met with appropriate sanctions.

The urgent need for an effective State Investigation Bureau

Abuse by officials can only be prevented when they know they will be effectively held to account for their actions. As well as removing the incentive for torture, there must be a strong deterrent – the certainty of disciplinary and/or criminal punishment.

Article 216 of the new Criminal Procedural Code provides for a State Investigation Bureau to investigate crimes committed by judges, law enforcement officers and high level officials and allows five years for its establishment. The establishment of such a bureau could potentially improve the effectiveness of investigations into torture allegations by removing the conflict of interest inherent in the role of the Prosecutor General's Office. However, no progress has yet been made towards its creation, and the victims of such abuse cannot afford to wait another five years.

In order to ensure that the investigation of crimes by officials complies with the requirements of the European Court of Human Rights such a body should be established according to the five principles of independence, adequacy, promptness, public scrutiny and victim involvement, and should have no hierarchical or institutional links with the police or government. Accordingly, the new legislation which envisages the creation of such a body should provide a legal framework which will put in place all the necessary provisions, including its institutional independence (amongst others, of the Prosecutor's Office as well as other elements of the criminal justice system), public accountability and sufficient resources, so that it is able to deliver effective, prompt, independent and impartial investigation into all allegations of torture or other ill-treatment by law enforcement officials.

While there will inevitably be a period of transition, considering the overall urgency of this matter, the transitional period should be as short as possible, and the need for transition must not be an excuse to delay the much-needed progressive reform.

The Association Agreement between Ukraine and the EU offers enhanced cooperation in trade, energy, banking and many other areas, and is based on common values, “notably democracy and rule of law, respect for human rights and fundamental freedoms, good governance.....”¹ Unless both the Ukrainian government and the European Union show clear political will to uphold these values, Ukrainians will continue to be deprived of their basic rights.

The EU must continue to effectively monitor Ukraine's human rights record after the signing of the Association Agreement placing criminal justice reform and specifically the establishment of an effective independent police complaints mechanism prominently on its agenda.

¹ European Union External Action, *EU Ukraine Association Agreement “What does the Agreement offer?”*, http://eeas.europa.eu/images/top_stories/140912_eu-ua_aa_what_does_the_agreement_offer_v.pdf