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COUNCIL OF EUROPE CONSEIL DE L'EUROPE
Committee of Ministers
Comité des Ministres

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Item reference: Action plan / Action report

Please find enclosed a communication from Ukraine concerning the case of Nechiporuk and Yonkalo against Ukraine (Application No. 42310/04).

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Référence du point : Plan d'action / Bilan d'action

Veuillez trouver, ci-joint, une communication de l'Ukraine relative à l'affaire Nechiporuk et Yonkalo contre Ukraine (requête n° 42310/04) (***Anglais uniquement***).

* In the application of Article 21.b of the rules of procedure of the Committee of Ministers, it is understood that distribution of documents at the request of a Representative shall be under the sole responsibility of the said Representative, without prejudice to the legal or political position of the Committee of Ministers (CM/Del/Dec(2001)772/1.4). / Dans le cadre de l'application de l'article 21.b du Règlement intérieur du Comité des Ministres, il est entendu que la distribution de documents à la demande d'un représentant se fait sous la seule responsabilité dudit représentant, sans préjuger de la position juridique ou politique du Comité des Ministres CM/Del/Dec(2001)772/1.4).

Annex to the letter of the Government Agent of
Ukraine before the European Court of Human Rights
of ___ May 2012 no. _____

Action plan/report
on measures to comply with the ECHR judgment
in the case of Nechiporuk and Yonkalo v. Ukraine
(appl. no. 42310/04, judgment of 21/04/2011, final on 21/07/2011)

In the case of *Nechiporuk and Yonkalo v. Ukraine* the Court found violation of material and procedural limbs of Article 3 of the Convention on account of the applicant's torture and ineffective investigation into it; Article 5 §§ 1, 2, 3, 4, 5 of the Convention on account of the applicants unlawful and lengthy detention, right to "be brought promptly before a judge", lack of the adequate procedure for judicial review of the lawfulness of his pre-trial detention during the judicial proceedings and the absence of the right to compensation for his unlawful detention.

The Court also found violation of Article 6 § 1 of the Convention as regards the first applicant's privilege against self-incrimination and Article 6 § 3 (c) as regards his right to counsel at early stages of the proceedings, and of Article 6 § 1 of the Convention as regards the reasoning of the domestic courts' judgments, by which the first applicant was convicted.

Individual measures

In light of the conclusions of the Court's judgment in the present case individual measures are the just satisfaction payment and the review of the impugned proceedings as regards the first applicant's conviction (*restitutio in integrum).*

The review of the impugned proceedings in the applicant's case shall constitute the remedy to the violation of Article 6 § 1 and 3 (c) of the Convention.

Just satisfaction

On 12/10/2011 the sum of just satisfaction was transferred to the applicant's account.

Restitutio in integrum

By the letter of 12 August 2011 the Government of Ukraine informed the applicants' representative about the possibility provided by the legislation in force to apply for the review of the impugned proceedings.

The first applicant's representative applied for the review of the judgments in the criminal case of the first applicant by which he was found guilty and sentenced to a certain term of imprisonment.

On 6 February 2012 the Supreme Court of Ukraine quashed the judgemnt by which the applicant was convicted and remitted the case for the new consideration to the first-instance court.

General measures

The violations found in the present case are caused by the deficiencies in national legislation as well as in administrative practice and require, therefore, respective legislative amendments and changes in administrative practice.

As regards violations of Article 3 of the Convention

The violations of Article 3 of the Convention under its material and procedural limbs are constantly found by the Court and therefore are of high concern for the Government. The basis of these violations rests within improper administrative practice of the law-enforcement authorities.

In this connection it should be noted that currently the process of launching national prevention mechanism aimed at combating ill-treatment is ongoing in Ukraine Namely, the draft Law, prepared by the Administration of the President of Ukraine, provides that the Ombudsman of Ukraine shall be empowered with the functions of the national prevention mechanism. Special department within the Office of the Ombudsman shall be established in order to ensure the implementation of functions of the national prevention mechanism.

It is envisaged that within the framework of this mechanism a set of visits to the detention facilities shall be conducted by the Ombudsman and the stuff of his Office in order to establish the facts of inhuman or degrading treatment, to monitor the conditions of detention and the medical treatment provided.

The Ombudsman shall be empowered to comment and submit proposals to the respective authorities as regards the conditions of detention and the treatment of detainees. The Ombudsman shall be entitled also to propose on amendments to the current legislation as regards combating ill-treatment. Moreover, according to the Decree of the Ministry of Internal of 21 April 2011 no. 154 Special Supervising Committee for Human Rights under the Ministry of Internal has been established. This Committee is aimed at taking coordinated measures as regards the prevention of human rights violations by the law-enforcement officers, ensuring proper consideration of the respective claims and adoption of proposals as to the amendment of legislation in the field of combating ill-treatment.

Further, starting from December 2011 within the framework of the Joint Programme of the European Union and the Council of Europe "Combating ill-treatment and impunity" a number of workshops for the judges of the appellate courts is being held with the participation of the High Specialized Court of Ukraine for civil and criminal cases, national School of Judges of Ukraine and the Association of Judges of Ukraine.

Also, respective seminars and round tables as regards combating ill-treatment are regularly held by the Ministry of Internal and the General Prosecutor's Office, including those with the participation of the representatives of the Government Agent's Office.

Moreover, the provisions of the draft new Criminal Procedural Code of Ukraine, which on 13 April 2012 was adopted by the Parliament of Ukraine provide for the inadmissibility of evidence obtained as result of torture, inhuman or degrading treatment or threatening to use ill-treatment. This provision shall exclude the necessity of application of such treatment by the law-enforcement officers, due to the fact that any evidence obtained as a result of such treatment shall be declared inadmissible.

As regards violations of Article 5 of the Convention

The violations of Article 5 § 1, 3, 4 of the Convention, disclosed in the case of *Nechiporuk* are recurrent in the cases against Ukraine and require legislative amendments, as well as changes in administrative practice. In this context see the action report under the *Kharchenko* case.

As regards the violation of Article 5 § 2 in the present case it is closely connected with the violation of Article 5 § 1 in respect of administrative arrest of the applicant. In this connection it should be noted that this violation shall be remedied within the actions to enforce the judgment in the case of *Balitskyy v. Ukraine*. For this purposes see the action plan/report under the *Balitskyy* case which shall be submitted in due course

As regards the violation of Article 5 § 5 it should be noted that it concerned several different periods of the applicant's detention and therefore the measures necessary differ.

1. Between 20 and 26 May 2004 the applicant was detained first in connection with administrative offence and than as a suspect, and this period was not covered by the Compensation Act unless the charges against the applicant were dropped. As regards this period, the violation of the applicant's right to compensation occurred as a result of improper administrative practice of the law-enforcement authorities and deficiencies of the national criminal procedural legislation. Thus, the violation in question shall be remedied by means of amendment of the respective legislation which is currently ongoing and changes in administrative practice.
2. Between 14 October 2004 and 5 May 2005, between 23 February and 31 August 2007 and on 18 December 2006 the applicant was detained according to the judgments delivered following the preparatory hearings for the trial, and the rulings had neither given any reasons nor set any time-limits for his detention as far as Ukrainian legislation at the material time did not contain any requirement for a domestic court, when committing a person for trial, to give reasons for changing the preventive measure or for continuing the detention of an accused, or to fix any time-limit when maintaining the detention. Therefore, the violation as regards this period occurred as a result of deficiencies of the national legislation shall be remedied by means of amendment of the respective criminal procedural legislation which is currently ongoing.
3. Between 22 and 23 November 2006 the applicant's detention was found to be lawful by the domestic courts, thus depriving the applicant of any basis for a compensation claim in that regard. Therefore, the violation occurred as a result of improper court's practice and accordingly, no legislative measures seem to be necessary.

As regards violations of Article 6 of the Convention

The violations of Article 6 of the Convention found in the present case occurred as a result of improper administrative practice.

In the context of change of judicial practice it should be noted that on 20 October 2011 the Constitutional Court of Ukraine adopted a decision concerning official interpretation of the provisions of Article 62 of the Constitution of Ukraine as regards the prohibition for the prosecution to be based on evidence obtained illegally.

The Constitutional Court, referring to the provisions of national law and the Court's case-law, indicated that the accusation of a crime can not be based on evidence obtained as a result of investigation and search operations violating the constitutional provisions (for example, when a person is denied access to counsel), or in violation of the procedure established by law, or when such operations are conducted by a person not authorized to perform such activities.

This decision is of key importance in the context of preventing the violation of Article 6 § 3 (c) of the Convention as regards the right to counsel and right against self-incrimination.

As to the violations of Article 6 § 1 the measures taken as to dissemination and publication of the Court's judgment shall be considered sufficient to prevent similar violations in future since they had isolated character.

The judgment was translated into Ukrainian and published in the official Government's print outlet – Official Herald of Ukraine [Ofitsiinyi Visnyk Ukrainy], no. 88 of November 2011. The summary of the judgment was published in the Government's Currier [Uriadovyi Kurier], no. 155 of 26 August 2011 and placed on the Ministry of Justice official web-site.

By the letters of 25 August 2011 explanatory notes as to the conclusions of the Court in the abovementioned judgment were sent to the Supreme Court of Ukraine, High Specialized Court of Ukraine for civil and criminal cases and Ternopil Regional Court of Appeal, Khmelnytskyy Town-District Court and Shepetivskyy Town-District Court; the Ministry of Interior, Khmelnytsky Regional Department of the Ministry of Interior and Khmelnytskyy City Police Department as well as Pivdenno-Zakhidnyy Police Department of Khmelnytskyy; General Prosecutor's Office, Khmelnytsky Regional Prosecutor's Office and Khmelnytskyy City Prosecutor's Office.

Moreover, the Court's conclusions in the above judgment were included into the submission to the Cabinet of Ministers of Ukraine as to execution of ECRH judgments (as of December 2011). The Cabinet of Ministers of Ukraine instructed relevant authorities to take measures to remedy the violation found, to avoid similar violations and bring their practices in accordance with the requirements of the Convention.

The Court's conclusions in the above case were reported to the judges of the above courts, the staff of the Ministry of Interior and General Prosecutor's Office, as well their subordinate departments.

Conclusions of the Respondent Government

The Government believe that they show due diligence in fulfillment of obligations arising from the above judgment and will inform the Committee of Ministers about further developments and measures taken.