PROTECTION OF WITNESSES AND VICTIMS OF TORTURE IN PENITENTIARIES

Authors:

Vadym Chovhan, Doctor of Public Law,
Penitentiary Issues Expert
Kostiantyn Avtukhov, Master of Law,
CEO of GO “Ukraine without Torture”

November 2021

CONTENT

INTRODUCTION

This publication is prepared under the Human Rights for Ukraine (HR4U) project, implemented by the United Nations Development Programme in Ukraine with financial support from the Ministry of Foreign Affairs of Denmark during 2019-2023.

The opinions, attitudes, and assessments contained in the report do not necessarily reflect those of the Ministry of Foreign Affairs of Denmark, the United Nations Development Programme or other UN Agencies.

Torture is a crime that is always committed by or with the participation of the state. Even when torture is committed by civilians, it is not recognized as such until it is proven that the state has facilitated, ignored or taken measures to stop the crime.

Such understanding of torture follows from Article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (known as UNCAT):

> "*For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind,* ***when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity***" (Highlighted by the author).

The state's participation in torture in penitentiaries has specific consequences for victims and witnesses, as they are under the control of the offender. In particular, this can lead to the following:

- They may not leave the penitentiary freely in the event of continued torture or intimidation;
- Their communication with the outside world may be limited or even stopped, making it difficult or impossible to report on events following torture;
- Violators may exercise physical and mental coercion to alter testimony or make victims/witnesses refuse to testify. At the same time, such coercion may be carried out both directly by penitentiary staff and through other convicts;
- Violators may otherwise influence the witness/victim by applying excessive restrictions of rights within or outside of law (accommodation in an "undesirable" cell, prohibition to engage in a favourite activity or participate in work and leisure, obstruction of personal belongings, restriction of communication, etc.).

What measures are taken in Ukraine and the world to protect against such consequences? We have studied this issue in our study. Below are the results of our search, as well as conclusions and recommendations for improving the protection of witnesses/victims of torture in Ukrainian penitentiaries.

1. INTERNATIONAL OBLIGATIONS

1.1. UN

1.1.1. UN Convention

Article 13 of the UNCAT contains a separate provision on the protection of witnesses of torture. According to it, the state should take measures to protect witnesses from any form of ill-treatment or intimidation in connection with their complaints or testimony.

In addition, the protection of victims of torture is provided for in Article 14 of the Convention, which requires compensation and restoration of rights. The concept of restoration of rights has a broad interpretation and includes guarantees of victims' rights. The UN Committee against Torture in its General Comment No. 3 2012 indicates that the restoration of rights requires, inter alia, guarantees that the crime is not to be repeated[1]. In this regard, the Committee outlines a wide range of obligations under the Convention:

> "*To guarantee non-repetition of torture or ill-treatment, States parties should undertake measures to combat impunity for violations of the Convention. Such measures include issuing effective, clear instructions to public officials on the provisions of the Convention, especially the absolute prohibition of torture. Other measures should include any or all of the following: civilian oversight of military and security forces; ensuring that all judicial proceedings abide by international standards of due process, fairness and impartiality; strengthening the independence of the judiciary; protecting human rights defenders and legal, health and other professionals who assist torture victims; establishing systems for regular and independent monitoring of all places of detention; providing, on a priority and continued basis, training for law enforcement officials as well as military and security forces on human rights law that includes the specific needs of marginalized and vulnerable populations and specific training on the Istanbul Protocol for health and legal professionals and law enforcement officials; promoting the observance of international standards and codes of conduct by public servants, including law enforcement, correctional, medical, psychological, social service and military personnel; reviewing and reforming laws contributing to or allowing torture and ill-treatment…*".

The UN Committee against Torture thus interprets guarantees of non-repetition of crime broadly, including general measures to prevent torture. According to its interpretation, by taking preventive and control measures similar to those listed above, "States parties may also be fulfilling their obligations to prevent acts of torture under Article 2 of the Convention [*article on torture prevention – author's note*]. Additionally, guarantees of non-repetition offer important potential for the transformation of social relations that may be the underlying causes of violence and may include, but are not limited to, amending relevant laws, fighting impunity, and taking effective preventative and deterrent measures."

The right not to be subjected to torture is part of the right to an effective legal remedy protected by both the Convention and other international instruments such as the International Covenant on Civil and Political Rights.

[1] Paragraph 31, General Comment No. 3 (2012) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: implementation of article 14 by States parties (CAT/C/GC/3) https://www.ohchr.org/Documents/HRBodies/CAT/CAT-C-GC-4_EN.pdf

UN Human Rights Committee in the *Hugo Rodriguez v. Uruguay* case considers the right to effective remedies contained in the Covenant as requiring an investigation, compensation for damage, and ensuring that such violations do not occur in the future;[2].

The UN General Assembly, in its resolution "Torture and other cruel, inhuman or degrading treatment or punishment", also drew attention to the need to protect witnesses and victims of torture[3]. "Alleged victims of torture or ill-treatment, witnesses, those conducting the investigation and their families shall be protected from violence, threats of violence or any other form of intimidation that may arise pursuant to the investigation." (paragraph 3b).

Moreover, the General Assembly even proposed one of the ways to protect victims and witnesses, which concerns penitentiaries:

"*Those potentially implicated in torture or ill-treatment shall be removed from any position of control or power, whether direct or indirect, over complainants, witnesses and their families, as well as those conducting the investigation*" (paragraph 3b).

UN international instruments contain other, more detailed, standards for the protection of the rights of witnesses/victims of torture.

1.1.2. Mandela rules

Rule 57.2 of the UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) stipulates that convicts who complain of a violation of their rights must not be exposed to any risk of retaliation, intimidation or other adverse consequences.

If an investigation has been initiated as a result of torture, "steps shall be taken immediately to ensure that all potentially implicated persons have no involvement in the investigation and no contact with the witnesses, the victim or the victim's family" (Rule 71.3).

1.1.3. Istanbul Protocol

The Istanbul Protocol contains international standards for the effective investigation of torture, in particular as regards the documentation (registering) of torture. It requires investigators to give constant consideration to the effect of the investigation on the safety of the person alleging torture and other witnesses (para. 95).

The Istanbul Protocol contains a number of special standards for the protection of witnesses and victims.

First, the Protocol contains a standard that those who are potentially involved in torture or ill-treatment should be removed from any position of control or power, whether direct or indirect, over complainants, witnesses or their families (para. 80). Control or power means both direct and indirect control or power (para. 95).

[2] Rodriguez v. Uruguay, Communication No. 322/1988, U.N. Doc. CCPR/C/51/D/322/1988 (1994).
[3] Resolution adopted by the General Assembly [on the report of the Third Committee (A/55/602/Add.1)] 55/89. "Torture and other cruel, inhuman or degrading treatment or punishment"

Second, the Protocol sets other standards for the questioning of witnesses/victims:

a) **Sensitivity.** Due to the nature of the torture and trauma that people suffer as a result of it, which often includes feelings of helplessness, it is particularly important to be sensitive to victims of torture and other witnesses (para. 88).

b) **Protection against the consequences of a statement (complaint) about a crime.** The state should protect victims of torture, witnesses and their families from violence, threats of violence or any other form of intimidation that may arise during the investigation. Investigators are obliged to inform witnesses about the consequences of their involvement in the investigation and about any further events in the case that may affect them (para. 88).

c) **Informing**. From the beginning, the victim should be informed, where possible, of the nature of the proceedings, why his or her testimony is required, whether the evidence provided by the victim can be used and how exactly. Investigators should explain to the witness/victim which details of the investigation will be public information and which will be confidential. A person has the right to refuse to cooperate with the investigation in whole or in part (para. 91).

Third, the Protocol imply that one should do no harm. If a witness may be endangered due to the evidence provided, the investigator should seek other form of evidence (para. 96). In other words, it is not acceptable to investigate torture "at any cost" if it may put the convicted witness at risk.

The protocol describes the specifics of this risk in penitentiaries as follows:

"*Prisoners are in greater potential danger than persons who are not in custody. Prisoners might have different reactions to different situations. In one situation, prisoners may unwittingly put themselves in danger by speaking out too rashly, thinking they are protected by the very presence of the "outside" investigator. This may not be the case. In other situations, investigators may come up against a "wall of silence", as prisoners are far too intimidated to trust anyone, even when offered talks in private. In the latter case, it may be necessary to start with "group interviews", so as to be able to explain clearly the scope and purpose of the investigation and subsequently offer to have interviews in private with those persons who desire to speak. If the fear of reprisals, justified or not, is too great, it may be necessary to interview all prisoners in a given place of custody, so as not to pinpoint any specific person…*" (para. 97).

Comments on the Protocol indicate that, in addition to the removal of those involved, States should criminalize victims and witnesses and complement these measures with practical measures to protect victims and witnesses[4]. In this context, international human rights organisations are calling for programmes to protect victims and witnesses of torture from intimidation. Such programmes should have a legal basis and be established, not temporary. It is also recommended to criminalize intimidation and bribery of victims and even counter-charges against complainants[5].

[4] A practical guide to the Istanbul Protocol – for lawyers Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Second edition 2007, International Rehabilitation Council for Torture Victims (IRCT) 2009
Published 2009. – p. 31.

[5] Taking Complaints of Torture Seriously. Rights of Victims and Responsibilities of Authorities, The Redress Trust, 2004. – p. 65

1.1.4. UN Special Rapporteur on Torture

The UN Special Rapporteur on Torture is a UN institution that develops standards for combating torture. In his reports, the Special Rapporteur drew attention to the problems of protection of victims/witnesses of torture. He also called for programmes to protect them:

> "*Consideration should be given to establishing protection programmes for witnesses of torture and similar ill-treatment, which should also cover convicted persons*"[6].

In addition, the Special Rapporteur pointed to the need to transfer prisoners to other penitentiaries in cases where they are under threat. In such an institution, special measures must be taken to ensure their safety[7].

1.1.5. Other UN standards

The UN has its own standards for the protection of victims, witnesses and others who cooperate with the UN in the context of monitoring the observance of human rights by its agencies and staff. A whole section of the UN Manual on Human Rights Monitoring is devoted to such standards[8].

From the point of view of the authors of the manual, protection consists in the application of all measures that can help prevent or minimize the risk of harm and/or reduce any threats that may endanger the life or physical integrity of the cooperating persons and/or stop harm to them. Safeguards include both those used to prevent risk (preventive) and those taken when such a person is threatened or repressed (reactive)[9].

From the point of view of the authors of the manual, protection is a joint responsibility of several entities:

1. A state with primary responsibility for the protection and implementation of human rights standards;

2. Victims, witnesses and other persons involved. Individual responsibility for self-defence is that such individuals make their own choices about the risks they consider acceptable or unacceptable. Risk assessment in this case is subjective and depends on the perception of political, social and security contexts and may change over time.

3. Those who may affect the safety of those who cooperate, directly or indirectly (for example, non-governmental organisations). Human rights officers bear a professional responsibility to do no harm. Victims/witnesses may misjudge the risks to their safety by working with human rights officers. Therefore, their professional responsibility is not to endanger the lives and health of witnesses/victims.

---

[6] Paragraph 26 (k), Report of the Special Rapporteur on the Question of Torture Submitted in Accordance with Commission Resolution 2002/38 (E/CN.4/2003/68) // https://documents-dds-ny.un.org/doc/UNDOC/GEN/G02/160/49/PDF/G0216049.pdf?OpenElement

[7] Ibid.

[8] Chapter 14, Protection of Victims, Witnesses and Other Cooperating Persons. Manual on Human Rights Monitoring // https://www.ohchr.org/Documents/Publications/Chapter14-56pp.pdf

[9] Ibid, paragraph 5.

Protection is based on the informed consent of witnesses/victims who should be fully informed of the potential consequences of their testimony. At the same time, the consent must be specific, in order to understand the further fate of the evidence and risks.

Moreover, even if consent has been given, the potential consequences for the safety of the witness should still be assessed. If there is a risk of endangering any of them, human rights officers should not disclose the information or should do it in a manner that removes the risk (e.g. providing information on a general pattern without revealing specific details). In this context, the best protection is to understand the potential risks and be careful in all interactions with witnesses/victims[10].

The UN has also developed a manual called "The Good Practices for the Protection of Witnesses in Criminal Proceedings involving Organized Crime" Although these standards apply to organised crime, they contain a number of guidelines relevant to victims/witnesses of torture.

For example, with regard to the penitentiary system, special measures may include:

a) isolation from the total mass of prisoners;

b) change of the convicted witness' name;

c) special transportation conditions for taking a stand in court;

d) isolation in some sections of the prison or even in special prisons[11].

The risks to convicted witnesses after release from prison should also be considered. Methods of protection at this stage may include relocation under a new name. At the same time, family members of such persons should also be included in witness protection programmes. In addition, if the victim commits a new crime after release, the risks to him/her as a former witness must be taken into account in future accommodation in the institution — it must be separate from the prisoners who pose a threat[12].

[10] Ibid, paragraph 7.
[11] The good Practices for the Protection of Witnesses in Criminal Proceedings involving Organized Crime, UNODC, 2008 // https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/Good_Practices_for_the_Protection_of_Witnesses_in_Criminal_Proceedings_Involving_Organized_Crime.pdf, p. 20.
[12] p. 21.

1.2. COUNCIL OF EUROPE

1.2.1. European prison rules

European prison rules do not contain special standards for the protection of witnesses/victims in prisons. However, they contain general guidelines for the protection of any witnesses (primarily at large) from convicts.

In particular, the Rules state that contacts of convicts may be restricted if it is necessary for criminal proceedings, maintenance of order, security, crime prevention, and witness protection (Rule 24.2).

European prison rules also state that convicts should not be subjected to any punishment, retaliation, intimidation, repression or other adverse consequences as a result of their complaints (Rule 70.9). This rule fully applies to cases of complaints of ill-treatment, allegations of crime in connection with torture.

1.2.2. European Committee for the Prevention of Torture

In its 27th General Report 2017, the European Committee for the Prevention of Torture developed standards for prisoner complaint mechanisms.

With regard to witnesses of torture, the Committee emphasized:

> "*The necessary efforts should also be made to ensure that complainants remain free from intimidation and reprisals. In this connection, staff at all levels should receive the clear message that any kind of threats, attempts to prevent complaints from reaching the relevant complaints bodies, or intimidatory or retaliatory action will not be tolerated and will be the subject of appropriate sanctions*"[13].

The Committee also draws attention to the protection of witnesses of torture during its visits to various countries. For example, in its 2020 report on a visit to Ukraine, the Committee wished to be informed whether the State Bureau of Investigation had taken any measures to ensure the anonymity and security of witnesses of torture in the Berdiansk Penitentiary Colony No. 77[14].

[13] Paragraph 85, 27th General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment // https://rm.coe.int/16807bc1cf

[14] Paragraph 35, Report on the CPT visit to Ukraine in 2020 // http://hudoc.cpt.coe.int/eng?i=p-ukr-20200804-en-8

2. FOREIGN EXPERIENCE IN PROTECTING VICTIMS/WITNESSES OF TORTURE IN PRISONS

In order to study the foreign experience of protection of victims/witnesses of torture, we analysed the legislation and publications on this topic in English-speaking and French-speaking countries. Only 4 of them had information on the subject of our study (the US, the UK, France, Belgium).

2.1. United States

The United States has clear procedures for protecting witnesses in prisons. There are so-called Protective Custody Units to do this[15]. Detention in such areas is used as an exceptional measure in case of danger. When the danger decreases, the prison system should try to integrate the witness into the general prison population. At the same time, the witness continues to be a participant in the Witness Protection Programme.

The measures provided in this context are that the witness is separated from those who pose a threat, the location of the witness cannot be disclosed to those who make the request, and transportation is carried out on an individual basis.

If the level of threat to the witness does not provide grounds for participation in the Witness Protection Programme, the investigative body shall provide any other protection it deems necessary.

If, after release, a witness refuses to continue to participate in the Witness Protection Programme, the prison system must cooperate with the probation authorities in an attempt to release the witness to a jurisdiction with no threat to him, including with regard to release through semi-open penitentiaries.

Witnesses living in the Protective Detention Centre are considered to live more comfortably than other prisoners. They have free and unlimited access to phone calls and cable TV, as well as the opportunity to use their own money to buy food, appliances and other household items[16].

In addition to the witness protection programme, prisons also have special shelters for prisoners who have been sexually harassed. Despite the fact that conditions in such centres vary considerably from one institution to another, living there is more limited than among the general mass of prisoners.

Some large prisons have separate protective facilities, but in most of them protective detention involves being in so-called administrative segregation (so-called administrative segregation, “Ad seg”). It means that the prisoner is in the cell twenty-three hours a day and has to eat there[17].

Protective detention centres have been criticized by US lawyers. In their view, the theory of protective imprisonment differs from practice. In practice, such protection means placement in a Special Housing Unit, which is commonly used for disciplinary action. Therefore,

[15] Section 708. Prisoner-witness, Criminal Resource Manual, https://www.justice.gov/archives/jm/criminal-resource-manual-708-prisoner-witnesses
[16] Protective custody // https://law.jrank.org/pages/9524/Protective-Custody.html
[17] Ibid.

witnesses are subject to almost the same restrictions there as convicts who are placed there in connection with the commission of offense. In particular, they are subject to such restrictions as 23-hour isolation in a single cell and reduced number of telephone calls and leisure[18].

Thus, it is necessary to distinguish placement in protective centres in order to protect witnesses from placement in protective centres in the general order. Moreover, the witness protection programme is applied at the initiative of the prosecutor's office, while placement in ordinary protective centres can be carried out by the penitentiary administration. In addition, there is so-called Sex Offender Management Programme when convicts who have committed sexual crimes are put into special protection centres[19].

Thus, the request for placement in a protective cell for convicts becomes a personal dilemma because it is necessary to decide between the best regime of detention and the risks to life and health.

A distinction should be made between voluntary placement in a protective centre and involuntary placement. For example, New York State distinguishes between these types of imprisonment[20].

1. ***Voluntary***. These are prisoners who are potential victims or witnesses who may be intimidated or who are unable to live with the general mass of convicts and who, for good reasons, may be restricted from communicating with the general mass of prisoners. They voluntarily agree to the status of special protection.

   A prisoner in this status may request to be transferred to the general mass of prisoners. Such a request must be considered, and within 14 days, the prisoner must be either included in the general mass or considered by a commission to determine the need for involuntary protection.

2. ***Involuntary***. These are prisoners who *can be* potential victims or witnesses who may be intimidated or who are unable to live with the general mass of convicts and who, for good reasons, may be restricted from communicating with the general mass of prisoners. They do not voluntarily agree to the status of special protection.

   The status of such a prisoner shall be reviewed every seven days for the first two months and at least every 30 days thereafter. The review is carried out by a commission of three members, consisting of staff from different departments of the institution.

US Prison Rape Elimination Act and other standards of protection

The Prison Rape Elimination Act (PREA) is a federal law passed in 2003 in response to a significant number of rapes in US prisons.

Although this law does not directly apply to victims of torture, the protective measures that follow from it are fully applicable to them as well. For example, after this law had been

[18] Prison Protective Custody // https://prisonerresource.com/prison-life/protective-custody/
[19] Ibid.
[20] Directive "Protective Custody Status" of the New York State Department of Corrections and Community Supervision // https://doccs.ny.gov/system/files/documents/2020/12/4948.pdf

adopted, a special commission was set up to recommend reforms to protect vulnerable convicts. For example, the Commission indicated:

> "*Protective measures may include moving a prisoner to a different housing unit, transferring them to a different facility, or adjusting staff work assignments. Transfers, however, should not be an automatic response, especially since they may involve disrupting an investigation, provision of needed services, and in some cases access to family. Talking to prisoners about their safety concerns can be constructive and suggest a range of possible precautions. Case-by-case assessments will help prevent transfers that prisoners could perceive as punitive. Because segregation can have a negative impact on a prisoner's mental health, staff should only use segregation when absolutely necessary to ensure the safety of the prisoner and integrity of the investigative process. ... some prisoners who would otherwise report abuse remain silent because they cannot bear the restrictions of life in segregation.*"[21].

Thus, the Commission drew attention to the downside of protective measures for vulnerable convicts, which is additional isolation and restriction of various rights.

In response to the Commission Report, the prosecutor's office interpreted it, specifying measures in the context of the protection of prisoners during the investigation of relevant crimes[22]:

- protection of prisoners and staff who report abuse or cooperate with the investigation from retaliation by other prisoners or staff;

- protection measures, including change of accommodation or relocation of prisoners, victims or their offenders, removal of involved personnel or perpetrators from contact with victims, and emotional support for prisoners or staff who fear retaliation for reports of sexual violence or co-operation with investigators;

- monitoring the conduct and treatment of prisoners or staff who report abuse or cooperate with the investigation, including disciplinary reports on prisoners and changes in living conditions or participation in programmes, for at least 90 days to see if any incidents that could be hidden revenge have taken place;

- discussing any events with the prisoner or staff member to determine whether retaliation is taking place and, if so, taking immediate action to protect the prisoner or staff member.

Lawyers have developed some general standards for the protection of the rights of vulnerable convicts, including witnesses. In 2010, the American Bar Association approved a set of standards for the treatment of prisoners.

Standard 23-5.2 deals with the prevention and investigation of violence[23]. According to the standard, correctional and governmental authorities should take all practicable actions to reduce violence and the potential for violence in correctional facilities and during transport, including:

---

[21] National Prison Rape Elimination Commission Report, 2009 // https://www.ojp.gov/pdffiles1/226680.pdf, p. 106.

[22] Prison Rape Elimination Act [Old Research Report], 2012-R-0423, by C. Reinhart, Chief Attorney // https://www.cga.ct.gov/2012/rpt/2012-R-0423.htm

[23] ABA Standards for Criminal Justice, 3rd Ed., Treatment of Prisoners // https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/treatment_of_prisoners.pdf

- using a validated objective classification system;
- preventing crowding;
- ensuring adequate and appropriate supervision of prisoners during transport and in all areas of the facility;
- preventing opportunities for prisoners to exercise coercive authority or control over other prisoners, including through access to another prisoner's confidential information;
- preventing opportunities for gangs to gain any power;
- promptly separating prisoners when one may be in danger from another;
- preventing staff from tolerating, condoning, or implicitly or explicitly encouraging fighting, violence, bullying, or extortion;
- regularly assessing prisoners' level of fear of violence and responding accordingly to prisoners' concerns.

2.2. The United Kingdom

The United Kingdom favours assessing risks of harm to convicts. The risk assessment of such damage is carried out at various stages, such as distribution to the institution, or even when filing complaints.

The ordinary and confidential access complaint forms include a box for the prisoner to tick if the complaint is about violence, including threats or intimidation. This is to enable violence reduction procedures to be implemented where necessary, in accordance with the instructions self-harm or harm from others[24].

Given that the British prison system is cell-based, some instructions also apply to the joint accommodation of prisoners in cells. Categories of prisoners are identified according to the risks of harm. Prisoners at high risk are those, "for whom there is clear evidence of a high risk that they may be seriously aggressive towards their cellmates, or that their cellmates may be seriously aggressive towards them". In case of high risk, restrictions on living in the same cell apply[25].

[24] Paragraph 5.6, Prisoner Complaints Policy Framework, PSI 02/2012, Re-Issue Date: 20th September 2021, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1018922/prisoner-complaints-policy-framework-mbu-appeals-addition.pdf

[25] Paragraph 1.4, The Cell Sharing Risk Assessment, PSI 20/2015, 11 May 2015, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/910904/PSI_20_2015_Cell_sharing.pdf

2.3. France

The French legal system does not provide for a special procedure for the protection of rights of victims/witnesses of torture in penitentiaries.

However, the French Code of Criminal Procedure, which regulates the execution of sentences and detention, contains a separate procedure for ensuring the safety of convicts. It can also be applied to convicted victims/witnesses. In particular, Article R57-7-62 provides for the use of solitary confinement for protection or security purposes, which may be initiated by the penitentiary administration or the convicted person. Such confinement is not considered a disciplinary measure.

The convict is placed in isolation alone in the cell. He/she reserves the right to information, appointments, written and telephone correspondence, worship and use of his/her personal bank account. In this case, the convict may not participate in walks and group activities, if permission to participate in a particular specific event is not granted by the head of the institution.

However, the head of the institution organises, as far as possible and depending on the personality of the convict, joint activities for convicts in disciplinary isolation.

The duration of such isolation at the initiative of the administration of the institution is 3 months and may be repeatedly extended by the prison administration, but in the end may not exceed 2 years. However, even in this case, in exceptional cases, detention by the Minister of Justice may be extended for more than 2 years.

France also has a special "référé" procedure, which provides for recourse to an administrative court to take immediate measures to protect rights. Article L521-2 of the French Code of Administrative Procedure provides that such application is possible if it is necessary to protect a fundamental freedom to which a public authority may cause substantial and manifestly unlawful damage (une atteinte grave et manifestement illégale). According to this procedure, the court must make a decision within 48 hours.

The "référé" procedure can also be used in cases of protection of witnesses/victims from violations of rights. In this case, the court may order any measures, including transfer to another institution.

For example, in 2015, a prisoner who had suffered negative consequences from the penitentiary administration because of his complaint about searches went to court on a "référé" basis to transfer from the Fleury-Mérogis detention centre to another institution. The administrative court denied him. However, the convict appealed this decision to the State Council[26], which ordered the prison authorities to resolve the issue of transferring the prisoner to another institution within 24 hours. The reason for this decision was that the prisoner was in a vulnerable situation and was subjected to regular revenge because of his complaints against prison staff[27].

[26] The highest instance in the system of administrative proceedings.
[27] Conseil d'État, Juge des référés, 30/07/2015, 392100 // https://www.legifrance.gouv.fr/ceta/id/CETATEXT000030969396/

2.4. Belgium

The main act regulating the activities of penitentiaries in Belgium is the Prison Act of 2005. This act is also named after its main author, Dupont's Law. In Western Europe, it is often cited as an example of progressive penitentiary laws, as it has absorbed a significant number of standards from the European Prison Rules.

Section 3 of the Law is called "Special Security Measures". It stipulates that the head of the institution may take special security measures against a prisoner if there are signs of a threat to order or security.

The specific security measure must be proportionate to the threat. Before making a decision on the application of a security measure, the head of the institution must hear the convict. In cases where the threat makes waiting impossible, the convict is heard as soon as possible. The convict is informed about the corresponding decision and about its motives ***in writing***.

If the threat excludes delays, other prison staff may temporarily apply special security measures, provided that the head of the institution is notified immediately.

The Special security measure may not be a disciplinary action, even if it is motivated by facts which may lead to disciplinary action.

The following special safety measures are allowed, taken alone or in combination for as short a time as possible:

- seizure of certain items;
- exclusion from certain joint or individual activities;
- observation day and night (following the needs of night rest);
- mandatory stay in the allotted living space;
- placement in a safe cell, without items which use may pose danger.

These special security measures may not be carried out for more than seven days. They can be continued by a motivated decision of the head of the institution after hearing the convict. Such measures may be extended three times maximum.

In case of insufficiency of the specified measures, "special safety measures" can be taken. They may last for 2 months (with the possibility of extension) and may consist of restrictions on various rights, but in the first place provide for isolation from other convicts. The penitentiary administration is obliged to record the taking of such measures in a special central register (§6, Article 118).

2. 5. Other countries

Special prisons have been set up in Hong Kong and the Netherlands to ensure the safety of high-risk witness prisoners. Placement in such centres consists in isolation from other convicts, especially from those who are to testify in the same case[28].

[28] Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organised Crime, UNODC, 2008 // https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/Good_Practices_for_the_Protection_of_Witnesses_in_Criminal_Proceedings_Involving_Organized_Crime.pdf, p. 20.

3. LEGISLATION AND PRACTICE IN UKRAINE

3. 1. Legislation

Issues of protection of witnesses of crimes in Ukraine are regulated by the Law of Ukraine "On Safety of Persons Participating in Criminal Proceedings". This law contains a separate article on ensuring the safety of persons in penitentiaries or detention centres (Article 19).

In accordance with this article, the safety of persons in penitentiaries or detention centres is to be ensured by the measures referred to in Articles 8[29], 11[30], 15[31], 16[32] of this Law, with the exceptions arising from the requirements of the regime of their detention.

In addition, the following measures may be applied:

a) transfer to another penitentiary or detention centre;

b) separate holding.

In addition to this law, the Penitentiary Code of Ukraine stipulates that convicts have the right to security (Article 10). This article stipulates that in the event of danger to the life and health of convicts for whom, in accordance with the law, security measures have been decided to apply in connection with their participation in criminal proceedings, the administration of the penitentiary shall take measures to ensure the safety of these persons. In addition, these persons may be subjected to solitary confinement[33]; transfer to another penitentiary.

Details of the application of security measures to witnesses of crimes (and, accordingly, to witnesses/victims of torture) are enshrined in a special Order of the Ministry of Justice[34].

According to this Order, the grounds for taking measures to ensure the safety of persons referred to in Article 2 of the Law are information indicating the existence of a real threat to their lives, health, housing, and property.

Reasons for taking measures to ensure the safety of detainees and convicts involved in criminal proceedings may be:

- statement of a participant in criminal proceeding, a member of his/her family or a close relative;

- appeal of the head of the relevant state body;

- obtaining operational and other information about the threat to life, health, housing, and property of these persons.

[29] Personal protection, protection of housing and property.
[30] Replacement of documents and change of appearance.
[31] Ensuring the confidentiality of personal data.
[32] Closed court session.
[33] It is noteworthy that a similar provision of the Law of Ukraine "On Safety of Persons Participating in Criminal Proceedings" indicates "separate detention", not "isolation". The definition of these types of detention is not disclosed, and therefore the question of how these types of detention differ was remained open by the legislator.
[34] Order of the Ministry of Justice of Ukraine "On approval of the Procedure for Implementing Measures to Ensure Safety of Persons Held in Penitentiaries and Detention Centres" No. 1408/5 dated 25.04.2017.

Security measures are applied upon a reasoned decision of the head of the detention centre or penitentiary, authorised by the prosecutor. They consist of being held in a separate cell of the ward-type room (solitary cell), detention centre, or solitary confinement cell until the end of the inspection, elimination of danger, final resolution of the conflict or receipt of a warrant for transfer to another detention centre or penitentiary.

The head of the detention centre or penitentiary where the detained person or convict is, who participates in criminal proceedings and in respect of whom security measures are taken, establishes a list of necessary measures and methods of their implementation, guided by the specific circumstances of the case and the need to eliminate the existing threat.

The head of the detention centre or penitentiary who implements such measures shall inform the investigator, prosecutor, court where criminal proceedings concerning criminal offenses are conducted, as well as the investigating judge if the decision to apply security measures was made by him/her.

The head of the detention centre or penitentiary also has the right to request the investigator, prosecutor, court conducting criminal proceedings for criminal offenses to cancel the security measures taken.

As for the commission of crimes against detainees by the administration of these institutions, the Order is mandatory. If the State Bureau of Investigation (SBI) investigates a crime on the grounds of ill-treatment of such persons by the State Penitentiary Service of Ukraine (SPSU) staff, they shall be immediately transferred to another institution:

> "*… on the basis of a reasoned decision of the investigator or prosecutor in such trials, the person taken into custody must be immediately transferred to another detention centre or other detention facility specified in the decision with simultaneous notification of the person or body conducting criminal proceedings, … And the relevant prosecutor who oversees compliance with the law during the pre-trial investigation*" (Paragraph 9, Section II)[35].

Security measures may also be taken at the initiative of the convict himself or a person taken into custody. In this case, they have the right to apply to any official of the penitentiary body or institution with a request for personal security. In this case, the official is obliged to take immediate measures to ensure the personal safety of the convict.

Upon receipt of the application (notification) on the threat to the safety of the convict, the official of the detention centre or penitentiary has to immediately report it to the head or acting head of the detention centre or penitentiary.

If the statement (notification) on the threat to the safety of the convict contains information about the criminal offense, the head or acting head of the detention centre or penitentiary on duty shall send the statement (notification) to the relevant law enforcement agency.

However, the Order does not provide for a procedure for a convict or detainee to apply to an investigator or prosecutor if they are witnesses or victims of torture. Even if SPSU officers were involved in the torture, the Order does not specify the procedure for requesting a transfer to another institution. After all, in this case, submitting an application for security to

[35] Author's note: This norm does not apply to convicts but only to detainees. The motivation of the legislator who did not extend the effect of this norm to convicts remains unclear. Similarly, this rule does not apply to witnesses of torture, but only to victims.

the administration of the institution can be dangerous, and submitting it to the SBI investigator/prosecutor is not regulated.

The order also stipulates that when deciding on the transfer of a convict to another penitentiary, a reasoned opinion is drawn up, approved by the head or acting head of the interregional department for execution of criminal punishments of the Ministry of Justice. The opinion is accompanied by materials, collected during the circumstances check, which threaten the safety of the convict. However, the Order does not contain clear grounds for the decision to transfer to another institution on the basis of the decision of the head of the institution (and not the prosecutor or investigator).

3.2. Practice

In order to learn about the practical aspects of the application of national law, we conducted two interviews with prosecutors and SPSU employees experienced in protecting witnesses/victims in prisons. The following statements are based on their interviews.

The above legislation has recently been amended to facilitate the protection of witnesses/victims of torture in prisons.

For example, if previously the transfer of a witness/victim from one detention centre to another required the consent of the investigator or investigating judge, now such consent is not required — a simple notification is sufficient. In addition, such a transfer is "urgent", although this concept is evaluative.

The situation is more complicated when it comes to penitentiaries. Transfer to another institution of the same level of security and type takes some time, if within the jurisdiction of one SPSU interregional department. In case of transfer to an institution under the jurisdiction of another interregional department, it is carried out through the "central office"[36], which significantly slows down the protection of the witness/victim. If protection is required immediately, it is carried out by transferring to a separate cell, which may require an application by the convict. However, this measure is also problematic, as the convict actually remains under the authority of the penitentiary administration involved in torture.

Another problem is the lack of deadlines for taking protective measures. Order of the Ministry of Justice[37] does not contain such time limits, although time is crucial when it comes to witness/victim protection. In this context, it may be appropriate to set a time frame for the transfer of both detainees and convicts to another institution.

Another way of protection is to transfer a witness/victim to a temporary National Police detention facility. Such a transfer is possible on the grounds that it is necessary to participate in the investigative action. This method allows quickly protecting the witness, "pulling" him/her out of the penitentiary where there is a threat to his/her life and health.

The problem of escorting witnesses/victims is complex. First, it is the time of convoying. If the situation with the detention centre is simpler due to the availability of transport, then the situation with the penitentiary is more complicated, especially when it comes to escorting to

[36] Author's note: Department for execution of criminal punishments.
[37] This is the Order of the Ministry of Justice of Ukraine "On approval of the Procedure for Implementing Measures to Ensure Safety of Persons Held in Penitentiaries and Detention Centres" No. 1408/5 dated 25.04.2017.

another region. In this case, it may be necessary to wait for suitable guards, i.e. to "transfer" from one established escort route between penitentiaries to another, as not all penitentiaries are connected by a "direct flight".

With regard to the application of criminal liability for witness/victim tampering in order to refuse to testify or change them (Article 386 of the Criminal Code of Ukraine), this article has not been used in practice[38].

Experience of convicts

In preparation for this publication, the Kharkiv Institute for Social Research and the Kharkiv Human Rights Group published a study on the protection of the rights of convicts complaining about human rights violations. It contains testimonies of former convicts who dared to complain about other prisoners' ill-treatment in connection with their homosexuality[39].

The following is a quote from an interview with a participant in this study:

"As practice shows, when... complaints come, the examination begins, the investigation is official, with a visit to the place, and the person starts to refuse. That is, he complained but remained in the same colony, and the administration learns in one way or another that he is complaining, so he's under pressure now.

He can, of course, apply anywhere, to the prosecutor's office, to the Office of the Commissioner, and even to the same court, but he can only be provided with real assistance by the administration.

Personally, I think it makes no sense at all. It doesn't help at all and can even make things worse. So, in this case, it's necessary to resolve it informally with the administration. So to speak, see the local situation, which colony, who holds administrative positions.

They do not come, and you learn that something is happening from other convicts. And, well, let's say, then the administration solves this issue with other convicts in different ways: by threatening them or not, they might say: "If something happens to him..." or "If you even touch him...", I mean in different ways. He might be transferred to another detachment where the local administrator is allocated to him, who's called and told: "Here's a man, make sure nothing happens to him".

In other words, the administration simply has to solve this issue in such informal ways because the only informal way here that can help is to isolate the person".

The study also describes other practices in the case of convicts' complaints:

"*Let's say: It's useless scrap of paper. They are told, "even if you write to Joe Biden or whoever you want there, you'll still get nothing". And so it is. Write or not, it won't solve anything.*

...

[38] Author's note: According to court statistics for 2019, this article has never been applied.

[39] Problems of discrimination and violence by law enforcement agencies against LGBT community. The qualitative research results / D. O. Kobzin, S. V. Shcherban; Kharkiv Institute for Social Research; Kharkiv Human Rights Group. — Kharkiv: Publishing House TOV "Prava Liudyny" LLC, 2021. — pp. 36~37. Online: https://khpg.org/files/doc/1608811304.pdf

Or they might do it through other convicts, by saying: "Look, sort it out so he doesn't write". I mean tampering such people is much easier than to make a person from another caste write a complaint. It would be harder to tamper a punk through other convicts. But tampering the whole caste through other convicts by, for example, calling some top dog out there and to saying: "Tell him not to write anymore" or "Make sure he doesn't write any more complaints". That's it, this problem will be solved. It will be very easy to tamper them".

Although the cited study addresses complaints of ill-treatment of LGBT people among convicts, it is also symptomatic in the context of complaints of other human rights violations in the penitentiary system. Filing such complaints may worsen the complainants' situation, especially if there are no proper procedures in place to protect the relevant victims/witnesses of human rights violations. The complainant's situation may further worsen in the case of torture directly by a SPSU officer.

CONCLUSIONS

The threat to the life and health of witnesses/victims of torture in penitentiaries is special — it comes from persons under whose control the witnesses/victims continue to be. This determines the specifics of means needed to protect such victims and witnesses.

In the light of international standards and practices for the protection of witnesses/victims in penitentiaries, the following basic protection measures and procedures are noted:

1. Transfer to another institution.

2. Transfer to an isolated cell, or a special protected section of a penitentiary. This can be a specially created area for witness protection.

3. Special order of transportation.

4. Removal from office of persons who may be involved in torture.

5. Application of restrictions on the rights of prisoners, if necessary for their protection. Restrictions may include additional supervision, contact restrictions, and so on.

6. Assessment of the risks of harm to the convict in view of his/her individual circumstances. Taking protective measures in case of high risk.

7. Special witness protection programmes, which may also apply to persons in penitentiaries.

8. Consultations on the most appropriate protection measures with the very prisoner.

9. Sensitive procedures for questioning witnesses of torture so as not to harm them. If this method of gathering evidence poses a risk of harm to the victim, alternative ways of gathering evidence must be found. The investigation must not take place “at any cost”.

10. Special register of persons whom protective detention is applied to.

In some cases, protection measures can be not only voluntary but also coercive. Moreover, the use of remedies may worsen the situation of the prisoner, which may deter him/her from participating as a witness/victim in the investigation of torture.

The analysis of the national legislation and practice of protection of witnesses/victims in a penitentiary shows the following shortcomings: no sufficiently clear procedures, criteria, terms of application of protection measures. These shortcomings may lead to the reluctance of convicts/prisoners to participate in criminal proceedings for torture, even if they are direct victims.

RECOMMENDATIONS

1. Improve procedures, establish grounds and criteria for the use of remedies against prisoners/convicts, such as transfer to a separate cell, transfer to another institution in the event of torture or witnessing torture in a penitentiary. Define clear deadlines for the application of such measures. Such measures shall apply to both victims and witnesses of torture, both convicts and detainees.

2. Consider setting up special witness protection stations in penitentiaries / detention centres. Identify the regime and supervision peculiarities in such station. Provide the grounds and procedure for placement in such stations.

3. Introduce features for the transportation of convicts/prisoners who have witnessed or suffered torture, in order to eliminate the danger to their lives and health in connection with the relevant criminal proceedings.

4. Provide criteria for the removal of SPSU officers who might be involved in torture. Establish the procedure and deadlines for such removal, as well as the procedure for return to duty.

5. Introduce assessment of the risk of harm, including harm to witnesses/victims of torture. Provide for the possibility of indicating to convicts/prisoners that they are in danger in connection with the filing of a complaint or allegation of a crime.

6. Introduce a programme to protect witnesses of torture in penitentiaries.

7. Discuss protection measures with very witnesses/victims of torture. Develop by-law procedures to do no harm in the investigation of torture by investigators and prosecutors.

8. Introduce the practice of initiating criminal liability for tampering witnesses or victims (pursuant to Article 368 of the Criminal Code of Ukraine).

9. Introduce registration of victims/witnesses who are in the penitentiary and whom protection measures have been taken or are being taken for in connection with criminal proceedings.

10. Consider changing the job descriptions of individual SPSU members, prosecutors and investigators in order to reflect the responsibility for the protection of witnesses/victims in prisons.