COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

SECOND SECTION

CASE OF NEVMERZHITSKY v. UKRAINE

(Application no. 54825/00)

JUDGMENT

STRASBOURG

5 April 2005

FINAL

12/10/2005

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Nevmerzhitsky v. Ukraine,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr I. CABRAL BARRETO,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Ms A. MULARONI,
Ms D. JOČIENĖ, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 15 March 2005,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 54825/00) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Mr Yevgen Ivanovych Nevmerzhitsky ("the applicant"), on 21 June 1999.

2. The Ukrainian Government ("the Government") were represented by their Agents, Ms Valeria Lutkovska, succeeded by Ms Zoryana Bortnovska.

3. The applicant alleged, in particular, that the length of his detention had been unreasonable and that his detention pending trial had been unlawful (Article 5 §§ 1(c) and 3 of the Convention). He also complained under Article 3 of the Convention that he had been subjected to inhuman and degrading treatment or punishment.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 25 November 2003, the Court declared the application partly admissible.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*). The parties replied in writing to each other's observations.

7. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1).

THE FACTS

8. The applicant, Mr Evgen Nevmerzhitsky, is a Ukrainian national, who was born in Kyiv in 1970 and currently resides there. He was formerly the manager of a branch of the Poltava Bank in Kyiv. The applicant was represented by Mr Portyanik, a lawyer practising in Kyiv.

I. THE CIRCUMSTANCES OF THE CASE

9. The facts of the case, as submitted by the parties, may be summarised as follows.

A. The criminal proceedings brought against the applicant

10. On 28 September 1995 police officers seized 184,761 US dollars (USD) that had been stored by the applicant on the premises of the Poltava Bank in readiness for their sale to a customer, Y.G.L.

11. On 18 October 1995 the Investigative Division of the main department of the Ministry of Internal Affairs of Ukraine in Kyiv ("the Investigative Division") began a criminal investigation into allegations of unlawful currency transactions that had allegedly been committed by the applicant.

12. On 8 April 1997 the Investigative Department initiated criminal proceedings in respect of the involvement of the applicant and other suspects in the case. On the same date an investigator from the division decided that the applicant should be detained as a suspect pending a decision concerning the appropriate preventive measure. He was accordingly placed in custody that day.

13. On 14 April 1997 an investigator from the Investigative Division charged the applicant with, *inter alia,* engaging in unlawful currency transactions (Article 80 § 2 of the Ukrainian Criminal Code 1960 – hereafter the "UCC"), theft of substantial amounts of currency (Article 86-1 of the UCC) and tax evasion (Article 148-5 § 2 of the UCC).

14. On 8 December 1997 and 2 March 1998 the applicant was additionally charged with abuse of power by an official (Articles 165 § 2 and 166 § 3 of the UCC) and fraud and forgery committed by an official (Articles 172 § 2 and 194 §§ 1 and 3 of the UCC).

15. Between 15 January and 14 April 1998 the applicant lodged applications with the Investigative Department for a medical examination and challenged the appointment of the investigator. On 7 April 1998 the General Prosecution Service of Ukraine instructed the investigator to arrange for the applicant's medical examination. The doctors who examined the applicant recommended that he should receive medical treatment in a

facility run by the Ministry of Health due to various diseases that he suffered from, including the skin infections of scabies and eczema.

16. On 13 March 1998 the investigator charged the applicant with offences under Articles 80 § 2, 86-1, 148-5 § 2, 166 § 3, 170 § 1, 172 § 2 and 194 § 3 of the UCC.

17. On 8 September 1998 the investigation into the case was completed and the accused, including the applicant, were allowed to inspect the case-file. On 9 August 1999 the accused finished their inspection.

18. On 9 August 1999 the criminal case-file was sent to the Kyiv Prosecution Service for approval of the indictment.

19. On 13 August 1999 the prosecution service transmitted the case to the Kyiv City Court (the "City Court").

20. On 27 August 1999 the Moskovsky District Court of Kyiv rejected as unsubstantiated the applicant's complaint against the investigator of the Investigative Department, in which he had claimed that the investigator had acted unlawfully and requested that criminal proceedings be instituted against him for abuse of power.

21. On 1 November 1999 the City Court remitted the case to the prosecution service for an additional investigation (*додаткове розслідування*). On 5 November 1999 it lodged a separate application (*окреме подання*) for an order setting aside the City Court's ruling. On 16 December 1999 the Supreme Court of Ukraine granted the application in part. Although it held that the case should be remitted for an additional investigation, it specified that certain matters did not have to be investigated further since the information previously obtained was sufficient.

22. On 5 January 2000 the prosecution service finished a supplementary investigation into the case and the applicant was allowed to inspect the file.

23. On 7 February 2000 the additional investigation was completed and the applicant was allowed to familiarise himself with the material in the case-file.

24. On 22 February 2000 the preliminary investigation was reopened in order to conduct additional investigative acts.

25. On 30 October 2000 the City Court ruled that the investigation into the charges of unlawful currency transactions should be dropped as criminal liability for unlawful currency transactions had been abolished and Article 80 of the UCC repealed.

26. On 19 February 2001 the City Court convicted the applicant of repeated financial fraud, acts in preparation of financial fraud, forgery committed by an official, aggravated forgery and abuse of power. It sentenced him to five years and six months' imprisonment, and ordered the confiscation of all his personal property. It acquitted him of the offences of aiding and abetting the concealment of the proceeds of currency sales, tax evasion and aggravated fictitious trading. On the basis of the Amnesty Law of 11 May 2000, and because the applicant had already been detained for

two years, ten months and fifteen days, the City Court decided to exempt him from serving the sentence. None of the parties appealed to the Supreme Court.

B. The detention of the applicant

27. On 8 April 1997 an investigator of the Investigative Division decided that the applicant should be temporarily detained as a suspect (*затриманий в якості підозрюваного*) in accordance with Article 115 of the Code of Criminal Procedure ("the CCP"). He was accordingly placed in custody that day.

28. On 11 April 1997 the Prosecutor of Kyiv sanctioned a warrant issued by the investigator authorising the applicant's arrest (*санкцію на арешт*) as a preventive measure pending trial (Article 155 of the CCP).

29. On 12 May 1997 the applicant applied to the Moskovsky District Court of Kyiv for orders to quash the warrant and release him. On 28 May 1997 the District Court rejected the applicant's claims as unsubstantiated. It also held that the applicant's detention was lawful.

30. From 8 April 1997 until 22 February 2000 the applicant was detained in the Temporary Investigative Isolation Unit of the Kyiv Region (SIZO No. 1 of the Kyiv Region).

31. The duration of the investigation and the applicant's detention were extended on successive occasions: to six months on 29 May 1997 by the Prosecutor of Kyiv, to nine months on 1 October 1997 by the Deputy Prosecutor General of Ukraine, to twelve months on 18 December 1997 by the Deputy Prosecutor General of Ukraine and to fifteen months on 28 March 1998 by the Acting Prosecutor General of Ukraine.

32. On 12 April 1998 the investigator informed the applicant that the preventive measure of detention could be replaced by release on bail. The Prosecutor of Kyiv informed the applicant by a letter of 20 July 1998 that bail had been fixed in the sum of 232,716 Ukrainian hryvnas (UAH).

33. On 22 July 1998 that amount was deposited in the account of the Main Department of the Ministry of Internal Affairs in Kyiv by Ukrinbank (the surety and the applicant's former employer). On 19 August 1998 the Department returned the sum and refused to release the applicant on bail.

34. On 30 June 1998 the Acting Prosecutor General of Ukraine extended the period of the investigation and the applicant's detention for another three months (until 30 September 1998), bringing the total period to eighteen months.

35. On 1 November 1999 the City Court refused to change the preventive measure, requiring the applicant to remain in custody. On 16 December 1999 the Supreme Court of Ukraine upheld that decision.

36. The applicant was detained during the prosecution's further investigation from 1 November 1999 onwards.

37. On 22 February 2000, owing to the expiry of the maximum statutory period of detention, the Kyiv Regional Prosecutor decided to release the applicant on his undertaking not to abscond. The applicant was released on 23 February 2000.

C. Hunger strike, force-feeding and medical treatment of the applicant

38. The applicant went on hunger strike on 13 April 1998, consuming only water. On 17 April 1998 the applicant's medical condition was examined and, following an acetone analysis of his urine on 20 April 1998, he was subjected to force-feeding as of 23 April 1998. The applicant suspended his hunger strike on 14 July 1998, only to resume it again in October 1998.

39. On 1 December 1999 the doctor of the detention facility issued a statement that the applicant was receiving medical treatment and, because of his continuing hunger strike, was being force-fed.

40. The Government mentioned that between 27 May 1997 and 7 February 2000 the applicant was examined by doctors on sixty-one occasions. However, they made no reference to any medical examinations of the applicant in the period from 5 August 1998 to 10 January 2000 (see paragraph 50 below).

41. On 5 February 1998 the doctor of the detention centre diagnosed the applicant as having allergic dermatitis (*алергійний дерматит*).

42. On 8 April 1998 the doctor of the detention centre, after examining the applicant, diagnosed him as also suffering from streptococcal impetigo (*стрептодермія*) and chronic cholecystitis (*хронічний холецистит*).

43. On 8 May 1998 the forensic medical examination No. 58 carried out by the Kyiv City Medical Examinations Bureau concluded that the applicant suffered from microbic eczema, chronic cholecystitis and neurocirculatory dystonia. It recommended that the applicant undergo specialised medical treatment for eczema as an inpatient.

44. On 2 June 1998 the doctor of the Central Hospital of Kyiv, Dr Glukhenky, found that the applicant had contracted disseminated microbic eczema (*розповсюджена мікробна екзема*). He also recommended that the applicant undergo medical treatment as an inpatient.

45. On 13 July 1998 the Deputy Head of the Investigative Department requested that the applicant be admitted to the Kyiv Specialist Dermato-Venerological Hospital for further treatment of his skin diseases as from 14 July 1998.

46. On 14 July 1998 the applicant was taken to the hospital and, after his preliminary medical examination there, he was diagnosed as suffering from scabies (*чесотка*) and pyodermatitis (*піодерматит*). The hospital

recommended that the applicant be returned to SIZO No. 1 for further medical treatment for scabies.

47. On 20 July 1998 the forensic medical examination No. 88 carried out by the Kyiv City Medical Examinations Bureau concluded that the applicant had suffered from disseminated microbic eczema from 8 May to 2 June 1998. It also found that the applicant suffered from scabies and that this disease could be treated in SIZO No. 1 if there were no appropriate conditions for his treatment as an inpatient. On the same date the investigator of the Investigative Division rejected as unsubstantiated the applicant's request for medical treatment as an inpatient.

48. The applicant underwent medical treatment for scabies on 31 July 1998 in the medical unit of the detention centre.

49. The applicant continued his hunger strike between 10 January and 7 February 2000. During this period he was examined by a doctor on eighteen occasions.

50. According to the applicant, his last hunger strike lasted from 5 October 1998 to 23 February 2000. In accordance with the timetable of medical examinations provided by the Government, no medical examinations of the applicant were performed between 5 August 1998 and 10 January 2000 (see paragraph 40 above).

51. Following his release on 23 February 2000, the applicant was admitted to Kyiv City Hospital from 24 February until 17 March 2000. He subsequently continued to receive medical treatment under the general supervision of a psychiatrist.

D. Complaints to the Constitutional Court of Ukraine

52. On 2 February 2000 the applicant's sister, on behalf of the applicant, lodged complaints with the Constitutional Court of Ukraine seeking to establish that it was unconstitutional to hold the applicant in custody after the maximum statutory term of detention had expired. She also petitioned the Constitutional Court for a ruling that Article 156 of the CCP, which allowed suspects to be detained while the case was being investigated, was unconstitutional. On 25 February 2000 the Registrar of the Constitutional Court rejected his complaints, as the court had no jurisdiction to consider them.

II. RELEVANT DOMESTIC LAW

A. Constitution of 26 June 1996

53. The relevant provisions of the Constitution read as follows:

Article 29

“Every person has the right to freedom and personal inviolability.

No one shall be arrested or held in custody other than pursuant to a substantiated court decision and only on the grounds and in accordance with the procedure established by law.”

Article 55

“Human and citizens' rights and freedoms are protected by the court.

Everyone is guaranteed the right to challenge in a court the decisions, actions or omissions of bodies exercising State power, local self-governing bodies, officials or officers.

...After exhausting all domestic legal remedies, everyone has a right of appeal for the protection of his or her rights and freedoms to the relevant international judicial institutions or to the relevant bodies of international organisations of which Ukraine is a member or participant.

Everyone has the right to protect his or her rights and freedoms from violations and illegal encroachments by any means not prohibited by law.”

Chapter XV

Transitional Provisions

“13. The existing procedure for the arrest, custody and detention of persons suspected of committing an offence, and the procedure for carrying out an inspection and search of a person's home and other property, shall be retained for five years after the entry into force of the present Constitution.”

B. The Code of Criminal Procedure, 1960

54. The relevant provisions of the CCP read as follows:

Article 148 (with amendments of 21 June 2001)

Purpose and grounds for the application of preventive measures

“Preventive measures shall be imposed on a suspect, accused, defendant, or convicted person in order to prevent his attempts to abscond from an inquiry, investigation or the court, to obstruct the establishment of the truth in a criminal case or to pursue criminal activities, and in order to ensure the execution of procedural decisions.

Preventive measures shall be imposed where there are sufficient grounds to believe that the suspect, accused, defendant or convicted person will attempt to abscond from

investigation and the court, or if he fails to comply with procedural decisions, or obstructs the establishment of the truth in the case or pursues criminal activities.

If there are insufficient grounds for the imposition of preventive measures, the suspect, accused or convicted person shall sign a written statement undertaking to appear upon notification by the inquirer, investigator, prosecutor or the court, and shall also undertake to notify them of any change in his place of residence.

If a preventive measure is applicable to a suspect, he shall be charged within ten days of the imposition of the measure. In the event that the indictment is not issued within that time, the preventive measure shall be annulled."

Article 149 (with amendments of 21 June 2001)

Preventive measures

"The preventive measures are as follows:

(1) a written undertaking not to abscond;

(2) a personal surety;

(3) the surety of a public organisation or labour collective;

(3-1) bail;

(4) remand in custody;

(5) supervision by the command of a military unit.

As a temporary preventive measure, a suspect may be detained on the grounds and pursuant to the procedure provided for by Articles 106, 115 and 165-2 of this Code."

Article 150 (with amendments of 21 June 2001)

Circumstances that shall be taken into account in choosing a preventive measure

"In resolving the issue of imposing a preventive measure, in addition to the circumstances specified in Article 148 of this Code, such circumstances as the gravity of the alleged crime, the person's age, state of health, family and financial status, type of activity, place of residence and other circumstances relating to the person, shall be taken into consideration."

Article 156 (in force at the material time)

The terms for holding in custody

The terms for remand in custody during the investigation of criminal offences shall not be more than two months. These terms can be extended to four months by district,

city or military prosecutors, prosecutors of the fleet or command garrison, or prosecutors of the same rank, if it is not possible to terminate the criminal investigation, and in the absence of any grounds to change the preventive measure. Further extension of this term to six months from the moment of arrest shall only be effected if the case is exceptionally complex, by the Prosecutor of the Republic of the Crimea, regional prosecutors, Kyiv prosecutors, military prosecutors of the district or fleet, or prosecutors equal to them in rank.

Further periods of remand in custody can be extended for up to one year by the Deputy Prosecutor General of Ukraine, and up to eighteen months by the General Prosecutor.

After that, no further extensions of detention on remand are allowed. The accused must then be immediately released.

If it is impossible to terminate the investigation within these remand periods and there are no grounds to change the preventive measure, the General Prosecutor or his Deputy shall be entitled to remit the case to the court in that part which relates to accusations which could be proved. In relation to the incomplete investigation, the case shall be divided into separate proceedings and terminated in accordance with the general rules.

The materials of the terminated part of the criminal case shall be provided to the accused and his representative for examination not later than one month before the expiry of the remand period, established by paragraph 2 of this Article.

The time taken by the accused and his representative to familiarise themselves with the materials in the case shall not be taken into account in calculating the overall term of remand in custody.

If the court remits the case for a new investigation, and where the term of remand in custody has ended, and an alternative preventive measure cannot be applied in the circumstances of the case, the prolongation of the detention on remand shall be effected by the prosecutor, whose task is to supervise the lawfulness of the pre-trial investigation in the case, within one month from the moment he receives the case-file. Further prolongation of the detention, before the case is remitted to the court, shall be governed by paragraphs 1, 2, and 6 of this Article."

Article 156 (with amendments of 21 June 2001)

Periods of detention during an investigation

"Detention during pre-trial investigations shall not exceed two months. In cases in which it is impossible for the investigation of the case to be completed within the period provided for by Part One of this Article and there are no grounds for discontinuing the preventive measure or substituting a less restrictive measure, the period of detention may be extended:

(1) to four months - on an application approved by the prosecutor who supervises compliance with the laws by

bodies of inquiry and pre-trial investigation or by the prosecutor who, or a judge of the court which, issued the order for the application of the preventive measure;

(2) to nine months - in cases of serious and especially serious crimes, on an application approved by the Deputy Prosecutor General of Ukraine, the Prosecutor of the Autonomous Republic of Crimea, the prosecutor of the regions, the prosecutor of the cities of Kyiv and Sevastopol and the prosecutors of equal rank, or submitted by the same prosecutor for consideration to a judge of an appellate court;

(3) to eighteen months - in particularly complex cases involving especially serious crimes, on an application by the Prosecutor General of Ukraine or his Deputy, or submitted by the same prosecutor for consideration to a judge of the Supreme Court of Ukraine;

In every case in which it is impossible to complete the investigation in full within the periods specified in Parts One or Two of this Article, the prosecutor supervising compliance with the law during the investigation into the case shall have the right to consent to the charge for which there is evidence being referred to the court. In such an event, the part of the case concerning uninvestigated crimes or criminal offences shall, in accordance with the requirements of Article 26 of this Code, be severed into a separate set of proceedings and completed under the general procedure.

The period of detention during the investigation shall be calculated from the moment the detention is ordered and, if the detention was preceded by time spent in police custody, from the moment of arrest. The period of detention shall include any time spent by the person concerned in undergoing expert examination as an in-patient in a psychiatric medical institution of any type. In the event of repeated detention orders being made against a person in the same case, or in a case joined to it or severed from it, or of new charges being brought, previous periods of detention shall be taken into account when calculating the length of the detention.

The period of detention during pre-trial investigations shall expire on the day the court receives the case-file; however, the time it takes for the accused and his representatives to familiarise themselves with the materials in the criminal case-file shall not be included in the calculation of the period for which the accused has been detained as a preventive measure.

In the event that the case is withdrawn from the court by a prosecutor on the basis of Article 232 of this Code, time shall start to run again on the day the case is received by the prosecutor.

In the event that the case is returned by the court to the Prosecutor for a supplementary investigation the period of detention shall be calculated from the moment the case is received by the Prosecutor and shall not exceed two months. The period specified shall be further extended by taking into account the time the accused was held in detention before the referral of the case to the court, in accordance with the procedure and within the time-limit prescribed by Part Two of this Article.

Save where the period has been extended pursuant to the procedure established by this Code, in the event of the expiry of the maximum period for detention as a preventive measure allowed by Parts One and Two of this Article, the body of inquiry, the investigator, or the prosecutor shall be obliged to release the person from custody without delay.

Governors of pre-trial detention centres shall promptly release from custody any accused in respect of whom a court order extending the period of detention has not been received by the time the period of detention allowed by Parts One, Two and Six of this Article expires. They shall notify the person or body before whom the case is pending and the prosecutor supervising the investigation (Article 156 in the wording of Law No. 1960-12 of 10 December 1991, as amended by Laws Nos. 2857-12 of 15 December 1992, and 3351-12 of 30 June 1993; in the wording of Law No. 2533-III of 21 June 2001 – which entered into force on 29 June 2001).”

Article 218 (in force at the material time)

Announcing to the accused the termination of the investigation in the case and allowing him to inspect the materials in the case file

“After deciding that the evidence collected in the case is sufficient for an indictment, and after complying with the terms of Article 217 of this Code (familiarisation of the victim, civil plaintiff and civil respondent with the materials in the case file), the investigator is obliged to announce to the accused that the investigation in his case has ended and that he has a right to familiarise himself with all of the materials in the case file personally and/or with the assistance of an advocate, and that he can lodge a motion to initiate an additional preliminary investigation. The investigator is obliged to explain to the accused his right to lodge petition for his case at first instance to be heard by a single judge or by a court composed of three judges.

If the accused has not shown any interest in familiarising himself with the materials of the case-file with the participation of the representative, he shall be personally provided with all of the materials in the case file (for familiarisation). In the course of this familiarisation process, the accused has the right to make extracts (to copy in writing) and to lodge motions. The investigator must allow all accused persons, even if there are several in one case, to familiarise themselves with all the case-file materials.

The announcement of the termination of the criminal investigation and the authorisation for the accused to familiarise himself with the case-file shall be mentioned in the verbatim record.

The accused and his representative shall not be limited in the time which they require to familiarise themselves with the materials in the case file. However, if the accused and his representative intentionally delay this process, the investigator has the right, by it's a reasoned resolution, to fix a deadline for the accused to complete the familiarisation exercise. This resolution shall be approved by the prosecutor."

Article 236-3 (with amendments of 21 June 2001)

Appeal against the prosecutor's arrest warrant

"The detainee, his defender or legal representative may appeal against the prosecutor's arrest warrant to the relevant district (city) court...

The appeal may be lodged directly with the court or through the administration of the pre-trial detention centre, which must send the appeal to the relevant court within twenty-four hours of its receipt."

(Article 236-3 was excluded from the CCP on the basis of the Code of Criminal Procedure (Amendments) Act of 21 June 2001.)

C. Resolution of the Plenary Supreme Court of 30 September 1994 on certain issues emerging in the course of the application by the courts of the legislation providing for an appeal against the prosecutor's arrest warrant

55. The relevant provisions of the Resolution of the Plenary Supreme Court of Ukraine read as follows:

"... in accordance with Article 236-3 of the Code of Criminal Procedure, the subject of appeal shall only be the arrest warrant issued by the prosecutor for detention of the suspect or accused, and not the decision of the investigator or the body of inquiry concerning the applicable preventive measure of taking into custody; nor the decision of the court (judge) to detain the defendant."

(This resolution was annulled on the basis of the new Resolution of the Plenary Supreme Court of Ukraine of 25 April 2003 on the courts' practice of applying the

preventive measure of detention and the prolongation of detention at the stages of the inquiry and pre-trial investigation.)

D. Reservation contained in the instrument of ratification deposited on 11 September 1997 (period covering 11 September 1997 – 28 June 2001)

56. The relevant extracts from the reservation of Ukraine provide as follows:

> “...2. The provisions of Article 5 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 shall apply in the part that does not contravene paragraph 13 of Chapter XV of the Transitional Provisions of the Constitution of Ukraine and Articles 106 and 157 of the Code of Criminal Procedure of Ukraine concerning the detention of a person and the issue of an arrest warrant by a public prosecutor.
>
> Such reservations shall be in force until appropriate amendments to the Code of Criminal Procedure of Ukraine are introduced or until the adoption of the new Code of Criminal Procedure of Ukraine, but not later than 28 June 2001...
>
> The provisions of Article 5 § 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 shall apply in the part that does not contravene Articles 48, 49, 50 and 51 of the Disciplinary Statute of the Armed Forces of Ukraine concerning the imposition of arrest as a disciplinary sanction.”

E. Appendix to the reservation handed to the Secretary General at the time of depositing the instrument of ratification on 11 September 1997

57. The relevant extracts from the Transitional Provisions of the Constitution of Ukraine provide as follows:

> “13. The existing procedure for the arrest, custody and detention of persons suspected of committing an offence, and the procedure for carrying out an inspection and search of a person's home and other property, shall be retained for five years after the entry into force of the present Constitution.”

58. The relevant extracts from Article 106 of the CCP that regulate detention by a body of inquiry of a person suspected of committing an offence provide as follows:

> “A body of inquiry shall be entitled to detain a person suspected of committing an offence for which a custodial penalty may be imposed, subject to the existence of one of the following grounds:
>
> 1. if the person is discovered whilst committing an offence or immediately after committing one;

2. if eye-witnesses, including victims, directly identify this person as the one who committed the offence;

3. if clear traces of the offence are found on the body of the suspect or on the clothing which he is wearing or which is kept at his home.

If there are other data which constitute grounds for suspecting the person of committing an offence, he may be detained only if he attempts to escape, or if he has no permanent place of residence, or if the identity of the suspect has not been established.

For each case of detention of a person suspected of committing an offence, the body of inquiry shall be required to draw up a record setting out the grounds, the reasons, the day, time, year and month, the place of detention, the explanation given by the person detained and the time when it was recorded that the suspect was informed of his right to have a meeting with defence counsel before being questioned for the first time, in accordance with the procedure provided for in Part 2 of Article 21 of the present Code. The body of inquiry shall also be required to notify the public prosecutor of the detention in writing within twenty-four hours and, on his request, give him the documents constituting the grounds for detention. The record of detention shall be signed by the person who drew it up and by the detained person. Within forty-eight hours of receipt of the notification of detention, the public prosecutor shall authorise the person detained to be taken into custody or order his release.

The body of inquiry shall inform the suspected person's family of his detention if his place of residence is known."

59. The relevant extracts from Article 157 of the CCP, which set out the specific duties of a public prosecutor when issuing a warrant for arrest, provide as follows:

"The public prosecutor shall issue a warrant for the arrest of a suspect or accused subject to the existence of the grounds prescribed by law. When deciding whether to issue a warrant for arrest, the public prosecutor shall be required to study conscientiously all the relevant documents and, where necessary, question the suspect or accused personally. In the case of a suspect or accused who has not attained the age of majority, such questioning shall be mandatory.

The right to issue a warrant for the arrest of a person shall be vested in the Prosecutor General of Ukraine, the public prosecutors of the Republic of the Crimea, the regional prosecutors, the prosecutors of the cities of Kyiv and Sevastopol, and other equal-ranking prosecutors. The same right shall also be vested in the deputy public prosecutors of towns and districts with a population exceeding 150,000, unless otherwise stipulated in a special order of the Prosecutor General of Ukraine."

F. Observance of human rights in preliminary detention facilities. Extracts from the reports of the Commissioner for Human Rights of the Parliament of Ukraine of 2001 (the first annual report) and 2002 (the second annual report)

60. The relevant extracts from Chapters 4.4-4.5 of the first annual report provide as follows:

> "... The situation in investigation wards is perhaps the worst, [due to] their overcrowding and abnormal conditions of custody. The number of suspects in the cells of investigation wards far exceeds normal sanitary standards. By late December 1999 Ukraine's investigation wards had available space for 32,800 detainees, but in reality held 44,700.
>
> The gravest situation was registered in the Autonomous Republic of Crimea where 1,439 detainees were in custody without sufficient space; in Donetsk and Kharkiv the same circumstances affected 1,300 detainees (in each city), 1,135 in Kryviy Rig, 1,000 in Luhansk, and 714 in Kyiv and Odessa (each). Thousands of detainees do not have personal bunks and are forced to take it in turns to sleep. This has been causing conflicts that are accompanied by injuries, physical reprisals, violence and other illegal actions.
>
> ... The unsanitary conditions in pre-trial detention facilities contribute to the spread of epidemic and parasitic diseases, such as tuberculosis, pediculosis and dysentery. In 1999 they caused the death of 326 detainees, or twice as many as in 1998. Inadequate nutrition is the cause of chronic gastro-intestinal disturbances and dystrophy.
>
> In the pre-trial detention facilities the regime of detention for suspects whose guilt has yet to be established is much more severe than in penitentiary institutions. In most cases the suspects are denied the opportunity to meet with relatives, to work and provide assistance to families; they are actually isolated from the outside world and have no access to the daily press and other mass media.
>
> ... The inspections of the Commissioner proved that on average people are held [in detention] for six months while courts delay processing their cases for unjustifiably long periods. Every year the statutory time for considering criminal cases is violated in relation to 10,000 people. Of the persons who are detained in custody to date 46% (or 21,000) are detained under the courts' responsibility; in some detention centres this category of detainees exceeds 90%, although 10 years ago they accounted for only 18-20%. ...
>
> Above everything else, this is caused by the unjustifiably widespread practice of pre-trial detention on formal grounds. Of the 112,600 arrested persons 15,000 (13%) were released from investigation wards in 1998, and of these every seventh arrested person was given a non-custodial sentence. Under the transitional provisions of the Constitution, there still exists the procedure of arresting and taking people into custody on the basis of the sanction issued by the public prosecutor. The introduction of judicial control over detention and prolongation of the period of custody has had no practical impact...
>
> Some legislation which is inconsistent with the provisions of the Constitution and international human-rights standards sets unjustifiably long terms of pre-trial detention. Owing to strictly ministerial interests, these terms were increased to a year and a half, from which is excluded the time taken by detainees and their lawyers to familiarise themselves with the case-file. The lack of an organised system of pre-trial investigation infringes the terms of detention of tens of thousands of persons.

The legislation in force does not establish any restrictions whatsoever as to the maximum period of detention once the case is referred for consideration on the merits. For this reason defendants have to wait for months and sometimes years for a hearing or completion of the judicial examination."

61. The second annual report of 2002 confirmed the first as regards the gross violations of the human rights of the detainees because of their conditions of detention, severe overcrowding, lack of adequate medical treatment and assistance, inadequate nourishment, and the inadequate financing of the needs of the pre-trial detention facilities. The poor hygienic and sanitary conditions of detention led to the spread of infectious diseases and in particular skin diseases. It mentioned for instance that in 1999 only 19.7% of the necessary food supplies were financed from the State budget (12.7% in 2000), and 6.7% of the medical supplies (12.7% in 2000). The average medical expenditure per person was UAH 18.7 in 2000 (compared to the required amount of UAH 220) and UAH 20.7 in 2001 (compared to the required amount of UAH 245.2).

G. The Decree of the Ministry of Internal Affairs of 4 March 1992 No. 122 on the approval of the instructions concerning the conditions of detention and force-feeding of persons who refuse to eat while in preliminary detention, penitentiary institutions and medical-labour facilities (extracts)

62. The relevant provisions of the Decree of 4 March 1992 read as follows:

"...1.2. Upon discovery of the detainee's refusal to take food, the head of the institution or the person acting on his behalf must interview the detainee within twenty-four hours in order to document the reasons for the refusal. He shall also inform the authorities responsible for this person's detention and the prosecutor supervising the execution of the judicial decisions in criminal cases and, in the event of serious grounds for the refusal to eat, shall take appropriate measures to satisfy the lawful demands of the detainee.

...1.3. Within twenty-four hours of the refusal of the detainee to take food, the head of the institution or the person acting on his behalf shall order the placement of the detainee in a separate cell, where he/she shall generally be held in isolation from other detainees and be kept under constant supervision.

...1.4. The detainee shall be provided with breakfast, lunch and supper in accordance with the envisaged timetable and the established nutritional norms. In the event of a refusal to eat, it shall be removed after two hours; this shall be noted in the record of the food taken by the detainee.

1.5. Within the time-period established by the administration of the institution, and taking into account the particular circumstances, but not more than three days from the time of the refusal to take food, the person shall undergo a compulsory medical examination during which a doctor shall explain the negative consequences of the

hunger strike for the detainee's health. On-going and emergency medical treatment shall be provided to the detainee unless there is a need to admit him/her as an in-patient...

1.7. Where the refusal to take food is not a result of a disease or illness, the representatives of the institution must continuously explain to the person the harmful effect that a lack of food inflicts on the body.

1.9. The force-feeding of a detainee on hunger strike shall be a measure of last resort aimed at preserving life and may only be used where the educational work and other measures of influence have had no effect on the detainee, and his/her further refusals to take food are endangering his/her life.

The decision to force-feed shall be adopted by the head of the institution, or the person acting on his behalf, on the basis of a written report by the medical commission establishing a life-threatening decline in the state of health of a detainee on hunger strike...

The prosecutor supervising the lawfulness of the execution of judgments in criminal cases shall be informed about the decision to force-feed the detainee.

The detention centre's doctor shall determine the length of time necessary to force-feed the detainee, taking into account his/her general state of health.

The doctor shall decide on the content of the food in accordance with the daily food ration composed of different products.

The doctor shall make a note in the medical file of the detainee on hunger strike at the time of the force-feeding, mentioning the date, components and quantity of the food; the surname and rank of the person who administered the force-feeding shall also be noted...

2. The procedure for force-feeding a detainee refusing to take food

2.1. Force-feeding shall be administered in the presence of one of the administrators of the institution, the doctor, a member of the medical staff and the necessary number of junior inspectors.

Before beginning the force-feeding, the doctor shall explain to the detainee the risks that threaten his/her health and the necessity of taking food.

If the detainee refuses the force-feeding, he/she can be handcuffed, and the junior inspectors shall hold him in such a position as is necessary for this procedure.

The force-feeding shall be conducted by a member of the medical staff under the doctor's supervision, taking into account all the measures necessary to avoid possible injuries and accidents. In the course of this procedure the mouth of the detainee shall be opened and held open by a mouth-widener (*роророзширювач*).

A medical tube with a funnel on the free end, cooled down after having been boiled, but soft, has to be placed through the mouth opening and the pharynx into the alimentary canal (*oesophagus*). In the course of this procedure the doctor has to make

sure that the tube does not get into the trachea. If the position of the tube is correct the member of the medical staff shall pour into the can a small quantity of cooled boiled water and then the food.

2.2. The medical staff must have with them the necessary medical supplies and medicines for providing emergency medical aid in the event of injuries that might occur in the course of force-feeding.

2.3. If the state of health of the detainee on hunger strike improves, the force-feeding shall be suspended and this shall be noted in the medical file of the detainee; a reasoned conclusion shall be drawn up by a doctor."

III. RELEVANT INTERNATIONAL REPORTS CONCERNING FORCE-FEEDING

A. Committee of Ministers' Recommendation No. R (87) 3 on the European Prison Rules (adopted by the Committee of Ministers on 12 February 1987 at the 404th meeting of the Ministers' Deputies)

63. The relevant extracts from the European Prison Rules read as follows:

"... Discipline and punishment

Instruments of restraint

39. The use of chains and irons shall be prohibited. Handcuffs, restraint-jackets and other body restraints shall never be applied as a punishment. They shall not be used except in the following circumstances:

...*b.* on medical grounds, by direction and under the supervision of the medical officer;

c. by order of the director, if other methods of control fail, in order to protect a prisoner from self-injury, ...

40. The patterns and manner of use of the instruments of restraint authorised in the preceding paragraph shall be decided by law or regulation. Such instruments must be applied no longer than is strictly necessary."

B. Recommendation No. R (98) 7 of the Committee of Ministers to Member States concerning the ethical and organisational aspects of health care in prison (adopted by the Committee of Ministers on 8 April 1998, at the 627th meeting of the Ministers' Deputies)

64. The relevant extracts from the Recommendation of the Committee of Ministers provide as follows:

> “... Referring to the specific declarations of the World Medical Association (WMA) concerning medical ethics, in particular the Declaration of Tokyo (1975), the Declaration of Malta on hunger strikers (1991) and the Statement on body searches of prisoners (1993); ...
>
> C. Patient's consent and confidentiality ...
>
> 14. ... The indication for any medication should be explained to the inmates, together with any possible side effects likely to be experienced by them.
>
> 15. Informed consent should be obtained in ... situations when medical duties and security requirements may not coincide, for example refusal of treatment or refusal of food.
>
> 16. Any derogation from the principle of freedom of consent should be based upon law and be guided by the same principles which are applicable to the population as a whole. ...
>
> 24. It should also imply [that a doctor must be] advising the prison management on matters concerned with nutrition or the environment within which the prisoners are required to live, as well as in respect of hygiene and sanitation.
>
> E. Refusal of treatment, hunger strike
>
> 60. In the case of a refusal of treatment, the doctor should request a written statement signed by the patient in the presence of a witness. The doctor should give the patient full information as to the likely benefits of medication, possible therapeutic alternatives, and warn him/her about risks associated with his/her refusal. It should be ensured that the patient has a full understanding of his/her situation. ...
>
> 61. The clinical assessment of a hunger striker should be carried out only with the express permission of the patient, unless he or she suffers from serious mental disorders which require the transfer to a psychiatric service.
>
> 62. Hunger strikers should be given an objective explanation of the harmful effects of their action upon their physical well-being, so that they understand the dangers of prolonged hunger striking.
>
> 63. If, in the opinion of the doctor, the hunger striker's condition is becoming significantly worse, it is essential that the doctor report this fact to the appropriate authority and take action in accordance with national legislation (including professional standards).”

C. Reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ["CPT"]

65. The relevant extracts from Chapter III of the CPT Standards of "Health care services in prisons" [CPT/Inf/E (2002) 1, Rev. 2004] and extracts from the 3rd General Report [CPT/Inf (93) 12] read as follows:

> "46. Patients should be provided with all relevant information (if necessary in the form of a medical report) concerning their condition, the course of their treatment and the medication prescribed for them. Preferably, patients should have the right to consult the contents of their prison medical files, unless this is inadvisable from a therapeutic standpoint.
>
> They should be able to ask for this information to be communicated to their families and lawyers or to an outside doctor.
>
> 47. Every patient capable of discernment is free to refuse treatment or any other medical intervention. Any derogation from this fundamental principle should be based upon law and only relate to clearly and strictly defined exceptional circumstances which are applicable to the population as a whole.
>
> A classically difficult situation arises when the patient's decision conflicts with the general duty of care incumbent on the doctor. This might happen when the patient is influenced by personal beliefs (eg. refusal of a blood transfusion) or when he is intent on using his body, or even mutilating himself, in order to press his demands, protest against an authority or demonstrate his support for a cause.
>
> In the event of a hunger strike, public authorities or professional organisations in some countries will require the doctor to intervene to prevent death as soon as the patient's consciousness becomes seriously impaired. In other countries, the rule is to leave clinical decisions to the doctor in charge, after he has sought advice and weighed up all the relevant facts."

66. The relevant extracts from the Report of the CPT on a visit to Ukraine from 24 November to 6 December 2002 read as follows:

> "...110. At Zhytomyr Prison No. 8, the building reserved for women and minors (No. 2) offered the best material conditions of the establishment. All the cells were clean and well maintained, properly equipped, benefited from good natural and artificial lighting, and had toilets that were partitioned off. In many cells, the living space, although far from ideal, was greater than that found in the other detention areas. For example, a cell measuring 29.7 m² accommodated seven women. Among the minors, a 29 m² cell accommodated three boys; it was, however, designed for eight, which is excessive. Generally speaking, the delegation observed that the potential occupancy rates of the cells in the building allowed for a living space of only 2.5 to 2.8 m² per person.
>
> 111. The CPT welcomes the fact that, in the parts of building No. 1 reserved for remand prisoners, administrative prisoners and prisoners subject to the "Tyurma" regime, there was proper access to daylight and fresh air, except in certain cells where the windows were still fitted with obstructive devices (for example, wire mesh). Otherwise, material conditions varied. Many of the cells visited, although modestly

equipped, were properly maintained and clean. Others, however, had been damaged by damp and were dirtier, with toilets in relatively poor condition, rusty beds and very modest bedding infested with cockroaches and other vermin.

Given the number of prisoners they accommodated at the time of the visit, the living space in certain cells could be considered tolerable or even acceptable. For example, among the remand prisoners, a 42 m² cell accommodated twelve prisoners, a 46 m² cell housed thirteen prisoners, a 19 m² cell was occupied by four people and a 13 m² cell by three. But here again, the living space was completely taken up by surplus beds.

Finally, heating was, generally speaking, a problem, as the temperature was barely above 18°.

112. The prison administration made real efforts to provide those prisoners who needed them with basic essentials (hygiene and cleaning products and, if necessary, extra clothing/shoes). Some women complained, however, that they were unable to obtain the special hygiene products they needed (sanitary towels/tampons). The delegation raised the issue with the prison governor, who gave assurances that the situation would be remedied. **The CPT would like to obtain confirmation that the problem has now been resolved.**

113. In SIZO No. 21 in Odessa, the situation of overcrowding, exacerbated by generally precarious material conditions, could legitimately be considered to amount to inhuman and degrading treatment.

The prisoners were crammed into a tiny living space. For instance, there were up to six prisoners in cells measuring 7 to 8 m², up to fifteen in 18 m² and up to thirty-seven (with forty beds) in 78 m². According to information gathered by the delegation, some parts of the prison had apparently been even more overcrowded in mid-November 2002. For instance, up to thirty-two prisoners had been placed in cells measuring 18 m² in the admissions unit, where they had had to share ten beds.

Most of the cells were very dilapidated, with damp-ridden walls and ceilings. The facilities were in a bad state of repair, the bedding was often dirty and inadequate (prisoners had to rely on relatives for sheets and blankets), and the toilets were not properly partitioned off, if at all. Moreover, in many cells, the toilets did not have a proper flush, which added to the ambient insalubrity. Worst of all, the cells were teeming with cockroaches.

In certain cells, prisoners were obliged to put blankets over the windows to keep out the draught, as panes of glass were missing. In addition, in many cells, the heating left something to be desired, as the temperature was only 17°.

In fact, the only positive feature was that the cells all had proper access to daylight and adequate artificial lighting.

114. The delegation received numerous complaints about the lack of basic hygiene and cleaning products, including toilet paper. In addition, prisoners had to wash their belongings and sheets and blankets in their cells with the means at their disposal, under highly dubious conditions of hygiene.

Furthermore, in view of the small number of showers per prison section (for example, two showers for over 170 prisoners) and their very dilapidated state, prisoners had great difficulty in maintaining satisfactory personal hygiene.

115. In their letter of 15 April 2003, the Ukrainian authorities stated that, in order to reduce overcrowding, it was planned to build a new building with a capacity of 250 places and to transfer a number of prisoners to other remand establishments in the region.

They also referred to other steps taken to remedy the hygiene problems observed (such as the provision of disinfectants and the washing of the bedding in the SIZO laundry) and indicated that prisoners were now provided with the necessary hygiene products.

116. Although the visit to Colony No. 14 focused on particular aspects ... the delegation noted that in the two sections (4 and 7) which it visited the dormitories were well-lit and ventilated, and equipped with beds with full bedding, bedside tables and storage space. The sanitary annexes were clean and relatively well maintained.

The dormitories were crowded. In section 4, for instance, dormitories measuring about 61 m² were accommodating up to 35 people; however, this was somewhat offset by the fact that prisoners could move about freely during the daytime in their section and had access to an exercise yard.

In this establishment, the delegation received numerous complaints about the lack of warm winter clothes (coats and hats). The matter was raised with the prison governor who assured the delegation that there were sufficient supplies to meet prisoners' needs. **The CPT wishes to obtain confirmation that the prisoners in Colony No. 14 have clothes suitable for the weather conditions.**

In the light of the above, the CPT recommends that:

in Prison No. 8:

- the necessary repairs to building No. 1 be carried out so that the material conditions equal those in building No. 2, reserved for women and minors, in all respects;

- the cells be adequately heated;

in SIZO No. 21:

- the material shortcomings observed be remedied, in order to ensure that:

- every prisoner has his own bed with full and clean bedding;

- the toilets in all the cells are properly partitioned off and have a working flush;

- the windows in all the cells have glass panes in them;

- the cells are adequately heated;

- the showers are in a satisfactory state of repair and that, as soon as possible, the number of showers is increased;

- the scheduled construction of the new building with a capacity of 250 places is completed;

- the occupancy rates in the cells/dormitories of the three establishments be reduced, the objective being to provide 4 m² of living space per prisoner."

67. The relevant extracts from the Report of the CPT on a visit to Turkey [CPT/Inf (2001) 31] read as follows:

"1. Management of hunger strikers

... The delegation had earlier been informed that these directives indicated that the management of hunger strikers should be based on a doctor/patient relationship. In fact, they deliver the clear message that "The duty of health workers is to assist in the continuation of life. The right to life, the most basic of the rights and freedoms, may not be limited by any norm or criterion." Turning to specifics, it is stipulated that "From the instant organ deterioration is noted, total parenteral nutrition is to be administered".

At the time of the December 2000/January 2001 visit, no prisoner had yet reached a stage where it was necessary to take a decision on possible artificial feeding against his/her wishes. However, cases of artificial feeding have subsequently occurred. Ministry of Health officials informed the CPT's delegation during the April 2001 visit that they were not aware of any cases of forced-feeding of prisoners who were conscious, but that prisoners had been artificially fed after losing consciousness.

33. As was acknowledged in the preliminary observations dated 29 January 2001, the issue of the artificial feeding of a hunger striker against his/her wishes is a delicate matter about which different views are held, both within Turkey and elsewhere. The CPT understands that the World Medical Association is currently reviewing its policy on this subject.

To date, the CPT has refrained from adopting a stance on this matter. However, it does believe firmly that the management of hunger strikers should be based on a doctor/patient relationship. Consequently, the Committee has considerable reservations as regards attempts to impinge upon that relationship by imposing on doctors managing hunger strikers a particular method of treatment."

D. World Medical Association Declaration of Tokyo, 1975 (Guidelines for Medical Doctors Concerning Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment)

68. The relevant extract from the 1975 Declaration reads as follows:

"...5. Where a prisoner refuses nourishment and is considered by the doctor as capable of forming an unimpaired and rational judgment concerning the consequences of such a voluntary refusal of nourishment, he or she shall not be fed artificially. The decision as to the capacity of the prisoner to form such a judgment should be

confirmed by at least one other independent doctor. The consequences of the refusal of nourishment shall be explained by the doctor to the prisoner.”

E. World Medical Association Declaration on Hunger Strikers (adopted by the 43rd World Medical Assembly, Malta, November 1991, and editorially revised at the 44th World Medical Assembly Marbella, Spain, September 1992)

69. The Declaration of the World Medical Association on Hunger Strikers reads as follows:

“PREAMBLE

1. The doctor treating hunger strikers is faced with the following conflicting values:

1.1. There is a moral obligation on every human being to respect the sanctity of life. This is especially evident in the case of a doctor, who exercises his skills to save life and also acts in the best interests of his patients (Beneficence).

1.2. It is the duty of the doctor to respect the autonomy which the patient has over his person. A doctor requires informed consent from his patients before applying any of his skills to assist them, unless emergency circumstances have arisen in which case the doctor has to act in what is perceived to be the patient's best interests.

2. This conflict is apparent where a hunger striker who has issued clear instructions not to be resuscitated lapses into a coma and is about to die. Moral obligation urges the doctor to resuscitate the patient even though it is against the patient's wishes. On the other hand, duty urges the doctor to respect the autonomy of the patient.

2.1. Ruling in favour of intervention may undermine the autonomy which the patient has over himself.

2.2. Ruling in favour of non-intervention may result in a doctor having to face the tragedy of an avoidable death.

3. A doctor/patient relationship is said to be in existence whenever a doctor is duty bound, by virtue of his obligation to the patient, to apply his skills to any person, be it in the form of advice or treatment. This relationship can exist in spite of the fact that the patient might not consent to certain forms of treatment or intervention. Once the doctor agrees to attend to a hunger striker, that person becomes the doctor's patient. This has all the implications and responsibilities inherent in the doctor/patient relationship, including consent and confidentiality.

4. The ultimate decision on intervention or non-intervention should be left with the individual doctor without the intervention of third parties whose primary interest is not the patient's welfare. However, the doctor should clearly state to the patient whether or not he is able to accept the patient's decision to refuse treatment or, in case of coma, artificial feeding, thereby risking death. If the doctor cannot accept the patient's decision to refuse such aid, the patient would then be entitled to be attended by another physician.

GUIDELINES FOR THE MANAGEMENT OF HUNGER STRIKERS

Since the medical profession considers the principle of sanctity of life to be fundamental to its practice, the following practical guidelines are recommended for doctors who treat hunger strikers:

1. DEFINITION

A hunger striker is a mentally competent person who has indicated that he has decided to embark on a hunger strike and has refused to take food and/or fluids for a significant interval.

2. ETHICAL BEHAVIOUR

2.1. A doctor should acquire a detailed medical history of the patient where possible.

2.2. A doctor should carry out a thorough examination of the patient at the onset of the hunger strike.

2.3. Doctors or other health care personnel may not apply undue pressure of any sort on the hunger striker to suspend the strike. Treatment or care of the hunger striker must not be conditional upon him suspending his hunger strike.

2.4. The hunger striker must be professionally informed by the doctor of the clinical consequences of a hunger strike, and of any specific danger to his own particular case. An informed decision can only be made on the basis of clear communication. An interpreter should be used if indicated.

2.5. Should a hunger striker wish to have a second medical opinion, this should be granted. Should a hunger striker prefer his treatment to be continued by the second doctor, this should be permitted. In the case of the hunger striker being a prisoner, this should be permitted by arrangement and consultation with the appointed prison doctor.

2.6. Treating infections or advising the patient to increase his oral intake of fluid (or accept intravenous saline solutions) is often acceptable to a hunger striker. A refusal to accept such intervention must not prejudice any other aspect of the patient's health care. Any treatment administered to the patient must be with his approval.

3. CLEAR INSTRUCTIONS

The doctor should ascertain on a daily basis whether or not the patient wishes to continue with his hunger strike. The doctor should also ascertain on a daily basis what the patient's wishes are with regard to treatment should he become unable to make an informed decision. These findings must be recorded in the doctor's personal medical records and kept confidential.

4. ARTIFICIAL FEEDING

When the hunger striker has become confused and is therefore unable to make an unimpaired decision or has lapsed into a coma, the doctor shall be free to make the decision for his patient as to further treatment which he considers to be in the best

interest of that patient, always taking into account the decision he has arrived at during his preceding care of the patient during his hunger strike, and reaffirming article 4 of the preamble of this Declaration.

5. COERCION

Hunger strikers should be protected from coercive participation. This may require removal from the presence of fellow strikers.

6. FAMILY

The doctor has a responsibility to inform the family of the patient that the patient has embarked on a hunger strike, unless this is specifically prohibited by the patient."

THE LAW

I. THE COURT'S ASSESSMENT OF THE EVIDENCE AND ESTABLISHMENT OF THE FACTS

A. Arguments of the parties

1. The applicant

70. The applicant argued that he had proved that he was subjected to inhuman and degrading treatment while he was force-fed and that the conditions of his detention, particularly between 28 October 1998 and 23 February 2000 (the date of his release from custody), were contrary to Article 3 of the Convention. He requested the Court to find the State responsible under Article 3. The applicant further mentioned that he had been held in detention from 16 October 1998 to 13 August 1999 without any proper sanction. He alleged an infringement of Article 5 §§ 1(c) and 3 of the Convention.

2. The Government

71. The Government denied that the applicant was force-fed by unqualified personnel and handcuffed to a heating facility in the presence of a guard dog. Furthermore, they denied that the applicant was placed in the Temporary Isolation Facility in SIZO No. 1 of the Kyiv Region from 10 January to 7 February 2000. They have not provided any other information with regard to the periods during which the applicant was in disciplinary detention. They further evaded the issue as to the conditions of the applicant's detention in the isolation cell and whether there was any

sanction for the applicant's continued detention from 7 February to 23 February 2000.

B. General principles

72. The Court reiterates that, in assessing evidence, it adopts the standard of proof "beyond reasonable doubt" (see *Orhan v. Turkey,* no. 25656/94, § 264, ECHR 2002). Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. In this context, the conduct of the parties when evidence is being obtained has to be taken into account (see *Ireland v. the United Kingdom,* judgment of 18 January 1978, Series A no. 25, p. 65, § 161).

73. The Court is sensitive to the subsidiary nature of its role and must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case (see, for example, *McKerr v. the United Kingdom* (dec.), no. 28883/95, 4 April 2000). Where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for those courts to assess the evidence before them (see *Klaas v. Germany*, judgment of 22 September 1993, Series A no. 269, p. 17, § 29). Though the Court is not bound by the findings of domestic courts, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by those courts (see *Klaas*, cited above, p. 18, § 30).

C. The Court's considerations under Article 38 § 1 (a)

74. Article 38 § 1 (a) of the Convention provides:

> "If the Court declares the application admissible, it shall
>
> (a) pursue the examination of the case, together with the representatives of the parties, and if need be, undertake an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities..."

75. The Court reiterates that it is of utmost importance for the effective operation of the system of individual petition instituted by Article 34 that States should furnish all necessary facilities to make possible a proper and effective examination of applications (see, as the most recent authority, *Orhan,* cited above, § 266, and *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 70, ECHR 1999-IV; *Velikova v. Bulgaria*, no. 41488/98, § 77, ECHR 2000-VI). It is inherent in proceedings relating to cases of this nature, where an individual applicant accuses State agents of violating his rights under the Convention, that in certain instances solely the respondent Government have access to information capable of corroborating or refuting

these allegations. A failure on a Government's part to submit such information which is in their hands without a satisfactory explanation may not only give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations, but may also reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 § 1 (a) of the Convention (see *Timurtaş v. Turkey*, no. 23531/94, §§ 66 and 70, ECHR 2000-VI). The same applies to delays by the State in submitting information which prejudices the establishment of facts in a case (see *Orhan*, cited above, § 266).

76. In the light of the above principles and having regard to the Government's obligations under Article 38 § 1 (a) of the Convention, the Court has examined the Government's conduct in the present case in particular in regard to the following matters in establishing the facts of the present case:

- the failure of the Government to provide a written medical report and the decision of the SIZO's director on the basis of which the applicant was subjected to force-feeding;
- the failure of the Government to provide thorough and detailed information as to the legal basis of the applicant's continued detention throughout the whole period he was detained;
- the failure of the Government to provide detailed information and to comment on the conditions of the applicant's detention in the isolation cell and his general conditions of detention, his medical treatment and the medical assistance provided to him.

77. The Court concludes that the Government have failed to provide any convincing explanation for their refusal to comment on particular questions raised by it at the stage of communication and later at the admissibility stage or to provide relevant documents and decisions and medical reports in the applicant's case. The Court therefore considers that it can draw inferences from the Government's conduct in the instant case (see *Velikova* and *Orhan*, cited above, §§ 77 and 274, respectively). Bearing in mind the difficulties arising from the establishment of the facts in the present case and in cases similar to it, and in view of the importance of a respondent Government's cooperation in Convention proceedings, the Court finds that the Government have failed to furnish all necessary facilities to the Court in its task of establishing the facts within the meaning of Article 38 § 1 (a) of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

78. The applicant complained that he had been held in detention and in particular in the isolation cell in the Temporary Investigative Isolation Unit of Kyiv Region (SIZO No. 1 of the Kyiv Region) despite the fact that he had been suffering from a number of chronic diseases. The applicant also

maintained that he had been deprived of adequate medical treatment while remanded in custody and that the conditions of detention (hygiene, bedding and other conditions) had been unsatisfactory. The applicant alleged that he had been force-fed while on hunger strike, without any medical necessity being established by the domestic authorities, which had caused him substantial mental and physical suffering. In particular, he alleged that he had been handcuffed to a heating appliance in the presence of guards and a guard dog (in his further complaints he did not mention the guard dog), and had been held down by the guards while a special medical tube was used to feed him. He referred in this respect to Article 3 of the Convention, which provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. General principles enshrined in the case-law

79. As the Court has held on many occasions, Article 3 of the Convention enshrines one of the most fundamental values of a democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (see *Labita v. Italy* [GC], no. 26772/95, § 119, ECHR 2000-IV).

80. According to the Court's case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this minimum level is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, among other authorities, *Ireland v. the United Kingdom,* judgment of 18 January 1978, Series A no. 25, p. 65, § 162). Furthermore, in considering whether treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3. However, the absence of such a purpose cannot conclusively rule out a finding of a violation of this provision (see *Peers v. Greece*, no. 28524/95, §§ 67-68 and 74, ECHR 2001-III, and *Valašinas v. Lithuania*, no. 44558/98, § 101, ECHR 2001-VIII).

81. The Court has consistently stressed that the suffering and humiliation involved must in any event exceed the inevitable element of suffering or humiliation connected with a legitimate deprivation of liberty. Nevertheless, in the light of Article 3 of the Convention, the State must ensure that a person is detained under conditions which are compatible with respect for human dignity, that the manner and method of the execution of

the measure do not subject the individual to distress or hardship exceeding the unavoidable level of suffering inherent in detention, and that, given the practical demands of imprisonment, the person's health and well-being are adequately secured (see *Kudła v. Poland* [GC], no. 30210/96, §§ 92-94, ECHR 2000-XI), with the provision of the requisite medical assistance and treatment (see, *mutatis mutandis*, the *Aerts v. Belgium* judgment of 30 July 1998, *Reports* 1998-V, p. 1966, §§ 64 et seq.). When assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as the specific allegations made by the applicant (see *Dougoz v. Greece*, no. 40907/98, § 46, ECHR 2001-II).

B. Scope of the issues for consideration

82. The Court notes that the applicant's complaints under Article 3 of the Convention mainly concern three issues:

- *first*, whether the conditions of the applicant's detention were compatible with that provision;
- *secondly*, whether the applicant's force-feeding while he was on hunger strike amounted to inhuman or degrading treatment or punishment or torture; and
- *thirdly*, whether the applicant was provided with the necessary medical treatment and assistance while being held in detention and while on hunger strike.

1. Conditions of the applicant's detention

a. The parties' submissions

83. In his initial submissions to the Court of 7 February 2000, the applicant submitted that he had been placed in a cell of seven square metres with twelve other detainees. There had been no drinking water in the cell and no access to a shower or water. The cell had been infested with bedbugs and head lice, which had eventually caused the applicant's acute skin diseases (*microbic eczema* and *scabies*).

84. The applicant submitted further that on 1 April 1999 he had been placed in the isolation cell of the detention centre for a period of ten days while he was still on hunger strike. The applicant maintained that the conditions there involved his total isolation in a cell of seven square metres that was situated in the basement of an old nineteenth century building. The cell had been damp, with wet concrete walls that had a rough finish. The temperature in the cell had been as low as 15ºC. The floor had also been made of concrete. The bed was made up at 11 p.m. and locked up to the wall at 7 a.m. There had been a small table and chair nailed to floor. The cell had not been ventilated and the applicant had not been allowed to have

regular outdoor walks. The cell had had no toilet and the water had been turned on several times a day only on demand. He alleged that he had been unable to withstand these conditions and had therefore had to cut his wrists in order to be placed back in the detention cell for hunger strikers.

85. The Government made no comment with regard to the applicant's conditions of detention in SIZO No. 1 of the Kyiv Region. Neither did they comment on the conditions of the applicant's detention in the isolation cell.

b. The Court's assessment

86. As to the conditions of detention, the excessive number of persons in the cell and the lack of proper hygiene, ventilation, sunlight, daily walks, appropriate clean bedding or clothes, the Court has examined them as a whole on the basis of the applicant's submissions and the lack of relevant comments from the Government. It notes that it cannot establish with certainty the conditions of the applicant's detention, which occurred quite some time ago. However, taking into account that the applicant's submissions are consistent, thorough and correspond in general to the inspections of the pre-trial detention centres in Ukraine conducted by the Committee for the Prevention of Torture (see paragraph 66 above) and the Commissioner of Human Rights of the Ukrainian Parliament (paragraphs 60-61 above), and that the Government have made no comment on these submissions, the Court concludes that the applicant was detained in unacceptable conditions and that such detention amounted to degrading treatment in breach of Article 3 of the Convention. The Court further finds that the applicant's situation was aggravated by the fact that he was subjected to disciplinary punishment in an isolation cell of the detention centre in conditions that were totally unacceptable under Article 3 of the Convention (see paragraph 84 above).

87. Moreover, the Court notes that the medical reports submitted by the parties show that in the course of his detention the applicant contracted various skin diseases (in particular *scabies* and *eczema*). Clearly the applicant's health significantly deteriorated, judging by his medical examinations of 8 May 1998, 2 June and 20 July 1998, and his further placement in hospital after his release on 23 February 2000. While it is true that the applicant received some medical treatment for these diseases, their initial contraction, recurrence, aggravation and the applicant's further medical treatment after release, demonstrate that he was detained in an unsanitary environment, with no respect for basic hygiene. These conditions had such a detrimental effect on his health and well-being that the Court considers that they amounted to degrading treatment (cf. *Kalashnikov v. Russia*, no. 47095/99, § 98, ECHR 2002-VI).

88. In the light of the above, the Court concludes that there has been a violation of Article 3 of the Convention.

2. *Force-feeding of the applicant*

a. The parties' submissions

89. The applicant submitted that the manner in which he was force-fed amounted to torture. Furthermore, he alleged that the procedure set out in the internal prison instructions was not followed by the prison authorities. He further submitted that no medical commission had met to examine his state of health in order to decide whether force-feeding was necessary from a medical point of view. The applicant alleged that force had been used to feed him. He also mentioned that he had been placed in an isolation cell on 1 April 1999 as a punishment for continuing his hunger strike.

90. The applicant further maintained that he had been force-fed by other detainees, who had already been convicted, and not by medical staff. In the course of the force-feeding, which occurred five times a week, he had frequently been handcuffed to a chair or a heating facility and forced to swallow a rubber tube that was connected to a bucket with a special nutritional mixture.

91. The Government submitted that the force-feeding had been conducted strictly in accordance with medical necessity in order to preserve the applicant's life. They further maintained that his state of health had been satisfactory in relation to his ability to be held in detention and to participate in investigative proceedings. Moreover, they submitted that the applicant had been under constant medical supervision as he had been examined practically every two or three days by one or more medical doctors and brought to a hospital for extensive examinations on two occasions. The force-feeding and treatment had been ordered and administered by medical professionals. They alleged that it had not been shown that the feeding and medical treatment had resulted in any aggravation of the applicant's health. As proof of their submissions, they provided signed reports from the medical officers, dated 2004, and the staff of SIZO No. 1 of the Kyiv Region of the Department for Enforcement of Sentences, where the applicant had been held in detention, and who had allegedly administered the force-feeding of the applicant.

92. The applicant alleged that the written reports of the medical staff of SIZO No. 1 had been written under pressure and instructions from the State Department for Enforcement of Sentences, and were not truthful. In addition, the applicant provided a copy of his diary and a written statement of his cell mate, Mr Koval [1], who insisted in particular that the applicant had been fed by other detainees, albeit under the supervision of medical staff, and that the nutritional mixture had been given to the applicant through a

[1] . Mr Koval’s case is currently pending before the Court (see *Koval v. Ukraine* (dec.), no. 65550/01, 30 March 2004).

rubber hose from a twelve-litre bucket. Mr Koval alleged that the applicant had been handcuffed when force-fed.

b. The Court's assessment

93. The Court notes that in previous case-law the Commission held that the "forced-feeding of a person does involve degrading elements which in certain circumstances may be regarded as prohibited by Article 3 of the Convention". When, however, as in the present case, a detained person maintains a hunger strike this may inevitably lead to a conflict between an individual's right to physical integrity and the High Contracting Party's positive obligation under Article 2 of the Convention – a conflict which is not solved by the Convention itself" (see *X v. Germany* (1984) 7 EHRR 152). The Commission reiterated that "under German law this conflict ha[d] been solved in that it [was] possible to force-feed a detained person if this person, due to a hunger strike, would be subject to injuries of a permanent character, and the forced-feeding [was] even obligatory if an obvious danger for the individual's life exist[ed]. The assessment of the above-mentioned conditions [was] left for the doctor in charge but an eventual decision to force-feed [could] only be carried out after judicial permission ha[d] been obtained" (ibid.). The Commission also found that the applicant's allegations of being subjected to ill-treatment while being force-fed on hunger strike were unsubstantiated, as the applicant had failed to prove that the manner of his force-feeding amounted to torture, inhuman or degrading treatment or punishment (see *Petar Ilijkov v. Bulgaria*, no. 33977/96, § 1, Commission decision of 20 October 1997). It further had due regard to the Recommendations of the Committee of Ministers, the Reports of the CPT and the World Medical Association in respect of the force-feeding of detainees (see paragraphs 64-65 and 68-69 above).

94. The Court reiterates that a measure which is of therapeutic necessity from the point of view of established principles of medicine cannot in principle be regarded as inhuman and degrading. The same can be said about force-feeding that is aimed at saving the life of a particular detainee who consciously refuses to take food. The Convention organs must nevertheless satisfy themselves that the medical necessity has been convincingly shown to exist (see *Herczegfalvy v. Austria,* judgment of 24 September 1992, Series A no. 244, p. 26, § 83). Furthermore, the Court must ascertain that the procedural guarantees for the decision to force-feed are complied with. Moreover, the manner in which the applicant is subjected to force-feeding during the hunger strike shall not trespass the threshold of a minimum level of severity envisaged by the Court's case law under Article 3 of the Convention. The Court will examine these elements in turn.

95. At the outset, the Court notes that the applicant did not claim that he should have been left without any food or medicine regardless of the

possible lethal consequences. However, he claimed that there had been no medical necessity to force-feed him, as there had been no medical examinations, relevant tests or other documents that sufficiently proved that necessity. He claimed that the decision to subject him to force-feeding had been based on the analysis of the acetone level in his urine. He further maintained that the force-feeding had been aimed at his humiliation and punishment, as its purpose had been to make him stop the hunger strike and, in the event of his refusal, to subject him to severe physical suffering.

96. The Court observes the statement of the Government with regard to the satisfactory state of health of the applicant in detention (see paragraph 91 above). In view of the failure of the Government to provide "the written report of the medical commission establishing a life-threatening decrease in the state of health of the applicant" and "the decision of the head of the [detention] institution" that were obligatory under the decree of 4 March 1992 (see paragraph 62 above), the Court concludes that the Government have not demonstrated that there was a "medical necessity" established by the domestic authorities to force-feed the applicant. It can only therefore be assumed that the force-feeding was arbitrary. Procedural safeguards were not respected in the face of the applicant's conscious refusal to take food, when dispensing forced treatment against his will. Accordingly, it cannot be said that the authorities acted in the applicant's best interests in subjecting him to force-feeding.

97. As to the manner in which the applicant was fed, the Court assumes, in view of the submissions of the parties, that the authorities complied with the manner of force-feeding prescribed by decree (see paragraph 62 above). However, in themselves the restraints applied – handcuffs, a mouth-widener (*роторозширювач*), a special rubber tube inserted into the food channel – in the event of resistance, with the use of force, could amount to torture within the meaning of Article 3 of the Convention, if there is no medical necessity (see paragraph 63 above - restraints in accordance with the European Prison Rules).

98. In the instant case, the Court finds that the force-feeding of the applicant, without any medical justification having been shown by the Government, using the equipment foreseen in the decree, but resisted by the applicant, constituted treatment of such a severe character warranting the characterisation of torture.

99. In the light of the above, the Court considers that there has been a violation of Article 3 of the Convention.

3. Medical assistance and treatment provided for the applicant

100. The applicant submitted that he had not been provided with necessary medical assistance and treatment in the course of his detention. He further alleged that SIZO No. 1 of the Kyiv Region lacked the medicines required for the treatment of his particular state of health, the chronic

diseases from which he suffered and the diseases which he contracted in detention. The medicines he required had been supplied largely by his relatives – his sister in particular – and sometimes the detention facility had not accepted them because the applicant had refused to discontinue his hunger strike.

101. The Government maintained that the applicant had received all necessary medical treatment and assistance while he was detained.

102. The Court notes its findings with regard to the force-feeding administered to the applicant, which in itself demonstrates that the domestic authorities did not provide appropriate medical treatment and assistance to the applicant while he was in detention. On the contrary, the force-feeding has not been shown to have been related to his particular state of health or to the strict medical necessity of saving his life.

103. It also notes that the applicant was examined by a doctor for the first time one and half months after he had been detained. Prior to his detention, the applicant had not been suffering from any skin disease and his state of health was normal until he contracted allergic dermatitis in custody (the conclusion of his examination on 5 February 1998, paragraph 41 above), which later proved to be microbic eczema and scabies. At the start of the force-feeding, the applicant was examined more regularly.

104. The independent medical examination No. 58 of 8 May 1998 recommended that the applicant be given treatment in a specialised hospital for microbic eczema (paragraphs 43-44 above). However, this recommendation was not followed because of that hospital's view that the applicant could well be treated for scabies in custody (examination by Kyivsky Dermato-Venerologichny Hospital of 14 July 1998, paragraph 46), confirmed by medical report No. 88 of 20 July 1998 (paragraph 47 above).

105. Furthermore, the applicant suspended his hunger strike on 14 July 1998, resuming in October 1998. However, from the records submitted by the Government it is clear that the applicant was not examined or attended by a doctor from 5 August 1998 to 10 January 2000 (paragraph 50 above). In the Court's view, this cannot be deemed to be adequate and reasonable medical attention, given the hunger strike and the diseases from which the applicant was suffering. Furthermore, the Government have provided no written records as to the force-feeding throughout the hunger strike, the kind of nutrition used or the medical assistance provided to him in this respect.

106. In these circumstances, the Court considers that there has been a violation of Article 3 of the Convention as regards the lack of adequate medical treatment and assistance provided to the applicant while he was detained, amounting to degrading treatment.

III. ALLEGED VIOLATION OF ARTICLE 5 §§ 1(c) AND 3 OF THE CONVENTION

A. Lawfulness of the applicant's detention (Article 5 § 1 (c) of the Convention)

1. The parties' submissions

107. The applicant complained that his detention on remand had been unlawful once the maximum statutory period of detention had expired. He referred to Article 5 § 1(c) of the Convention, which provides in so far as relevant:

> “1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; ...”

108. The Government maintained that the applicant's detention from 30 September 1998 to 22 February 2000 was lawful. They submitted that it had been lawful to detain the applicant from 9 September 1998 to 9 August 1999 and from 5 January to 7 February 2000 as, during those two particular periods, the applicant had been studying the material on the case-file, foreseen by Article 218 of the CCP, and there had been an additional investigation in the criminal case, pursuant to Article 156 § 7 of the CCP.

2. General principles enshrined in the case-law

109. The Court notes that the expressions “lawful” and “in accordance with a procedure prescribed by law” in Article 5 § 1 essentially refer back to national law and lay down an obligation to conform to the substantive and procedural rules thereof. While it is for the national authorities, notably the courts, to interpret and apply domestic law, the Court may review whether national law has been observed for the purposes of this Convention provision (see, among other authorities, *Douiyeb v. the Netherlands* [GC], no. 31464/96, §§ 44-45).

110. The Court recalls that the “lawfulness” of detention under domestic law is the primary, but not always the decisive element. The Court must, in addition, be satisfied that the detention during the period under consideration was compatible with the purpose of Article 5 § 1 of the Convention, which is to prevent persons from being deprived of their liberty in an arbitrary manner. Moreover, the Court must ascertain whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein (see *Winterwerp v. the Netherlands*, judgment of 24 October 1979, Series A no. 33, pp. 19-20, § 45).

111. The Court stresses that, where deprivation of liberty is concerned, the general principle of legal certainty must be satisfied. It is therefore essential that the conditions for the deprivation of liberty under domestic law be clearly defined, and that the law itself be sufficiently certain to enable a person – if need be after having obtained appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *S.W. v. the United Kingdom*, judgment of 22 November 1995, Series A no. 335-B, pp. 41–42, §§ 35–36).

3. The reservation made by Ukraine under Article 5 § 1 of the Convention

112. The Court observes that the reservation refers, *inter alia*, to Articles 106 and 157 of the CCP (see paragraphs 56-59 above), according to which a person may be arrested or detained on the basis of a public prosecutor's decision, without there being any requirement for judicial supervision of the initial detention (see *Salov v. Ukraine* (dec.), no. 65518/01, 27 April 2004). Having regard to the terms of the reservation, Ukraine was under no Convention obligation to guarantee that the initial arrest and detention of persons, like the applicant, be ordered by a judge (see *Falkovych v. Ukraine* (dec.), no. 64200/00, 29 June 2004).

113. The Court notes that the issue of the prolongation of a person's detention is decided on the basis of Article 156 of the CCP (see paragraph 54 above). This provision was not, however, included in Ukraine's reservation under Article 5 § 1 of the Convention.

114. Having regard to the terms of the reservation and the fact that it did not refer to Article 156 of that Code, the Court considers that the issue of continued detention is not covered by that reservation.

4. The lawfulness of the applicant's continued detention

115. As regards the facts of the present case, the Court notes that the applicant's detention was initially ordered by the investigator of the Ministry of the Interior on 8 April 1997. A warrant for the applicant's arrest was confirmed by the Kyiv City Prosecutor on 11 April 1997. This warrant was reviewed by a court on 28 May 1997. The applicant's detention was extended on five successive occasions by the relevant prosecutors from six to eighteen months. The last decision to extend the applicant's detention was given on 30 June 1998 by the Acting Prosecutor General (see paragraphs 27 and 31-34 above). On 1 November and 16 December 1999 the Kyiv City Court and the Supreme Court rejected the applicant's requests for release, even though the maximum statutory period of permitted detention had expired.

116. The Court notes that a period of detention is, in principle, "lawful" if it is based on a court order (see *Ječius v. Lithuania*, no. 34578/97, § 68, ECHR 2000-IX). However, there were no court decisions taken as to the applicant's continued detention from 29 May 1997 to 1 November 1999. The decisions to prolong the applicant's detention were taken by prosecutors, who were a party to the proceedings, and cannot in principle be regarded as "independent officers authorised by law to exercise judicial power" (see *Merit v. Ukraine*, no. 66561/01, judgment of 30 March 2004, § 63). In view of their role and status, they could not carry out the appropriate review of the lawfulness of the decision to prolong the applicant's detention, which is an issue to be considered under Article 5 § 3 of the Convention.

117. The courts only reviewed the decisions of the prosecution for the applicant's continued detention on 1 November and 16 December 1999, when they refused the applicant's request for release, without giving any particular reasons and without specifying the period of further detention, even though the maximum statutory period of detention in the applicant's case had already expired on 30 September 1998. The applicant finished familiarising himself with the case-file on 9 August 1999 but, in accordance with Article 156 of the CCP, this period was not taken into account in calculating the total period of detention. Further investigations were ordered on 1 November 1999 by the Kyiv City Court and 16 December 1999 by the Supreme Court.

118. In these circumstances, the Court concludes that the applicant's continued detention from 1 October 1997 (the date of second prolongation of the period of his detention, that falls within the Court's jurisdiction *ratione temporis*) to 1 November 1999 (the first period) was not lawful, as understood by Article 5 § 1(c) of the Convention.

119. Furthermore, the maximum statutory period of detention in the event of an additional investigation ordered by the court is two months. This period expired on 16 February 2000. However, the applicant was not

released for another seven days, on 23 February 2000, following the decision the day before of the First Deputy Prosecutor of Kyiv Region to release him. In these circumstances, the Court concludes that the applicant's continued detention from 16 to 22 February 2000 (the second period) was also unlawful under Article 5 § 1(c) of the Convention.

120. Furthermore, the applicant was released on 23 February 2000, a day after it had been decided to release him (third period), even though he should have been released immediately in view of the expiry of the statutory period of detention (see paragraph 54 above).

121. The Court concludes, therefore, that there has been a violation of Article 5 § 1(c) of the Convention in that the applicant was detained without lawful ground from 1 October 1997 to 1 November 1999, from 16 to 22 February 2000 and from 22 to 23 February 2000.

B. Complaints under Article 5 § 3 of the Convention

122. The applicant further complained that the overall length of his detention had not been "justified" or "reasonable". He referred to Article 5 § 3 of the Convention, which provides in so far as relevant as follows:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

1. Whether the applicant was brought promptly before an officer authorised by law to exercise judicial power to review his continued detention

a. The parties' submissions

123. The applicant complained under Article 5 § 3 of the Convention that he had been held in detention for two years, ten months and fifteen days without being brought promptly before a judge or other officer authorised by law to exercise judicial power in order to review his prolonged detention.

124. The Government argued that the length of the applicant's detention in police custody had been in conformity with the legislation in force at the time. They asked the Court to reject the applicant's allegations as groundless. They further maintained that the prosecutor was an officer authorised by law to exercise judicial power and that the prolongation of the applicant's detention had therefore complied with the requirements of Article 5 § 3 of the Convention.

b. Status of the public prosecutor in Ukrainian law / As to whether the prosecutor could be considered as "an officer authorised by law to exercise judicial power"

125. The Court decided this issue in the case of *Merit v. Ukraine* (cited above, §§ 62-64). There it noted the status of the prosecutor under Ukrainian law as a party to criminal proceedings and his or her subordination to the executive branch of Government. The Court held, therefore, that a prosecutor cannot be regarded as an officer exercising "judicial power" who is endowed with the attributes of "independence" and "impartiality" required by Article 5 § 3 (see also *Schiesser v. Switzerland*, judgment of 4 December 1979, Series A no. 34, §§ 27-41) and who can offer guarantees against an arbitrary or unjustified deprivation of liberty (see *Niedbała v. Poland*, no. 27915/95, §§ 48-57, 4 July 2000). There is no reason to reach a different conclusion in the present case. Accordingly, the Court rejects the Government's submissions as to the independence and impartiality of the prosecutor.

c. Whether the applicant was brought promptly before a court to review his prolonged detention

126. The judicial control under Article 5 § 3, must be prompt, a matter to be assessed in each case according to its special features (see *De Jong, Baljet and Van den Brink v. the Netherlands*, judgment of 22 May 1984, Series A no. 77, pp. 24-25, §§ 51-52). However, the scope for flexibility in interpreting and applying the notion of promptness is very limited (*Brogan and Others v. the United Kingdom*, judgment of 29 November 1988, Series A no. 145-B, pp. 33-34, § 62). The Court recalls that, in the *Brogan and Others* case (p. 33, § 62), it held that a justifiable detention in police custody which had lasted four days and six hours, without judicial control, breached the requirement of promptness.

127. The Court observes that the applicant was held in pre-trial detention for a total of two years, ten months and fifteen days from 8 April 1997 to 23 February 2000. His initial detention as a suspect was authorised by the public prosecutor on 11 April 1997, against which the applicant appealed on 12 May 1997. However, it took the Moskovsky District Court of Kyiv more than two weeks to review the measure and, on 28 May 1997, it upheld its lawfulness. Further decisions with regard to the applicant's continued detention were taken by the prosecutors. The only other judicial reviews of the applicant's detention were held on 1 November and 16 December 1999 by the Kyiv City Court and the Supreme Court respectively.

128. Even though the investigation of economic offences presents the authorities with special problems, the Court cannot accept that it was necessary to detain the applicant for so long in pre-trial detention without either prompt or regular judicial supervision.

129. The Court finds therefore that there has been a breach of Article 5 § 3 of the Convention in this respect.

2. Length of the applicant's detention

a. Case-law of the Court

130. The Court observes that the question of whether or not a period of pre-trial detention is reasonable cannot be assessed in the abstract. Each case must be examined on its own special features. Continued detention may be justified if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention (see, among other authorities, *Kudła v. Poland,* [GC], no. 30210/96, § 110, ECHR 2000-XI).

131. It falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must, paying due regard to the principle of the presumption of innocence, examine all the facts arguing for or against the existence of a public interest justifying a departure from the rule in Article 5, and must set them out in their decisions on the applications for release. It is essentially on the basis of the reasons given in these decisions, and any well-documented facts stated by the applicant in his appeals, that the Court is called upon to decide whether or not there has been a violation of this aspect of Article 5 § 3 (see *Labita v. Italy* [GC], no. 26772/95, § 152, ECHR 2000-IV).

132. The persistence of a reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. The Court must then establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were "relevant" and "sufficient", the Court must also be satisfied that the national authorities displayed "special diligence" in the conduct of the proceedings. The complexity and special characteristics of the investigation are factors to be considered in this respect (see *Scott v. Spain*, judgment of 18 December 1996, *Reports* 1996-VI, pp. 2399-2400, § 74, and *I.A. v. France*, judgment of 23 September 1998, *Reports* 1998-VII, p. 2978, § 102).

133. Furthermore, the Court reiterates that the notion of legal certainty, based on the rule of law, pervades Article 5 of the Convention, in particular Article 5 § 3. In this connection the Court observes that Article 156 of the CCP (see paragraph 54 above) in essence contravenes the Court's case-law, since the time allowed for the applicant to familiarise himself with the case-file was not regulated by domestic law with sufficient precision and was not taken into account in calculating the overall period of the applicant's pre-trial detention. Moreover, the applicant was expected to remain in custody for an indeterminate period of time, without any judicial authorisation for his prolonged detention, as required by Article 5 § 3, while he and/or other suspects were studying the case-file. The Court considers, therefore, that this statutory loophole which existed in the CCP was, in itself, contrary to

the principle of “legal certainty” (see *Ječius v. Lithuania*, no. 34578/97, § 57, ECHR 2000-IX). It further notes that, with the introduction of changes and amendments to the CCP on 3 April 2003, this situation has been partially rectified. However, such reforms did not affect the applicant's situation at the material time.

b. Period to be taken into consideration

134. The Court recalls that, in determining the length of detention pending trial under Article 5 § 3 of the Convention, the period to be taken into consideration begins on the day the accused is taken into custody and ends on the day when the charge is determined, even if only by a court of first instance (see, among other authorities, *Wemhoff v. Germany*, judgment of 27 June 1968, Series A no. 7, p. 23, § 9, and *Labita v. Italy* [GC], no. 26772/95, §§ 145 and 147, ECHR 2000-IV). The Court thus finds that the applicant's detention lasted from 8 April 1997 to 23 February 2000, that is, a total of two years, ten months and fifteen days. However, only two years, five months and twelve days fall with its competence *ratione temporis,* the entry into force of the Convention with respect to Ukraine having occurred on 11 September 1997.

135. The Court notes the standard reasons for the prosecution's initial decision to remand the applicant in custody: the risks of obstruction, intimidation of witnesses and tampering with evidence. The decision also had regard to the gravity of the charges against the applicant. The Court recalls that the existence of a strong suspicion of the involvement of a person in serious offences, while constituting a relevant factor, cannot alone justify a long period of pre-trial detention (see *Scott v. Spain*, cited above, p. 2401, § 78). In this context, it notes that none of the judicial or prosecution decisions in the applicant's case relied on any factual circumstances to support their conclusions that the preventive measure should be maintained. There is no reference in these decisions to any factor capable of showing that the risks relied on actually persisted during the relevant period. Moreover, there is no reference to the grounds specified in Articles 148 and 150 of the CCP (paragraph 54 above).

136. The Court considers that the original reasons given by the prosecution - a possible interference with the investigation and the suspicion that the applicant had committed the offences with which he was charged – might have sufficed to warrant the applicant's initial detention on remand. However, as the proceedings progressed and the collection of the evidence neared completion (the applicant familiarising himself with the content of the prosecution's case-file) that ground would have inevitably become less relevant. It notes that some of the suspects were not held in detention during the course of the investigation, due to their family situation. Having regard to its conclusions above (paragraphs 83-88) as regards the applicant's state of health and conditions of detention, the Court considers that he should not

have been subjected to prolonged detention. In the absence of any concrete evidence to the contrary from the Government, the Court finds that the applicant's continued detention was neither necessary nor justified by special circumstances.

137. Moreover, the Court notes that no alternative measures were effectively considered by the domestic authorities to ensure the applicant's appearance at trial (cf. *Neumeister v. Austria*, judgment of 27 June 1968, Series A no. 8, p. 3, § 3, and *Jablonski v. Poland*, no. 33492/96, § 83, 21 December 2000). A bail surety was deposited, but had no effect (see paragraphs 32-33 above). The authorities did not look into the other possible preventive measures expressly provided for in Article 149 of the CCP (paragraph 54 above) until the statutory limit on the applicant's detention had expired, when, on 23 February 2000, he was released on his undertaking not to abscond (paragraph 37 above).

138. In sum, the Court finds that the reasons relied on by the authorities to justify the applicant's continued detention for more than two years and five months, although possibly relevant and sufficient initially, lost these qualities as time passed. There has accordingly been a violation of Article 5 § 3 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

139. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary damage

140. The applicant claimed pecuniary damage amounting to 60,700 American dollars (USD), being about 45,828.60 euros (EUR). In that sum he included his loss of salary during the 34 months of his detention (USD 15,300), the bail surety paid to the Ministry of the Interior (USD 40,000), the cost of medicine provided by his relatives and other medical expenses (USD 5,400) he had incurred during his detention. In support of his claim, the applicant provided evidence of the salary he had previously received as an employee of the Ukrinbank, information regarding the calculation of the bail surety and receipts of currency-exchange transactions, the proceeds of which were allegedly spent on his medical needs.

141. The Government submitted that there was no causal link between the protracted length of the applicant's detention and the pecuniary damages

claimed. They noted that the period of the applicant's detention had been deducted from the sentence, against which the applicant had not appealed. They also considered that the applicant's claim for bail compensation could not be examined by the Court as that part of the applicant's case had been declared inadmissible. As regards the applicant's claims for compensation for medical expenditure, the Government considered them unsupported by receipts and fabricated. They asked the Court not to make an award of this kind.

142. The Court considers that no causal link has been established by the applicant between the alleged pecuniary damage and the violation of Article 5 of the Convention it has found. However, the Court accepts that the applicant and his family incurred certain medical expenses in their attempt to mitigate the unacceptable conditions of the applicant's detention and their negative consequences for his health, in respect if which the Court has found a violation of Article 3 of the Convention. Deciding on an equitable basis, it awards the applicant EUR 1,000 in compensation in this respect.

B. Non-pecuniary damage

143. The applicant claimed USD 150,000 (EUR 112,530) in compensation for non-pecuniary damage. He maintained that he had suffered spiritual and physical anguish, stress and worry throughout his detention, and had been tortured during the force-feeding, dishonoured, his will suppressed and his health broken. He also submitted that his normal way of life had been disrupted and that he had been deprived of normal relations with other people. His image and career opportunities had been affected and it was not possible for him to support his elderly parents.

144. The Government noted that the amount claimed was inordinate and bore no relation to the present case. They submitted that social disruption was a natural consequence of any detention. They asked the Court to award a sum on an equitable basis taking into account its case-law on the issue and the principle that applications to the Court cannot serve as a basis for unjustified enrichment.

145. The Court recalls its findings above of grave violations of Articles 3 and 5 of the Convention in the present case. Having regard to comparable applications in its case-law, and deciding on an equitable basis, the Court awards the applicant EUR 20,000 in compensation for non-pecuniary damage (cf. *Peers v. Greece*, no. 28524/95, § 88, ECHR 2001-III, and *Khokhlich v. Ukraine*, no. 41707/98, § 228, 29 April 2003).

C. Costs and expenses

146. The applicant submitted a legal costs claim for his representation in Ukraine and before the Court amounting to USD 59,200 (EUR 44,410), supported by the following:

(a) a certificate from Mr Vronsky (the lawyer dealing with the applicant's case from August 1997 until February 2000) for the month of February in the sum of UAH 1,200. The applicant claimed that the total amount for the whole period of his representation at the rate of UAH 1,200 per month was USD 16,200 (EUR 12,150);

(b) a certificate from Mr Portyanyk (the lawyer dealing with the applicant's case from May 1997 until February 2001) for UAH 90,610 (EUR 13,014) that is allegedly still unpaid;

(c) the applicant claimed that he had paid Mr Didenko (his lawyer from June 1997 until February 2001) USD 9,000 (EUR 6,751.69);

(d) the applicant claimed that on 10 December 1998 he had paid Analityk, an auditing company, UAH 2,400 (EUR 437.92) for a financial and accounting examination that had been necessary in his criminal case. He provided the contractual documentation of this service.

(e) the applicant submitted an expenses claim relating to correspondence, telephone calls, telegrams, etc., in the total amount of USD 500 (EUR 375), of which he provided some proof;

(f) the applicant submitted that he had concluded an agreement with Mr Portyanyk for a total amount of UAH 60,000 (EUR 9,307.70) that is still owed for his representation before the Court (between May 1999 and January 2004);

(g) the applicant claimed other expenses for the proceedings before the Court with regard to the printing of documents, telephone calls, faxes and translations into official languages, amounting to USD 5,000 (EUR 3,750).

147. The Government submitted that the claims were unsubstantiated. They further pointed out that these claims were not corroborated by any vouchers, receipts or other documents. They requested the Court to reject them.

148. The Court reiterates that, in order for costs and expenses to be included in an award under Article 41, it must be established that they were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum (see *Merit v. Ukraine*, no. 66561/01, § 88, 30 March 2004). The Court considers that these requirements have not been fully met in the instant case. It is not satisfied that all the costs and expenses, allegedly amounting to EUR 44,410, were reasonably incurred in connection with the complaints submitted to the Court. The only expenditure which the applicant has substantiated is the UAH 1,200 paid to Mr Vronsky, and the UAH 2,400 paid by his sister for Analytik's expert audit. However, the first sum of UAH 1,200 was not directly or personally paid by the applicant but by Ukrinbank (cf. the publication of extracts of the

judgment in *Gusinskiy v. Russia*, no. 70276/01, § 88, ECHR 2004). Furthermore, as regards the contracts concluded between Mr Portyanik and the applicant for a total amount of UAH 150,610.00 (EUR 21,632.30), the Court finds them couched in very general terms from which it is impossible to determine the specific financial obligations of the applicant towards his lawyer and the conditions under such sums were due. Nevertheless, it is clear that the applicant incurred some legal fees and bore some expenses in relation to the domestic proceedings and the proceedings before the Court, in the light of his submissions before the Court throughout the proceedings and the observations submitted by his lawyers.

149. Regard being had to the information in its possession and to the above criteria, the Court considers it reasonable to award the applicant EUR 5,000 for costs and expenses.

D. Default interest

150. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 3 of the Convention in respect of the conditions of the applicant's detention and the lack of adequate medical treatment and assistance, which amounted to degrading treatment;

2. *Holds* unanimously that there has been a violation of Article 3 of the Convention in respect of the force-feeding of the applicant, which amounted to torture;

3. *Holds* by six votes to one that there has been a violation of Article 5 § 1(c) of the Convention in respect of the lawfulness of the applicant's detention from 1 October 1997 to 1 November 1999, from 16 to 22 February 2000 and from 22 to 23 February 2000;

4. *Holds* unanimously that there has been a violation of Article 5 § 3 of the Convention in respect of the lack of prompt judicial reviews of the lawfulness of the applicant's continued pre-trial detention;

5. *Holds* unanimously that there has been a violation of Article 5 § 3 of the Convention in respect of the overall length of that detention;

6. *Holds* unanimously that the Government have failed to fulfil their obligation under Article 38 § 1 (a) of the Convention;

7. *Holds* unanimously

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts, to be converted into the national currency of the respondent State on the date of payment:

(i) EUR 1,000 (one thousand euros) in respect of pecuniary damage;

(ii) EUR 20,000 (twenty thousand euros) in respect of non-pecuniary damage;

(iii) EUR 5,000 (five thousand euros) in respect of costs and expenses;

(iv) any tax that may be chargeable on the above amounts;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

8. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 5 April 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Ms Mularoni is annexed to this judgment.

J.-P.C.

S.D.

PARTLY DISSENTING OPINION OF JUDGE MULARONI

I voted against finding of a violation of Article 5 § 1 of the Convention for two different reasons.

1. Unlike the majority, I consider that the issue of the prolongation of a person's detention is covered by Ukraine's reservation under Article 5 § 1 of the Convention.

The said reservation provides as follows (see paragraphs 56 and 57 of the judgment):

> "... 2. The provisions of Article 5 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 shall apply in the part that **does not contravene paragraph 13 of Chapter XV of the Transitional Provisions of the Constitution of Ukraine and Articles 106 and 157 of the Code of Criminal Procedure of Ukraine concerning the detention of a person and the issue of an arrest warrant by a public prosecutor**.
>
> Such reservations shall be in force until appropriate amendments to the Code of Criminal Procedure of Ukraine are introduced or until the adoption of the new Code of Criminal Procedure of Ukraine, but not **later than 28 June 2001**."
>
> Paragraph 13 of Chapter XV of the Transitional Provisions of the Constitution of Ukraine of 26 June 1996 provides as follows:
>
> "... 13. The existing procedure for the arrest, custody and detention of persons suspected of committing an offence, and the procedure for carrying out an inspection and search of a person's home and other property, shall be retained for five years after the entry into force of the present Constitution."

The majority have recalled that the Court held in its previous decisions that, having regard to the terms of the reservation under Article 5 § 1, Ukraine was under no Convention obligation to guarantee that the initial arrest and detention of persons be ordered by a judge (see paragraph 112 of the judgment). I fully share such a conclusion. However, in this judgment the Court has concluded that the issue of continued detention was not covered by the reservation, as it did not refer to Article 156 of the Code of Criminal Procedure (see paragraph 114 of the judgment).

Firstly, I observe that the reservation made by Ukraine under Article 5 § 1 of the Convention not only refers to Articles 106 and 157 of the Code of Criminal Procedure, but also to paragraph 13 of Chapter XV of the Transitional Provisions of the Constitution, which provides, *inter alia*, that "the existing procedure for the arrest, custody, and detention of persons suspected of committing an offence ... shall be retained for five years after the entry into force of the present Constitution".

Secondly, Article 156 of the Code of Criminal Procedure at the material time concerned "<u>the terms</u> for holding in custody". However, the reason for the majority to find a violation of Article 5 § 1(c) of the Convention in relation to the first period (from 1 October 1997 to 1 November 1999) has

nothing to do with the length of holding the applicant in custody; the reason is that the applicant's detention was extended on five successive occasions not by the court, but by the relevant prosecutors for periods from six to eighteen months, i.e. within the maximum statutory period of detention.

I cannot conclude therefore that Ukraine violated Article 5 § 1(c) of the Convention because the issue of continued detention was not covered by the reservation made by the respondent party under Article 5 § 1. It seems to me that the majority considers that there was a problem as to the lack of judicial control over the applicant's detention during the statutory term. However, I consider that this is an issue that has to be examined under Article 5 § 3 of the Convention. The Court reviewed this issue separately and unanimously found a violation of Article 5 § 3 in respect of the lack of prompt judicial review of the lawfulness of the applicant's continued pre-trial detention (see §§ 123 – 129 of the judgment).

I conclude therefore that the applicant's detention from 1 October 1997 to 1 November 1999 was lawful and consequently that there was no violation of that Article 5 § 1(c) of the Convention, as the Ukrainian authorities have complied with the statutory period of detention provided for by Article 156 of the Criminal Code of Procedure.

2. The majority also found a violation of Article 5 § 1(c) of the Convention in that the applicant was detained without lawful grounds from 16 to 22 February 2000 and from 22 to 23 February 2000, as the maximum statutory period of detention had expired.

However, having regard to the facts of the case and to the text of Articles 156 and 218 of the Code of Criminal Procedure, in force at the material time, I cannot conclude that the applicant's detention from 16 to 22 February 2000 was outside the statutory limit. In particular, I note that Article 156 provided that the time allowed for the applicant to familiarise himself with the case-file was not taken into account in calculating the overall period of the applicants' pre-trial detention, on the one hand, and that the term of holding in custody could be prolonged in case of a new investigation, on the other hand (see paragraph 54 of the judgment).

I cannot conclude either that Article 5 § 1(c) was violated for the detention period from 22 to 23 February 2000 as the authorities "should have released him immediately in view of the expiry of the statutory period of detention" (see paragraph 120 of the judgment). Firstly, as I said just above, I cannot find that the applicant's detention from 16 to 22 February 2000 was outside the statutory limit. Secondly, I consider that the Court would take a much stricter approach to Ukraine than to other responding States should it find a one-day delay in release of a detainee unacceptable.

For these reasons, I conclude that Article 5 § 1(c) of the Convention was not violated as to the applicant's detention from 16 to 22 February 2000 and from 22 to 23 February 2000.

It goes without saying that the excessive length of the applicant's detention is a different issue. This aspect was examined under Article 5 § 3 of the Convention and the Court has unanimously found a violation in this respect (see §§ 130 – 138 of the judgment).