



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

FIFTH SECTION

CASE OF NECHIPORUK AND YONKALO v. UKRAINE

(Application no. 42310/04)

JUDGMENT

*This version was rectified on 1 June 2011
under Rule 81 of the Rules of Court*

STRASBOURG

21 April 2011

FINAL

21/07/2011

*This judgment has become final under Article 44 § 2 of the Convention. It
may be subject to editorial revision.*

In the case of Nechiporuk and Yonkalo v. Ukraine,

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

Elisabet Fura, *President*,

Karel Jungwiert,

Boštjan M. Zupančič,

Mark Villiger,

Ann Power,

Ganna Yudkivska,

Angelika Nußberger, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 15 March 2011,

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

PROCEDURE

1. The case originated in an application (no. 42310/04) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Ukrainian nationals, Mr Ivan Nikolayevich Nechiporuk and Ms Natalya Nikolayevna Yonkalo (“the applicants”), on 13 November 2004.

2. The applicants, who had been granted legal aid, were represented by Mr A. Bushchenko, a lawyer practising in Kharkiv. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev.

3. The first applicant alleged, in particular, that he had been the victim of several violations of Articles 3, 5 §§ 1, 2, 3 and 5, as well as of Article 6 §§ 1 and 3 (c) of the Convention.

4. On 27 August 2009 the Court decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1982 and 1981 respectively. The first applicant is serving a prison sentence in Kolomyia Prison no. 41. The second applicant lives in Khmelnytsky¹.

A. Background events

6. On 13 March 2004 two persons wearing masks, one of whom was armed with a gun, attacked a certain Ms I. and her son at the door of their flat in Khmelnytsky. In the course of the fight the armed intruder shot at Ms I., after which they both retreated without any further action and without their faces being seen. Some minutes later Ms I. died.

B. Facts concerning the first applicant

1. The first applicant's detention from 20 to 23 May 2004 and administrative offence proceedings against him

7. On 20 May 2004, at about 1 p.m., the police apprehended the first applicant in the street and took him to the Pivdenno-Zakhidna Police Station. According to a written explanation addressed by one of the arresting officers to the Chief of the Pivdenno-Zakhidna Police Department, the apprehension was occasioned by the suspicious behaviour of the applicant, whom the police had seen “walking fast and looking around”, entering a building (according to the case-file materials, that was the building in which the applicant lived), leaving it when approached and trying to re-enter it later. In the applicant's submission, he was asked by two officers to go to the police station “to clarify some issues”, to which he agreed.

8. The applicant was body-searched in the police station. As a result, a packet containing a “green substance of plant origin” was discovered in his pocket. According to the applicant, it had been planted on him by the police.

9. On the same day, at 10.45 p.m., on the premises of the police station, the applicant was placed in “administrative detention” on suspicion of illegal drug possession. As noted in the respective police report, the offence on suspicion of which the applicant was detained was “a breach of Article 44 of the Code on Administrative Offences”.

1. Rectified on 1 June 2011: the text was “lives in Kharkiv”.

10. The applicant's relatives, while learning about his detention from a witness, were not informed of his whereabouts and enquired unsuccessfully at various police stations and detention facilities in the town, including the Pivdenno-Zakhidna Police Station.

11. On 22 May 2004 an expert report was issued, according to which the substance discovered in the applicant's pocket was not a drug.

12. On 23 May 2004 the applicant was released in the administrative offence proceedings “given the fact that all the circumstances of the case [had] been established and that [his release would] not impede further investigation”. He was however immediately re-arrested in the framework of the criminal proceedings (see below).

13. On 29 May 2004 the police terminated the administrative offence proceedings, finding that there was no case to answer.

2. Alleged ill-treatment of the first applicant and corresponding investigation

14. The applicant's account of the events of 21 May 2004 is as follows. During the night of 20 to 21 May 2004 he was taken from the cell to an office in the Pivdenno-Zakhidna Police Station, where the police officers R.O. and M.D. urged him, under threat of violence, to confess that he had murdered Ms I. As the applicant refused to confess, at about 4 a.m. those officers brought in a manual electricity generator. The applicant was handcuffed and suspended from a metal bar between two tables, with naked wires from the generator attached to his ankles and coccyx. One of the officers, R.O., administered electric shocks to the applicant, while the other officer, M.D., gagged his mouth with a sofa cushion. At about 6.30 a.m. the applicant lost consciousness. After he had recovered consciousness, several officers took it in turns to beat him until 8 p.m., having previously put a bullet-proof jacket on him and covered his head with a pillow. In the meantime, at about 4 p.m., the applicant heard his wife (the second applicant) being questioned in the neighbouring office. One of the officers entered the office where the applicant was, and asked his colleague: “Do you think she would be able to survive what he has gone through?” The applicant then wrote his first confession, allegedly under dictation from a police officer. He stated that he had committed the murder of Ms I. together with a certain Mr M. At 10.05 p.m. the applicant was placed in the Khmelnytsky Temporary Detention Facility (the “Khmelnytsky ITT”).

15. The Government did not submit their version of the events of 21 May 2004, apart from mentioning the first applicant's placement in the Khmelnytsky ITT.

16. At some point on 21 May 2004 the applicant was taken to the investigator in the Khmelnytsky City Prosecutor's Office (“the KCPO”), to whom he complained about his alleged torture by electric shocks.

17. On 24 May 2004 the applicant repeated his complaint to the investigator during questioning. On the same day he was examined by a doctor of the Khmelnytsky Regional Forensic Medical Bureau, who noted that his both ankles had sores of 2.5 cm x 1.5 cm and 2.3 cm x 0.9 cm respectively. The doctor concluded that those injuries were minor and could have been inflicted on the applicant with blunt objects some three days earlier. Given their nature, which the doctor described as “unspecific”, he expressed doubt as to the plausibility of the applicant's allegation that electric current had been applied to him.

18. On 26 May 2004 the applicant's lawyer and relatives complained to the KCPO that he had been tortured during the first hours of 21 May 2004 by two police officers, R.O. and D. They noted that the doctor who had examined the applicant on 23 May 2003 had ignored a number of pinpoint sores on his ankles and that the medical report had been inaccurate. The complainants sought an investigation into the matter and a new medical examination of the first applicant.

19. On the same day the first applicant raised the ill-treatment complaint before the Khmelnytsky City Court during the examination of the prosecutor's request for him to be remanded in custody (see paragraph 41 below). The court allegedly ignored his complaint.

20. Later on the same day the first applicant was allegedly beaten again by police officers, who had previously put a bullet-proof jacket on him. He confessed to the crimes again.

21. On 7 June 2004 the Pivdenno-Zakhidna Police Department examined the office in which the first applicant's questioning had been conducted on 21 May 2004 and issued a report according to which “there were no foreign objects discovered there which could have been used for inflicting bodily injuries”.

22. On 10 June 2004 the first applicant underwent another forensic medical examination ordered by the investigator. According to its report, twenty pinpoint sores had been discovered on the applicant's feet and ankles, each about 0.3 cm wide and 0.2 cm long. A purple bruise, 3 cm x 2 cm, was discovered on the back of his right thigh. The doctor concluded that the injuries were minor and could have been inflicted with blunt objects, possibly on 24 May 2004. The report mentioned: “There is no medical indication that the injuries were caused by an electric current”.

23. On 15 June 2004 the Khmelnytsky Regional Police Department issued a report of its internal investigation in which it found the first applicant's allegation of his ill-treatment in police custody to be unsubstantiated. The report was based on the questioning of the police officers involved, who denied any coercion, as well as the medical findings of 24 May and the office examination report of 7 June 2004.

24. On 18 June 2004 the KCPO issued a decision refusing criminal prosecution of the police officers for lack of *corpus delicti* in their actions. It

was mainly based on the questioning of the police officers involved and the findings of the medical reports of 24 May and 10 June 2004.

25. The first applicant challenged that refusal both separately and in the course of his own trial. In September 2005 the KCPO informed him that his complaints about his alleged ill-treatment by the police had been added to his own case file and would be considered in the course of his trial.

26. Overall, the prosecutor's refusal on 18 June 2004 to bring proceedings against the police officers involved to establish their criminal liability was quashed and subsequently upheld three times. Having quashed it for the last time on 28 March 2007, the Khmelnytsky Regional Court of Appeal ("the Khmelnytsky Regional Court") also referred to the fact that the first applicant's ill-treatment complaint had been included in the case file concerning his own criminal case and was to be examined in the context of his trial (see also paragraph 95 below).

27. On 22 June 2004 the first applicant was transferred from the Khmelnytsky ITT to the Pre-Trial Detention Centre ("the SIZO"). According to the Government, he did not raise any allegation about ill-treatment before the ITT or the SIZO medical personnel or administration.

28. On 20 July 2004 the first applicant was allegedly beaten up again by the police officers who had escorted him to the court for a decision regarding his detention. On the same date his father raised a complaint in that regard before the General Prosecutor's Office ("the GPO").

29. The applicant's father also complained about the alleged ill-treatment of the applicant to the hotline of the Organised Crime Combating Unit of the Khmelnytsky Regional Police Department.

30. On 19 August 2004 the aforementioned authority decided to forward the case to the Khmelnytsky Regional Prosecutor's Office ("the KRPO") given the inability of its own investigation to establish the truth.

31. In June 2005 the first applicant's lawyer asked a licensed private forensic-medical centre for an expert's conclusion regarding the following: (a) whether the findings of the medical reports of 24 May and 10 June 2004 provided grounds to state that the injuries to the applicant's ankles might have been caused by blunt objects; (b) what marks typically appeared on the skin in cases of direct contact with electric current and whether the marks on the applicant's body were of that nature; (c) what injuries could be caused if a bullet-proof jacket was put on the person before beating.

32. On 29 June 2005 two experts of the aforementioned centre, with twenty-three and four years of experience respectively, issued a report with the following conclusions: the first applicant's injuries could not have been caused by blunt objects; their number and features indicated that they might have been inflicted on 21 May 2004 by contacts, possibly multiple ones, with naked electric wires. As to the question about injuries from beatings inflicted through a bullet-proof jacket, the doctors referred to statements

from their colleagues at the Khmelnytsky Regional Forensic Medical Bureau given in the course of the trial, according to which in such cases internal injuries could be inflicted. They could be identified by X-ray, whereas the first applicant had not been X-rayed.

33. As is apparent from the ruling of the Shepetivka Court of 10 July 2006 (see paragraph 82 below), the above medical report had been included in the first applicant's case file.

34. The facts concerning the investigation into the applicant's ill-treatment allegation in the course of his trial are summarised below in the sections pertaining to the trial.

3. Criminal proceedings against the first applicant

(a) Events before the official commencement of the proceedings

35. On 21 May 2004 the first applicant confessed to the armed assault and murder of Ms I. (see also paragraph 14 above).

36. On the same date the investigator applied to the Khmelnytsky City Court for authorisation to search two flats where the first applicant's domicile was registered and where he actually lived. As noted in the application, the investigation had revealed that the applicant might have been involved in the murder and that significant evidence might be found at the place of his residence and/or official domicile.

37. On the same day the Khmelnytsky City Court authorised the requested searches.

38. At about 9 p.m. the police searched the flat where the first applicant lived with his wife (the second applicant). Later that same evening they searched his parents' flat where his domicile was registered. Apparently the searches did not reveal anything of relevance to the investigation.

(b) Pre-trial investigation and the first applicant's detention

39. On 23 May 2004 a criminal case was opened against the first applicant on suspicion of assault with intent to commit robbery and murder for profit, and he was arrested by the investigator in the context of the criminal proceedings. The investigator documented the arrest at 12 a.m. by filling in a document template entitled "Record of a suspect's arrest". The reasons for the arrest were included in the pre-printed part of the template and read as follows:

"Having regard to the circumstances of the case, it cannot be ruled out that the suspect [name] may evade the investigation and impede the establishment of the truth, which, together with the seriousness of the crime committed, provides grounds for his detention".

In the line "Explanations of the detainee" it was noted that the first applicant "had not given any explanations". The applicant had been body-

searched, with “nothing having been discovered”. On the same day he withdrew his earlier confessions, alleging they had been extracted by force.

40. On 26 May 2004 the KCPO requested the Khmelnytsky City Court to remand the applicant in custody, referring to strong evidence against him and to the fact that he was suspected of having committed serious crimes. According to the request, on 21 May 2004 the first applicant had walked into the Pivdenno-Zakhidna Police Station and had given himself up to the police, confessing to assault and murder. It then stated that he had been detained on suspicion of the aforementioned crimes on 23 May 2004.

41. On the same day, 26 May 2004, the Khmelnytsky City Court, following a hearing with the participation of the first applicant and the lawyer contracted by his parents, Mr Ma. (see § 53 below), allowed the prosecutor's request and remanded the applicant in custody. It referred to the gravity of the charges against him and the inherent risk of his absconding or obstructing justice. It was noted in the aforementioned ruling that it could be appealed against within three days.

42. The case file contains a copy of the first applicant's written statement dated 28 May 2004, according to which he refused to make any statement in the course of the pre-trial investigation, relying on Article 63 of the Constitution. At the same time it transpires from some other documents that on the aforementioned date the applicant made another confession. According to the first applicant, he confessed again after his alleged beating by police officers in the Khmelnytsky KCPO and the confession was dictated by the investigator.

43. On 1 June 2004 the first applicant again confessed to those crimes in the presence of his lawyer (Mr Ma.). According to him, those confessions were made in the presence of the police officers involved in his alleged ill-treatment. The record of his questioning of 1 June 2004 contained both his confession and his note “I do not admit my guilt”.

44. On 2 June 2004 a certain Mr M. was arrested on the same charges as those laid against the applicant and confessed to the crimes after his alleged beating by police officers (as he would later complain during his trial).

45. On 5 June 2004 a confrontation was held between the applicant and Mr M., during which the first applicant repeated his confession in the presence of the appointed lawyer Mr Ko. (see paragraph 52 below).

46. On 15 July 2004 the first applicant, in the presence of the lawyer Mr Ma., retracted his earlier confessions as having been given under duress and pleaded not guilty.

47. On 20 July 2004 the Khmelnytsky City Court, acting at the prosecutor's request, extended the term of the first applicant's detention to 23 September 2004, referring to the seriousness of the charges against him and to the inherent risk of his absconding, as well as the possibility of his impeding the investigation which had not yet been completed.

48. On 31 August 2004 the charges against the first applicant were changed from premeditated murder to grievous bodily harm causing death. Both co-accused were also charged with violent robbery and unlawful possession of weapons.

49. On 3 September 2004 the investigation was declared complete, and the first applicant and Mr M. received access to the case file.

50. On 22 September 2004 the case was sent to the Khmelnytsky City Court.

(c) Legal representation of the first applicant during the pre-trial investigation

51. According to the first applicant, he was not legally represented during the period from 20 to 24 May 2004.

52. The Government maintained that on 23 May 2004 a lawyer (Mr Ko.) was appointed for the applicant.

53. On 24 May 2004 the first applicant's parents entered into an agreement with a private lawyer, Mr Ma., for legal representation of the applicant in the criminal proceedings against him.

54. On 25 May 2004 Mr Ma. received from the investigator dealing with the case a written permit for his meetings with the first applicant in the Khmelnytsky ITT, where his client was detained.

55. On 27 May 2004 the first applicant refused the services of the appointed lawyer Mr Ko. and expressed his wish to be represented by Mr Ma. During some investigative activities thereafter he however agreed to be represented by Mr Ko.

56. On 2 June 2004 Mr Ma. was not admitted to see the applicant on the ground that the permit allegedly contained flaws. On the following day he complained about that to the Chief of the Khmelnytsky Police Department.

57. On 18 June 2004 Mr Ma. also complained to the KCPO that the investigator was obstructing his participation in the investigative measures. He submitted in particular that he had not been duly notified of the investigative activities, which were conducted in his absence. Furthermore, he complained that the lawyer appointed for the applicant was incompetent.

58. On 24 June 2004 the Chief of the Khmelnytsky Police Department wrote to Mr Ma. that indeed the ITT official had wrongly impeded his meetings with the applicant for which he had been disciplined.

(d) The first applicant's acquittal and release by the Khmelnytsky City Court

59. On 14 October 2004 the Khmelnytsky City Court held a preparatory hearing at which it maintained the first applicant's detention. The materials submitted by the parties to the Court did not contain a copy of that ruling.

60. On 5 May 2005 the Khmelnytsky City Court, under the presidency of Judge P., acquitted the applicant on all the charges, while the other co-defendant, Mr M., was found guilty of an unrelated instance of illegal possession of weapons (a hunting gun and a box of bullets – of no relation to the murder of Ms I. – had been discovered in his garage). The court found that there was no evidence of the defendants' guilt and that their confessions had been extracted by force.

61. The judgment noted as follows:

“As it had been stated by the defendants in the course of the pre-trial investigation and later confirmed during the trial, ... the police had applied physical and psychological violence to them with the intention of coercing them into confessing to the murder which they had not committed and the circumstances of which they had found out from the police.

There are no doubts about that, as it clearly transpires from the case file that the defendants were under arrest when they wrote their confessions. They name specific officers of the Pivdenno-Zakhidna Police Station as behaving violently towards them, and give a detailed account of their actions. The medical examinations held at the defendants' requests [...] revealed injuries to their bodies. During the pre-trial investigation [the applicant and Mr M.] retracted their confessions to the crime against the family of [Ms I]. and complained to various authorities that they had been ill-treated in police custody.”

62. The court noted that both the circumstances and motives of the crime were presented inconsistently in the confessions of the co-defendants. It observed that they had attracted the suspicion of the police only because the son of Ms I., who had happened to see them together in the street, believed that their statures and size were similar to those of the offenders. The court found that that investigation had wrongly taken over that wholly unsubstantiated argument. Moreover, it recognised all the findings of the investigation as mere presumptions not corroborated by any evidence.

63. The court further observed that the pre-trial investigation relied “as one of the key pieces of evidence proving the defendants' guilt” on the statements of a taxi driver, Mr K., who stated that he had taken two passengers somewhere close to the building where the murder took place. The court noted, however, that his description of those passengers changed on 22 March 2004 in comparison with that given earlier on 13 March 2004. While Mr K. had not been able to indicate any specific features of their appearance, he later recognised the first applicant from a choice of two persons “by his size”.

64. As to the other evidence, three witnesses had seen two persons running down the stairs close to the murder site, but they were not able to identify them as the defendants. The investigation had also found a box containing bullets at Mr M.'s home, but they were of a different type from the one with which the victim had been shot.

65. The court lifted the preventive measure concerning the applicant.

66. On the same day, 5 May 2005, the Khmelnytsky City Court issued a separate ruling, by which it brought to the attention of the KRPO, the Khmelnytsky Regional Police Department and the Khmelnytsky Bureau of Forensic Medical Expertise the following violations:

“[the defendants] had been detained for fictitious reasons; they had not been examined in the presence of attested witnesses; neither the reasons for the detention nor their right to defence had been explained to them; and their relatives had not been informed that they were detained”.

67. It was also noted in the separate ruling that the defendants had consistently complained that they had been ill-treated in police custody, naming the police officers involved, and that injuries had been discovered on their bodies. The court considered that the doctor who had examined the applicant on 24 May 2004 had come to a superficial and unfounded conclusion that there were no injuries caused by electric current.

68. On 5 May 2005 the Khmelnytsky City Court also issued another ruling, by which it quashed the prosecutor's decision of 18 June 2004 not to open a criminal case into the applicant's allegation that he had been ill-treated in police custody.

(e) Transfer of the case to the Ternopil Regional Court of Appeal and overturning of the first applicant's acquittal

69. Messrs I. (the son and husband of the deceased Ms I. having victim status in the proceedings) appealed against the judgment of 5 May 2005. In June 2005 they challenged before the Supreme Court the composition of the Khmelnytsky Regional Court of Appeal, which was to examine their appeal, on the ground that some of its judges allegedly had friendly relations with Judge P. under whose presidency the impugned judgment had been delivered at first instance. They further contended that certain judges there were members of the regional lawyers' qualification and disciplinary board to which the defendants' lawyers also belonged. Messrs I. therefore sought the transfer of the case to any other regional appellate court.

70. On 23 June 2005 the Deputy President of the Supreme Court instructed the Khmelnytsky Regional Court to transfer the case to the Ternopil Regional Court of Appeal (“the Ternopil Court”) “with a view to ensuring the most comprehensive and objective examination of the case”.

71. On 11 August 2005 the Ternopil Court found that the first-instance court had failed to assess all the evidence in the case thoroughly and conclusively and that it had accepted the defendants' allegations that they had been ill-treated in police custody, without having taken into consideration the related findings of the prosecution authorities. It also remarked that no assessment had been made of the confessions by the defendants in the presence of their lawyers. The Ternopil Court noted that some hearings had been held without the prosecutor's participation, and that the Khmelnytsky City Court had not responded to the victims' request for

remittal of the case for additional investigation, by which they had sought application of a stricter provision of the Criminal Code. On those grounds, the Ternopil Court quashed both the acquittal and the two rulings of the Khmelnytsky City Court of 5 May 2005, and remitted the case to it for fresh examination by a different panel.

72. The Ternopil Court rejected the victims' request for transfer of the case to any other trial court in the Ternopil region, as such a transfer would be contrary to the Code of Criminal Procedure ("the CCP").

(f) Transfer of the case to the Shepetivka City Court and the first applicant's retrial

73. In August and September 2005 the lawyer representing the victims requested the Supreme Court to transfer the case from the Khmelnytsky City Court to a court in a different region. He noted that Judge P. under whose presidency the case had earlier been examined (see paragraph 60 above), was the Deputy President of the Khmelnytsky City Court and that he would therefore influence the proceedings regardless of the panel's composition.

74. On 20 September 2005 the First Deputy President of the Supreme Court, while finding no grounds to transfer the case to a different region, instructed the Khmelnytsky Regional Court to consider transferring it to another court within the Khmelnytsky region.

75. On 29 September 2005 the Khmelnytsky Regional Court transferred the case to the Shepetivka City Court ("the Shepetivka Court"), within the Khmelnytsky region.

76. On 21 November 2005 the Shepetivka Court held a preparatory hearing, during which the victims unsuccessfully sought a change of preventive measure in respect of the defendants.

77. On 4 January 2006 the Shepetivka Court again rejected the victims' request for pre-trial detention of the co-defendants instead of an undertaking not to abscond. The court noted that the co-defendants had not been evading or impeding the investigation.

78. On 10 July 2006 the Shepetivka Court remitted the case to the KCPO for additional investigation, indicating thirty-seven shortcomings in the investigation previously undertaken, which could not be remedied in the course of the trial.

79. The court noted, *inter alia*, that the defendants' confessions lacked consistency, as did the statements by the witnesses and the victim (Mr I., the son of Ms I.). It observed in particular that Mr I. had initially stated on several occasions that he and his mother had been attacked by their business competitors. Later in the trial, he changed both his description of the perpetrators' appearance (which then contradicted that given by some other witnesses) and his version as to who they might have been. Furthermore, the case file contained a report from the police, according to which one of the

taxi drivers had heard from a neighbour of Ms I. that the latter had been receiving threatening telephone calls because she had reduced the prices of her products. There was no further investigation into the matter.

80. The court also noted that the investigator had given no reasoning for having changed the charges against the applicant from murder to inflicting grievous bodily harm causing death, with a new charge of illegal possession of weapons added.

81. The Shepetivka Court next expressed its concern over the way the investigation had received the statements by the taxi driver Mr K. (according to the court's ruling – a key witness in the case), who had recognised the applicant as one of his two passengers whom he had driven to the building where the crime was committed, around the time of the murder, had waited for there for about half an hour and had then driven to a café. The court noted that on 22 March 2004 the investigator had questioned Mr K. as a witness in the case concerning the murder of Ms I., while at the same time Mr K. was detained in the Khmelnytskyi ITT on suspicion of illegal drug possession. While both Mr K. and the investigator denied the above in the course of the applicant's trial, the ITT administration confirmed that on the aforementioned date, which was also the documented date of Mr K.'s questioning as a witness, he had been in detention in the ITT. Moreover, according to the register of detainees' movements, on the above-mentioned date Mr K. was in the ITT.

82. Furthermore, the court noted that the defendants' allegations that they had been ill-treated in police custody had not been duly investigated. Its critical remarks included the following:

“The [KCPO] refused to open a criminal case relying on the absolutely identical explanations of the [police officers], who are interested persons and whom the defendants accuse of torture, as well as the conclusions of the internal investigation undertaken by senior [police officers] in respect of their own subordinates, which the court considers unacceptable.

At the same time, the [KCPO] failed to clarify why, for what reasons, under what circumstances and in what manner [the applicant] sustained the injuries while being held in the ITT, but not in the SIZO, for over a month.

... The case file contains a forensic medical report, according to which [the applicant's] injuries might have originated from electric shocks.

... Given the discrepancies in the medical findings ..., an additional forensic medical examination should be undertaken ...”

83. On the same day, 10 July 2006, the Shepetivka Court issued a separate ruling indicating a number of gross violations of the criminal procedural legislation in the course of the pre-trial investigation, similar to those mentioned in the separate ruling of the Khmelnytskyi City Court of 5 May 2005. The court again criticised the investigation undertaken into the

allegations of both defendants about their ill-treatment in police custody. It made, in particular, the following observation:

“The prosecutor entrusted the official investigation into the use of force on the defendants directly to the supervisors of the officers whom the defendants accuse of torture, and that investigation yielded a decision that there had been nothing criminal in the actions of those officers. The court considers this unacceptable.”

84. Furthermore, the court noted that the investigators had imposed on the applicant an appointed lawyer, although the applicant had already been represented by a lawyer of his own choosing, who remained uninformed about the investigative measures undertaken.

(g) Repeated transfer of the case to the Ternopil Court

85. The victims appealed against the aforementioned rulings of the Shepetivka Court. At the same time, they opposed the examination of the case by the Khmelnytsky Regional Court.

86. On 28 July 2006 the First Deputy President of the Supreme Court again instructed the Khmelnytsky Regional Court to transfer the case to the Ternopil Court, referring to the reasoning given in support of such transfer in his letter of 23 June 2005.

87. On 4 August 2006 the Khmelnytsky Regional Court sent the case file to the Ternopil Court.

88. On 4 October 2006 the Ternopil Court quashed, on formal grounds, the separate ruling of the Shepetivka Court of 10 July 2006 and upheld the decision of the KCPO of 18 June 2004 refusing to institute criminal proceedings against police officers on the first applicant's complaint that he had been ill-treated. The Ternopil Court concluded that the requirements of Article 236-1 of the CCP had not been complied with: there had been no written application for quashing the refusal of 18 June 2004, and, in any event, such an application would have had to be lodged with the Khmelnytsky City Court.

89. The Ternopil Court also excluded from the Shepetivka Court's ruling of 10 July 2006 remitting the case for additional investigation all issues other than those concerning the classification of the defendants' actions under the Criminal Code and assessment of the testimony of the son of Ms I. Thus, the Ternopil Court noted in its ruling as follows:

“In the light of all the materials of the case, namely, the collected evidence, the nature of the criminal actions, the instrument of the crime being a firearm, the conclusions of the forensic medical expert on the location and nature of the wounds, the bench considers that the victim's ... life was taken deliberately and thus there is every ground to classify the defendants' actions under a different criminal provision envisaging liability for a more grievous crime”.

(h) The first applicant's remand in custody from 22 to 23 November 2006

90. On 22 November 2006, at 10.50 a.m., the first applicant was arrested by the investigator on suspicion of premeditated murder. The investigator substantiated this decision with the standard wording of the arrest report template, which read as follows:

“the eyewitnesses, including the victims, directly indicate this person as the one who committed the crime”.

91. On 23 November 2006 the KCPO ordered the applicant's release with a reference to the criminal procedure provisions concerning a replacement of one preventive measure by another.

92. On the same date the first applicant complained to the KRPO about the alleged unlawfulness of his detention during the aforementioned period.

(i) Joinder of the first applicant's complaint about his alleged ill-treatment to his own criminal case

93. In line with the aforementioned ruling of the Ternopil Court of 4 October 2006 (see paragraph 88 above), the first applicant challenged the KCPO's ruling of 18 July 2004 before the Khmelnytsky City Court.

94. On 26 February 2007 the Khmelnytsky City Court quashed the ruling of 18 June 2004 and remitted the case to the KCPO, allowing the complaint.

95. On 28 March 2007 the Khmelnytsky Regional Court quashed the aforementioned ruling of 26 February 2007 on the KCPO's appeal and ruled that the investigation into the alleged ill-treatment was to take place within the first applicant's own criminal case, which was being examined by the Ternopil Court.

(j) The first applicant's detention from 18 December 2006 to 31 August 2007

96. On 30 November 2006 the investigator brought formal charges against the first applicant on two counts of premeditated murder for profit (considering that he had also attempted to kill the son of Ms I. and failed for reasons beyond his control), violent robbery and illegal possession of weapons.

97. On the same day the investigator applied to the Khmelnytsky City Court for replacement of the preventive measure in respect of the first applicant from the undertaking not to abscond to pre-trial detention. Referring to the seriousness of the charges as advanced on the same date and the inherent risk of absconding, the investigator submitted that detention was a more appropriate preventive measure.

98. On 18 December 2006 the Khmelnytsky City Court – at the hearing with the participation of the first applicant and his lawyer – examined the aforementioned application of the investigator as well as the first applicant's complaint about the alleged unlawfulness of his detention from 22 to

23 November 2006. The court lifted the applicant's undertaking not to abscond and remanded him in custody at the prosecutor's request. It dismissed as unsubstantiated the applicant's complaint about his arrest of 22 November 2006. The court gave as the reasons for the new preventive measure the fact that the applicant was suspected of serious crimes and that he could abscond or hinder the establishment of the truth. The court referred to unspecified statements made by the victims. As regards the applicant's complaint about his detention from 22 to 23 November 2006, it noted that there were no reasons to consider it unlawful.

99. The first applicant's father and lawyer appealed, submitting that the applicant had always complied with the investigator's summons while under the undertaking not to abscond and that the allegations of the victim's family about his attempts to influence their testimony had been confined to their suspicion that "somebody had been following them". Furthermore, they noted that the first applicant had health problems, referring to the fact that at the time of the arrest order he was undergoing in-patient treatment in a neurological hospital, of which he provided documentary evidence. They also submitted that he had a permanent place of residence, no criminal record in the past, had a small baby to support, and was studying at a university. They therefore insisted that there were no reasons to believe that he would abscond. The first applicant's representatives also challenged the finding of the Khmelnytsky City Court concerning his detention from 22 to 23 November 2006. They did not make any comments or complaints regarding their or the applicant's access to the case-file materials prior to the examination of the prosecutor's appeal by the court on 18 December 2006.

100. On 21 December 2006 the Khmelnytsky Regional Court of Appeal, following a hearing with the participation of the first applicant's lawyer and father, rejected the applicant's appeal and upheld his detention with a reference to the gravity of the charges against him and "the witnesses' fears for their safety". It also dismissed the applicant's complaint concerning his detention from 22 to 23 November 2006 having found "no significant grounds for recognising [it] unlawful".

101. On the same date the Khmelnytsky Regional Court extended the first applicant's pre-trial detention, on the investigator's application, to five months (to 23 January 2007 – with his detention from 23 May to 22 September 2004 included therein). The court referred to the gravity of the charges against the applicant and his unspecified attempts to impede establishment of the truth, as well as to the significant volume of the case file.

102. On 23 January 2007 the investigator applied to the Khmelnytsky Regional Court for another extension of the first applicant's pre-trial detention, referring to the scope of the remaining investigative work.

103. In January 2007 (the date is illegible) the Khmelnytsky Regional Court extended the applicant's pre-trial detention to six months (to

23 February 2007). It founded its decision on the time required for the applicant to study the case file, the seriousness of the charges, and his “negative behaviour when at large”.

104. On 19 February 2007 the first applicant was indicted, and the case was sent to the Khmelnytsky Regional Court of Appeal.

(k) The first applicant's retrial and conviction by the Ternopil Court as the court of first instance

105. On an unspecified date in 2007 it was decided that the Ternopil Court would try the case as a court of first instance.

106. On 21 March 2007 the Ternopil Court held a preparatory hearing. The court upheld the first applicant's detention, having found that “there [were] no grounds for changing the preventive measure”. It did not set any time-limits for the detention.

107. On 31 August 2007 the Ternopil Court found the first applicant guilty of premeditated murder for profit committed following a conspiracy with a group of persons, assault with intent to rob, and illegal possession of weapons, and sentenced him to fifteen years' imprisonment.

108. The court relied, *inter alia*, on the statements by the taxi driver Mr K., according to which he had taken two passengers to the building where the crime was committed, waited for them there for about half an hour and then driven them away. He recognised the applicant “by the features of his face, shape of the nose and his hair” as being one of those passengers. Mr K. denied that any pressure had been put on him by the police. He mentioned that he had been questioned in the prosecutor's office, but did not remember any details about that questioning. The investigator who had questioned Mr K. stated that the questioning had taken place in the prosecutor's office and on a different date than that mentioned in the questioning report, with the discrepancy in the dates being a typing error. Mr K. denied as inaccurate the first applicant's allegation that he had admitted to the latter having slandered him under pressure from the police. The court noted as follows:

“There is no information from which it could be discerned that unlawful investigation methods were applied to witness [Mr K.] entailing his incriminating statements against the defendants as they allege.

The allegation of [the first applicant] that [Mr K.] was arrested on 19 March 2004, remained in police custody until 22 March 2004 and that is why he recognised [the first applicant as the offender] is unfounded. It is not corroborated by the materials of the case and cannot be interpreted as an indication of any pressure on [Mr K.] with a view to incriminating the defendants. The witness [Mr K.] denied this fact during the court hearing in a categorical manner, as well as denying the allegation that he had admitted to [the first applicant] having incriminated him under pressure from the police, as [the first applicant] has submitted many times.

The panel considers the statements of [Mr K.] given during the pre-trial investigation and the trial to be truthful, as both during the pre-trial investigation and during the judicial proceedings they were identical, consistent in detail and without any considerable discrepancies as alleged by the defendants and their defence. The court therefore takes them into consideration in the basis of the conviction as proof of the defendants' ... guilt, being concordant with the other evidence.”

109. The court also took into account the testimony of the son of Ms I., who thought he had recognised the first applicant and the other co-defendant by their postures and gestures, having seen them together in the street. It further took note of statements from several witnesses who had seen two persons wearing masks close to the crime scene. The Ternopil Court relied on the defendants' confessions given at the initial stages of the pre-trial investigation. It attributed some discrepancies between the defendants' versions to the voluntary nature of their confessions. The police officers allegedly involved in the defendants' ill-treatment were questioned in the trial and denied those allegations. The court also noted that the first applicant had not complained about his ill-treatment to the ITT or to the SIZO authorities. It questioned the doctors who had examined the first applicant in May and June 2004, and they again concluded that his injuries were not typical of the effects of electric current. Furthermore, the court relied on the ruling of the KCPO of 18 June 2004 refusing to open a criminal case in respect of the first applicant's complaint. In the light of those considerations, the trial court found the first applicant's allegation that he had been ill-treated unsubstantiated.

110. The term of the first applicant's imprisonment was to be calculated from 18 December 2006 and included his detention from 23 May 2004 to 5 May 2005 and from 22 to 23 November 2006.

111. The first applicant lodged a cassation appeal, alleging, *inter alia*, that his guilt had never been proven and that his conviction was primarily based on his confessions extracted by torture and in the absence of legal assistance. He noted that the forensic medical report corroborating his allegation of having been tortured by electric shocks had remained ignored.

112. Furthermore, the first applicant stressed that the statements of Mr K., on which the trial court had relied as proof of his guilt, had drastically changed over time to his disadvantage and in suspicious circumstances. He submitted in particular that Mr K. had initially stated that he did not remember any features of his passengers of 13 March 2004. The first applicant further noted that on 19 March 2004 the police had apprehended Mr K. for being drunk. During his subsequent body-search a package of substance of “plant origin” had been discovered on him, and Mr K. had been arrested. It was during his administrative detention that he had “remembered” some general features of one of his passengers. The first applicant referred to specific pages in the case file quoting Mr K. as having stated during the trial that “there [was] a significant difference between those to whom [he] had given a lift [on 13 March 2004] and the defendants”

and that the investigator had included some untruthful information in the records of his questioning during the pre-trial investigation. The applicant also submitted that the case file contained a transcript (by a technical expert) of his conversation with Mr K. made in 2006 (apparently during the period when the first applicant had been at large), in which Mr K. had stated that the police had forced him to incriminate the defendants under threat of being accused himself of the murder of Ms I., that drugs had been planted on him and that he had made the incriminatory statements while being detained in the ITT. The first applicant stressed that Mr K. had admitted in court that he had indeed met him in 2006 and that their conversation could have been recorded. He further complained that although the defence had sought the examination of the aforementioned audiotape in the hearing and putting questions in that respect to Mr K., the trial court had dismissed that motion without any explanations. It was also mentioned in the cassation appeal that the case file contained a copy of the investigator's ruling of 31 August 2004 about refusal to open a criminal case against Mr K. without reference to any provision of the Criminal Code – a fact, which, according to the first applicant, had remained without assessment.

113. On 20 March 2008 the Supreme Court upheld the first applicant's conviction. It referred mainly to his confessions during the pre-trial investigation, including those given in the presence of his lawyer, which it found to be corroborated by other evidence in the case. As to the first applicant's allegation that he had been ill-treated in police custody, the court noted that it had studied the videotape of the investigative activities and found that the applicant had given his confessional account of the events in a free and detailed manner and that there were no injuries on his body. Furthermore, according to the above ruling of the Supreme Court, the first applicant “had never referred to any specific persons who had allegedly ill-treated him” and that he “had always replied that he was well when asked about his health”. The court considered that all the persons involved in the investigation of the applicant's allegation of ill-treatment had been questioned in the course of the trial and all the respective medical reports had been studied. In the light of all the aforementioned, it found the complaint of ill-treatment to be wholly unsubstantiated.

114. As regards the statements of witness Mr K., the Supreme Court noted that he “had been examined many times both during the pre-trial investigation and the trial” and that he had recognised the first applicant “without any hesitation”. It further noted as follows:

“There is no information from which it could be discerned that the law-enforcement authorities applied unlawful methods to this witness, and therefore his statements were rightly taken into consideration in the basis of the conviction”.

C. Facts concerning the second applicant

115. The second applicant worked at a factory run by the victim's family. At the end of May 2004 she was in her eighth month of pregnancy.

116. On 21 May 2004, at about 4.00 p.m., the second applicant was at her workplace. The manager asked her to come in for a work-related conversation, when two plain-clothes police officers, allegedly without any explanation and not allowing her to change out of her uniform into her own clothes, took her to the Pivdenno-Zakhidna Police Station. The second applicant was placed there in a room she described as very cold. The police officers, as well as the widower of Ms I., who was also present at the police station, allegedly shouted at her, threatened her with imprisonment and pushed her in the back, pressurising her to testify against her husband.

117. The second applicant wrote that her husband (the first applicant) had been with her at home at the time of the murder.

118. After the questioning, which lasted for about four hours, the second applicant was taken back to the factory. She had to wait there for some time until the door was opened so that she could change into her own clothes.

119. On 22 May 2004 the second applicant complained to the prosecution authorities about the alleged unlawfulness of her detention on 21 May 2004.

120. On 11 June 2004 the prosecution office wrote to her that the police had not violated any criminal procedure legislation.

II. RELEVANT DOMESTIC LAW AND PRACTICE AT THE MATERIAL TIME

A. Constitution of Ukraine 1996

121. Articles 28 and 29 of the Constitution, which are relevant to the case, read as follows:

“Article 28

Everyone has the right to respect for his or her dignity.

No one shall be subjected to torture, cruel, inhuman or degrading treatment or punishment that violates his or her dignity. ...

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 reasoned court decision and only on the grounds and in accordance with a procedure established by law.

In the event of an urgent necessity to prevent or stop a crime, bodies authorised by law may hold a person in custody as a temporary preventive measure, the reasonable grounds for which shall be verified by a court within seventy-two hours. The detained person shall be released immediately if he or she has not been provided, within seventy-two hours of the moment of detention, with a reasoned court decision in respect of their holding in custody.

Everyone who has been arrested or detained shall be informed without delay of the reasons for his or her arrest or detention, apprised of his or her rights, and from the moment of detention shall be given the opportunity to personally defend himself or herself, or to have the legal assistance of defence counsel.

Everyone who has been detained has the right to challenge his or her detention in court at any time.

Relatives of an arrested or detained person shall be informed immediately of his or her arrest or detention.”

122. Articles 59 and 63 concerning the right to legal assistance and the right not to incriminate oneself can be found in the judgment of 19 February 2009 in the case of *Shabelnik v. Ukraine* (no. 16404/03, § 25).

B. Criminal Code 2001

123. Article 115 envisages seven to fifteen years' imprisonment as the penalty for premeditated murder and imprisonment of ten to fifteen years or for life as the penalty for premeditated murder for profit and/or committed following conspiracy by a group of persons.

124. Article 121 penalises premeditated infliction of grievous bodily harm causing the victim's death by imprisonment for seven to ten years.

125. Under paragraph 4 of Article 187, assault with intent to rob committed by an organised group or coupled with infliction of grievous bodily harm is punishable by imprisonment for a term of eight to fifteen years, with confiscation of property.

126. Paragraph 1 of Article 263 provides for two to five years' imprisonment for illegal possession and use of weapons.

127. Under Article 371, deliberately unlawful arrest is a crime punishable by a maximum of five years' imprisonment.

C. Administrative Offences Code 1984

128. Article 44 prohibits production, purchase, storage, transport, or dispatch of drugs or psychotropic substances in small quantities without the purpose being trafficking.

129. Article 263 provides for administrative detention on account of an administrative offence for a maximum of three hours. In exceptional cases envisaged in the legislation the duration of the administrative detention may be longer. Persons suspected of a drug offence may be detained for up to three hours for compilation of the offence report. If the identity of the suspect is not known, or if there is a need for a medical examination or clarification of the circumstances in which the drug had been procured, or if the drug needs to be analysed, the administrative detention may last up to three days subject to the prosecutor's notification, or up to ten days – subject to the prosecutor's approval and if the offender's identity is unknown.

D. Code of Criminal Procedure (CCP) 1960

130. The provisions concerning the application of preventive measures and their types, time-limits for pre-trial detention and also the grounds for and procedure of detention by an enquiry body (the investigator in the instant case), can be found in the *Molodorych v. Ukraine* judgment, no. 2161/02, §§ 56-58, 28 October 2010.

131. The provisions concerning the obligation to institute criminal proceedings and investigate a crime can be found in the judgment of 27 November 2008 in the case of *Spinov v. Ukraine* (no. 34331/03, § 33).

132. Under Article 23-2, if the court discovers a violation of law and/or of citizens' rights in the course of a pre-trial enquiry or investigation, or during an examination of a case in a lower-level court, it issues a separate ruling by which it draws the attention of the respective authorities to the established facts and directs them to take certain measures to remedy the situation. Failure to take the requisite measures is considered an administrative offence.

133. Article 45 provides that legal representation during the enquiry, the pre-trial investigation and the trial before the first-instance court is obligatory if, *inter alia*, the possible penalty is a life sentence. It further specifies that in this case the legal representation must be provided from the moment of the arrest or the laying of charges against the person.

134. Article 97 obliges prosecutors, investigators, bodies of enquiry and judges to accept applications or communications as to the crimes committed or prepared, including in cases that fall outside their competence, and to adopt one of the following decisions within the three-day time limit: (1) to institute criminal proceedings; (2) to refuse to institute criminal proceedings; or (3) to remit the application or communication for further examination according to jurisdiction.

135. Pursuant to paragraphs 2 and 4 of Article 155, persons remanded in custody are held in Pre-Trial Detention Centres (SIZOs, part of the penal system). Exceptionally, they may also be held in Temporary Detention Facilities (ITTs, part of the police infrastructure), but for no longer than

three days. If it is impossible to ensure a transfer to a SIZO within the aforementioned time-limit, because of its remote location or lack of infrastructure, a detainee may stay in an ITT for up to ten days.

136. Under Article 236-1, complaints against decisions of an investigator or prosecutor refusing to initiate criminal proceedings may be filed by a person whose interests it concerns with the local court at the place of the respective authority or official.

137. Before the amendments of 21 June 2001, Article 244 had specified that a court ruling following the preparatory hearing prior to a trial had to give reasons in the event of changing the preventive measure. By the aforementioned amendments, that provision was repealed. Article 237, as worded at the material time, obliged the judge of a trial court dealing with the case to consider in the preparatory hearing, *inter alia*, whether there were grounds for changing, lifting or applying a preventive measure.

138. Under paragraph 1 of Article 370, essential violations of the criminal procedure legislation are those which have impeded or could have impeded the court in the complete and thorough examination of a case and in issuing a lawful, reasoned and just judgment. Paragraph 2 of this Article includes a violation of the right of an accused to defence, as well as a breach of the territorial jurisdiction rules, among such essential violations which warrant the quashing of a judgment in any event (that is, regardless of whether the requirements of paragraph 1 have been met).

E. Code of Civil Procedure 1963

139. Chapter 31-A of the Code dealt with complaints against decisions, acts or inactivity on the part of State and local self-government bodies as well as their officials. In particular, Article 248-1 of the Code provided that anyone who considered that his or her rights or freedoms had been infringed by a decision, act or omission on the part of a State body, legal entity or official could lodge a complaint with a court.

F. Law of Ukraine “On the Procedure for the Compensation of Damage caused to Citizens by the Unlawful Actions of Bodies in charge of Operational Enquiries, Pre-trial Investigation Authorities, Prosecutors or Courts” (“the Compensation Act”)

140. Articles 1 and 2 (as worded before the amendments of 1 December 2005) can be found in the following judgments respectively: *Kobtsev v. Ukraine*, no. 7324/02, § 35, 4 April 2006, and *Afanasyev v. Ukraine*, no. 38722/02, § 52, 5 April 2005).

141. Following the amendments to the Compensation Act of 1 December 2005, the list of cases where the right to compensation would arise was expanded by the following point:

“(1-1) where ... unlawfulness of remand and holding in custody ... has been established by a conviction or other judgment of a court (save for rulings on remittal of cases for additional investigation)”.

G. Extracts from the Report of the Commissioner for Human Rights of the Parliament of Ukraine (Ombudsman) for 2004 and 2005

142. The relevant extracts from Chapter 4.4 provide as follows:

“While being held in police stations detainees are particularly exposed to the risk of being beaten or humiliated. ...

The Commissioner has been underlining in each annual report that law-enforcement officials systematically subject detainees to torture. ...

The Commissioner has emphasised on numerous occasions that one of the main reasons for violence by the police is the actual preservation of the rate of resolved crimes as a benchmark for performance reporting. The police achieve the required statistics of resolved crimes by torturing innocent persons. And the figures in support of this statement are dramatic. ...

The following phenomenon was noted in the past and still remains in place. In order to verify whether a person is involved in a crime, he/she is placed under administrative arrest on falsified grounds and subjected to intensive torture with a view of breaking his/her will and extracting a confession to the crime. It is this period when the detainee is particularly exposed to serious risk of loss of life or becoming disabled or being subjected to unbearable humiliation and loss of dignity. ...”

III. RELEVANT INTERNATIONAL MATERIAL

143. The relevant extracts from the Report to the Ukrainian Government on the visit to Ukraine carried out by the CPT from 9 to 21 October 2005 [CPT/Inf (2007) 22] read as follows:

“...

15. Since the CPT's first visit to Ukraine, the treatment of persons deprived of their liberty by Internal Affairs staff has been a cause of very serious concern. The 2005 visit revealed a slight reduction as regards the scale of the phenomenon of ill-treatment, although not sufficient to dispel the Committee's misgivings. Indeed, in the course of the 2005 visit, the Committee's delegation received a significant number of allegations of deliberate physical ill-treatment of detainees [...] inflicted by operational officers, in particular during initial questioning in district police stations with a view to securing confessions in respect of the criminal offence for which the persons in question were detained or additional confessions relating to unsolved crimes. [...] In some cases, the severity of the ill-treatment alleged – which could also consist of a combination of several forms of ill-treatment – was such that it could be considered as amounting to torture.

...

18. In the light of the delegation's findings, the Committee has no alternative but to revert back to the conclusion it reached in paragraph 20 of its 2002 visit report. Three years later, it has to be said that persons deprived of their liberty by Internal Affairs staff still run a significant risk of being subject to ill-treatment – on occasion, severe ill-treatment/torture – by operational officers, in particular during interrogation.”

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 3 OF THE CONVENTION IN RESPECT OF THE FIRST APPLICANT

144. The first applicant complained that he had been tortured while in police custody and that the domestic authorities had failed to perform a due investigation into the matter. He relied on Article 3 of the Convention, which reads as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

A. Admissibility

145. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. Alleged ill-treatment

(a) The parties' submissions

146. The first applicant alleged that he had been subjected to torture by electric shocks while in police custody. Referring to the medical reports of 24 May and 10 June 2004 and the findings of the Shepetivka Court in its ruling of 10 July 2006, he emphasised that it was an established fact that he had sustained injuries while being held in the hands of the police. The first applicant further submitted that although the authorities had denied that electric shocks had been administered to him, they had failed to advance any plausible explanation regarding the origin of his injuries. Moreover, the

medical report of 29 June 2005 corroborating his allegation had never been challenged or even commented on by the authorities.

147. The Government contended that the first applicant had not proven the veracity of the allegation of his ill-treatment beyond reasonable doubt. They noted that he had never raised that complaint before the medical personnel or administration of either the Khmelnytskyi ITT or the SIZO. Although the medical reports of 24 May and 10 June 2004 found that the first applicant had sustained some bodily injuries, they refuted his allegation as to their origin. Furthermore, the injuries in question were classified as minor. Overall, the Government considered that the first applicant's complaint had been duly verified by the domestic courts in the context of his trial and had rightly been dismissed as unfounded.

(b) The Court's assessment

148. The Court reiterates that Article 3 of the Convention enshrines core values of the democratic societies making up the Council of Europe and ranks as one of the most fundamental provisions in the Convention, from which no derogation is permitted (see, among many other references, *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999-V). Where allegations are made under this provision, the Court must conduct a particularly thorough scrutiny and will do so on the basis of all the material submitted by the parties (see *Matyar v. Turkey*, no. 23423/94, § 109, 21 February 2002, and *Ülkü Ekinçi v. Turkey*, no. 27602/95, § 136, 16 July 2002).

149. In determining whether a particular form of ill-treatment should be classified as torture, consideration must be given to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. As noted in previous cases, it appears that it was the intention that the Convention should, by means of such a distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering (see *Ireland v. the United Kingdom*, 18 January 1978, § 167, Series A no. 25). In addition to the severity of the treatment, there is a purposive element to torture, as recognised in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which in Article 1 defines torture in terms of the intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating (see *Selmouni*, cited above, § 97; and *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, § 115, ECHR 2000-X). In the *Selmouni* judgment, cited above, the Court took the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably required greater firmness in assessing breaches of the fundamental values of democratic societies (§ 101).

150. As the Court has held on many occasions, allegations of ill-treatment must be supported by appropriate evidence. In assessing evidence, the Court adopts the standard of proof “beyond reasonable doubt”. Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see, as a classic authority, *Ireland v. the United Kingdom*, cited above, § 161). Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during such detention. The burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII).

151. Turning to the facts of the present case, the Court notes that two forensic medical examinations, of 24 May and 10 June 2004, undertaken on the investigator's orders discovered injuries on the applicant's body – consisting of some twenty pinpoint sores on both ankles and a purple bruise on the thigh – and found that they had been inflicted at the time when he was in police custody (see paragraphs 17 and 22 above). This was not disputed by the parties.

152. At the same time the Court observes that the parties advanced different explanations as to the origin of those injuries. On the one hand, the first applicant gave a detailed and consistent account supported by a private institution's forensic medical report of 29 June 2005 (see paragraph 32 above), according to which electric shocks had been administered to him in the police station. On the other hand, the authorities' version supported by official medical reports of 24 May and 10 June 2004 was that the injuries at issue “might have been caused by blunt objects”, with no further details available and without any comments concerning the 29 June 2005 report although it had been included in the case file in the criminal proceedings against the first applicant (see paragraphs 17, 22 and 82 above).

153. The Court does not find convincing the Government's explanation as to how the first applicant's injuries were caused. Nor does it accept their view that the first applicant's failure to raise the ill-treatment allegation before the ITT or SIZO administration undermines its plausibility. He might have been discouraged from complaining to the ITT administration by its structural link with the police whom he accused of torture (see paragraph 135 above). At the same time, the Court does not lose sight of his prompt attempts to bring the matter to the attention of the prosecution authorities, as is confirmed by the fact that the KCPO ordered his forensic medical examination as early as 24 May 2004. As regards the first applicant's silence on the matter before the SIZO administration, the Court finds it to be of no relevance, as by the time of his transfer there (on 22 June 2004), the prosecution authorities had arranged for his two medical

examinations and had delivered a ruling refusing to bring proceedings against the police officers to establish their criminal liability.

154. Bearing that in mind, and given the authorities' failure to challenge, or even to explain, the medical evidence in support of the applicant's allegation of ill-treatment by electric current, the Court finds it established to the standard of proof required in Convention proceedings that the injuries recorded in the medical reports were the result of the treatment of which the applicant complained and for which the Government bore responsibility (see *Polonskiy v. Russia*, no. 30033/05, § 123, 19 March 2009, and cited therein *Mehmet Emin Yüksel v. Turkey*, no. 40154/98, § 30, 20 July 2004).

155. Having regard to the fact that the applicant confessed to the murder of Ms I. for the first time on 21 May 2004 while being formally under arrest for an unrelated administrative offence and noting the allegations of his beatings by the police prior to his repeated confessions on 26 and 28 May 2004 (see paragraphs 14, 20 and 42 above), the Court considers it probable that the police had intentionally ill-treated him with the aim of extracting confessions from him (see and compare with *Durmuş Kurt and Others v. Turkey*, no. 12101/03, § 30, 31 May 2007).

156. Furthermore, given that both the first applicant and his wife (the second applicant), who was in her eight month of pregnancy at the time, were questioned at about the same time during the day on 21 May 2004 in the same police station, the Court considers plausible the first applicant's allegation about having been implicitly threatened with his wife's torture (see paragraphs 14 and 116 above, as well as paragraph 189 below). The Court reiterates that a threat of conduct prohibited by Article 3, provided it is sufficiently real and immediate, may fall foul of that provision (see *Gäfgen v. Germany* [GC], no. 22978/05, § 91, ECHR 2010-...). The Court recalls that in the *Akkoç v. Turkey* case, cited above, it took into consideration the psychological impact of threats made against the victim's children in qualifying the acts in question as amounting to torture (§§ 116 and 117). Similarly, it considers that in the present case the threats concerning the torture of the first applicant's wife – who was particularly vulnerable given her advanced stage of pregnancy and who, as the first applicant knew, was also in police custody – must have exacerbated considerably his mental suffering.

157. The Court has already held that subjecting a person to electric shocks is a particularly serious form of ill-treatment capable of provoking severe pain and cruel suffering and therefore falling to be treated as torture, even if it does not result in any long-term health damage (see *Polonskiy*, cited above, § 124; and *Buzilov v. Moldova*, no. 28653/05, § 32, 23 June 2009). It sees no reason to apply a different approach to the present case. Moreover, the Court considers that, as suggested by all the circumstances of this case, the ill-treatment sustained by the first applicant was aimed at

intimidating and debasing him, driving him into submission and making him confess to a criminal offence.

158. Lastly, but no less importantly, the Court does not lose sight of the disturbing findings – concordant with the first applicant's allegations in the present case – made at the material time, by both the Ukrainian Ombudsman and the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment, that there was a significant risk of torture for those in police custody, especially during questionings aimed at resolving crimes (see paragraphs 142-143 above).

159. Having regard to the severity of the ill-treatment suffered by the first applicant and the surrounding circumstances, the Court finds that he was a victim of very serious and cruel suffering that may be characterised as torture. Accordingly, there has been a violation of Article 3 of the Convention under its substantive limb.

2. Effectiveness of the investigation

160. The first applicant contended that there had been no effective domestic investigation into his allegation of torture by the police.

161. The Government contested that view. They maintained that the effectiveness of the investigation had been verified and confirmed by the courts at two levels of jurisdiction in the course of the first applicant's trial.

162. The Court emphasises that where an individual raises an arguable claim that he has been seriously ill-treated in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to “secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention”, requires by implication that there should be an effective official investigation (see, among other authorities, *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV). Thus the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis for their decisions (see *Assenov and Others v. Bulgaria*, 28 October 1998, § 103 et seq., *Reports of Judgments and Decisions* 1998-VIII).

163. The Court considers that in the present case the authorities did not make adequate efforts to establish what had happened to the first applicant in Pivdenno-Zakhidna Police Station. It was never disputed that he had sustained injuries in police custody. The authorities, however, consistently confined their reasoning that the applicant's complaint was unsubstantiated to finding implausible the allegation that he had been tortured with electric shocks. At the same time, they did not even attempt to clarify the circumstances in which he had in fact been injured.

164. Although the aforementioned omission was admitted and criticised by the domestic authorities on several occasions (see paragraphs 61, 67, 82 and 83 above), it was never remedied. Thus, the Court notes that the first

applicant's attempts to reverse the KCPO ruling of 18 June 2004 on its refusal to prosecute the police officers were dismissed under the pretext that the matter would be examined in the context of his own trial (see paragraph 95 above). The Court questions the adequacy of such approach in principle given that the purpose of the criminal proceedings against the applicant was to find him innocent or guilty of the criminal charges levelled against him rather than to attribute responsibility for alleged beatings or afford redress for an alleged breach of Article 3 of the Convention (see *Toteva v. Bulgaria* (dec.), no. 42027/98, 3 April 2003). The Court observes that the examination by the Ternopil Court of the applicant's allegations of his ill-treatment in police custody was confined to the repeated questioning of the police officers concerned and of the medical experts, who denied that electric shocks had been given to the applicant and submitted that his injuries might have been inflicted by "blunt objects" without giving further explanations. The Court finds it striking that the trial court ignored altogether – as is apparent from its judgment of 31 August 2007 – the alternative medical findings in the case file supporting the first applicant's allegation (see paragraphs 32 and 109 above). As to the subsequent examination of the case by the Supreme Court, the Court cannot but conclude that it was superficial and in apparent disregard of essential documents and facts. In particular, the Supreme Court confined its efforts to analysing the video-recording of the investigative activities in which no injuries were visible on the applicant's body, and this was sufficient for it to find his complaint unsubstantiated. Furthermore, it found that the first applicant "had never referred to any specific persons who had allegedly ill-treated him" and that he "had always replied that he was well when enquiries were made about his health", although it had been established by that time that he had raised quite specific complaints on numerous occasions naming specific officers (see paragraphs 61, 82 and 113 above), and his injuries sustained in police custody had been officially documented.

165. Overall, the Court concludes that the first applicant was denied an effective investigation of his allegation of ill-treatment by the police. There has therefore been a violation of Article 3 of the Convention under its procedural limb as well.

II. ALLEGED VIOLATIONS OF ARTICLE 5 §§ 1, 2, 3 AND 5 OF THE CONVENTION IN RESPECT OF THE FIRST APPLICANT

166. The first applicant complained that his detention from 20 to 26 May 2004 had been unlawful and arbitrary. He further complained that he had not been informed promptly about the reasons for his arrest on 20 May 2004 and that he had not been brought before a judge until the sixth day of his detention. He also complained that his repeated arrests from 22 to 23 November and from 18 to 21 December 2006 respectively had been

unlawful, as were the following periods of his detention: from 23 February to 21 March 2007 – as not being covered by any decision; as well as from 14 October 2004 to 5 May 2005 and from 21 March to 31 August 2007 – as being based on unreasoned judicial decisions without any time-limits. Furthermore, the first applicant considered that the overall length of his pre-trial detention could not be regarded as reasonable. Lastly, he complained that the Ukrainian legislation did not envisage the possibility for him to seek compensation for his allegedly unlawful detention. The first applicant relied on Article 5 §§ 1, 2, 3 and 5 of the Convention, which reads as follows:

“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; ...

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. 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. ...

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.”

A. Admissibility

167. The Government submitted that the first applicant's complaint under Article 5 § 5 of the Convention was to be rejected as being incompatible *ratione personae* with the Convention provisions, in so far as it concerned the lack of compensation to him for the alleged violations of his rights under paragraphs 2, 3 and 4 of Article 5 of the Convention. They noted in this connection that the first applicant had claimed in substance to be a victim of a violation of paragraph 5 of Article 5 only in conjunction with its paragraph 1 (c), but not in respect of its other provisions.

168. The applicant disagreed, noting that in his application he had relied on paragraph 5 of Article 5 in conjunction with its paragraphs 1-4.

169. The Court reiterates that it views complaints before it as characterised by the facts alleged in them and not merely by the legal grounds or arguments relied on. Being master of the characterisation to be given in law to the facts of the case and having regard to the substance of the first applicant's complaint under Article 5 § 5 of the Convention, the Court decides to examine it only in conjunction with Article 5 § 1 (c) (see *Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports* 1998-I).

170. In the light of such classification, the Government's objection needs be neither upheld nor rejected.

171. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. Article 5 § 1 of the Convention

172. The Court notes that the first applicant's complaints under this heading concern several distinct instances or periods of his deprivation of liberty and it will examine them separately.

(a) From 20 to 26 May 2004

173. The first applicant maintained that his apprehension on 20 May 2004 had not been based on a reasonable suspicion that he had committed an offence. He further noted that his detention from 1 p.m. until 10.45 p.m. on 20 May 2004 had not been documented at all, whereas his subsequent detention classified as administrative had been a mere pretext for keeping him available for questioning in respect of the investigated murder. The first applicant emphasised that even that allegedly artificial pretext ceased to exist on 22 May 2004, when an expert concluded that the substance found on him was not a drug. He further submitted that his administrative detention had been converted into criminal and that he had remained detained as a criminal suspect without a judicial warrant from 23 to 26 May 2004, which he considered to be contrary to the safeguards of Article 29 of the Constitution permitting such detention only in specific urgent cases allegedly not applicable to his situation.

174. The Government submitted that the first applicant had been arrested on 20 May 2004 on suspicion of a drug offence and that his arrest had been in compliance with Article 263 of the Code of Administrative Offences. They noted that he had been held under administrative detention without a prosecutorial or judicial warrant for the three-day period permissible under the aforementioned legal provision, after which he had

been released (on 23 May 2004). As regards the subsequent three days of the first applicant's detention (from 23 to 26 May 2004), the Government maintained that they had been based on a reasonable suspicion of his involvement in a murder and had been in compliance with the criminal procedure legislation.

175. The Court reiterates that a “reasonable suspicion” presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence (see *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 32, Series A no. 182). The object of detention for questioning is to further a criminal investigation by confirming or dispelling suspicions which were the grounds for detention (see *Murray v. the United Kingdom*, 28 October 1994, § 55, Series A no. 300-A). However, the requirement that the suspicion must be based on reasonable grounds forms an essential part of the safeguard against arbitrary arrest and detention. Moreover, in the absence of a reasonable suspicion, the arrest or detention of an individual must never be imposed for the purpose of making him confess, testify against others or elicit facts or information which may serve to ground a reasonable suspicion (see *Cebotari v. Moldova*, no. 35615/06, § 48, 13 November 2007).

176. The Court also emphasises that unrecorded detention of an individual is a complete negation of the fundamentally important guarantees contained in Article 5 of the Convention and discloses a grave violation of that provision. The absence of a record of such matters as the date, time and location of detention, the name of the detainee, the reasons for the detention and the name of the person effecting it must be seen as incompatible with the requirement of lawfulness and with the very purpose of Article 5 of the Convention (see *Kurt v. Turkey*, 25 May 1998, § 125, *Reports* 1998-III).

177. Turning to the present case, the Court notes that the only document providing explanations as to the grounds for the first applicant's arrest on 20 May 2004 (prior to his administrative detention) and formulating suspicions on the basis of which the police decided to arrest him, was an internal explanatory note of the arresting officers addressed to their superior, according to which the arrest had been caused by the observation that the applicant had been “walking fast and looking around” and that he had appeared hesitant as to whether to go home or elsewhere (see paragraph 7 above). The Court considers that, firstly, that was not a valid document recording the arrest and, secondly, there was no reasonable suspicion of any crime committed by the first applicant at that stage.

178. As regards the subsequent three-day detention of the first applicant (from 20 to 23 May 2004), documented by the police as based on an administrative offence suspicion, the Court notes that during that period the first applicant was treated as a suspect in the criminal case concerning the murder of Ms I. He was thus interviewed by the investigator in respect of

that murder and confessed to it, and the police conducted searches at his registered and actual places of residence (see paragraphs 35-38 above). Looking beyond the appearances and the language used, and concentrating on the realities of the situation, the Court considers that the applicant's administrative detention was in reality part of his detention on remand under Article 5 § 1 (c) as a criminal suspect in the murder case without, however, safeguarding his procedural rights as a suspect, notably the right to defence (see *Kafkaris v. Cyprus* [GC], no. 21906/04, § 116, ECHR 2008-..., and *Doronin v. Ukraine*, no. 16505/02, § 55-56, 19 February 2009). In the *Doronin* case cited above (§ 56), the Court condemned such conduct by the authorities as being incompatible with the principle of legal certainty and arbitrary, and as running counter to the principle of the rule of law. That finding holds true even more in the present case, where, unlike in the case of *Doronin*, there was no judicial decision regarding the applicant's administrative detention, and the suspicion of the drug offence ceased to exist even formally on 22 May 2004, whilst the applicant spent another day in administrative detention (see paragraphs 11-12 and 129 above).

179. The Court further observes that from 23 to 26 May 2004 the first applicant was detained upon the investigator's order, on suspicion of murder and assault (see paragraphs 39-40 above). The major point of disagreement between the parties on this point concerned the compliance of that period of detention with the domestic legislation.

180. The Court reiterates that the expressions “lawful” and “in accordance with a procedure prescribed by law” in Article 5 § 1 essentially refer back to national law and enshrine the obligation to conform to the substantive and procedural rules thereof. Although it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law, under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention and the Court can and should review whether this law has been complied with (see, among many other references, *Benham v. the United Kingdom*, 10 June 1996, § 41, *Reports* 1996-III, and *Assanidze v. Georgia* [GC], no. 71503/01, § 171, ECHR 2004-II).

181. The Court notes that, under Ukrainian legislation, deprivation of liberty without a reasoned court decision was possible only in a limited number of situations defined with sufficient precision. Thus, Article 29 of the Constitution permitted such a measure for a maximum of three days only as a response to an urgent need to prevent or stop a crime (see paragraph 121 above). According to further indications in Articles 106 and 115 of the CCP (see the reference in paragraph 130 above), an investigator could arrest a person if the latter was caught in *flagrante delicto*, was pointed out as the offender by eyewitnesses/victims, or had clear traces of the crime on his body or clothing. Having regard to the pre-prepared and standard wording of the first applicant's arrest report in the present case, which did not even mention any of those legally envisaged

preconditions for arrest (see paragraph 39 above), as well as noting that by the time the applicant was formally detained as a criminal suspect he had already been in detention without judicial supervision for three days, the Court considers that his deprivation of liberty by the investigator from 23 to 26 May 2004 was in breach of the national legal safeguards and therefore unlawful within the meaning of the Convention.

182. The Court therefore concludes that there has been a violation of Article 5 § 1 of the Convention in respect of the first applicant's detention from 20 to 26 May 2004.

(b) From 14 October 2004 to 5 May 2005 and from 21 March to 31 August 2007

183. The first applicant submitted that he had been detained during those periods on the basis of the rulings of the Khmelnytsky City Court and the Ternopil Court of 14 October 2004 and 21 March 2007, respectively, delivered following the preparatory hearings for the trial, and that, in both cases, the rulings had neither given any reasons nor set any time-limits for his detention.

184. The Government maintained that the trial courts had been obliged under the domestic law to examine the appropriateness of the preventive measure at the preparatory hearing stage and that there was no indication in the present case that they had not fulfilled that obligation.

185. The Court observes that the Ukrainian legislation at the material time did not contain any requirement for a domestic court, when committing a person for trial, to give reasons for changing the preventive measure or for continuing the detention of an accused, or to fix any time-limit when maintaining the detention (see paragraph 137 above).

186. The Court notes that the two periods of the first applicant's detention were based on the preliminary hearing rulings of the Khmelnytsky City Court and the Ternopil Court of 14 October 2004 and 21 March 2007 respectively. The case-file materials before it contain only the second of the aforementioned rulings (see paragraphs 59 and 106 above). The Court observes that the available ruling failed both to give any reasons for the first applicant's detention and to set any time-limits for it. Having regard to the applicable domestic legislation (see paragraphs 130 and 137 above) and in the absence of any evidence to the contrary, the Court infers that the other ruling in question had addressed the issue of the first applicant's detention in the same manner.

187. The Court considers that the absence of any precise provisions laying down whether – and if so, under what conditions – detention ordered for a limited period at the investigation stage could properly be prolonged at the stage of the court proceedings does not satisfy the test of “foreseeability” of a “law” for the purposes of Article 5 § 1 (see *Baranowski v. Poland*, no. 28358/95, § 55, ECHR 2000-III).

188. It has already found a violation of Article 5 § 1 of the Convention in many cases where Ukrainian courts extended detention for an indefinite period of time and without giving reasons (see, for example, *Yeloyev v. Ukraine*, no. 17283/02, §§ 52-55, 6 November 2008; *Solovey and Zozulya v. Ukraine*, nos. 40774/02 and 4048/03, § 59, 27 November 2008; and *Doronin*, cited above, § 59, 19 February 2009). Moreover, the Court concluded that this has been a recurrent issue in the case-law against Ukraine stemming from legislative lacunae (see *Kharchenko v. Ukraine*, no. 40107/02, § 98, 10 February 2011, not yet final).

189. The Court therefore concludes that these two periods of the first applicant's detention were in breach of Article 5 § 1 of the Convention.

(c) From 22 to 23 November 2006

190. The applicant reiterated his argument in respect of his detention without a reasoned court decision from 23 to 26 May 2004 as equally applicable to his detention from 22 to 23 November 2006 (see paragraph 173 above).

191. The Government disagreed, stressing that the prosecutorial supervision of the applicant's arrest by the investigator had been in the applicant's favour and had resulted in his release.

192. Referring to its findings in paragraph 181 above, the Court considers that the applicant's detention from 22 to 23 November 2006 was contrary to domestic law and thus in breach of the lawfulness principle enshrined in Article 5 § 1 of the Convention.

193. Accordingly, the Court finds a violation of Article 5 § 1 of the Convention also in respect of this instance of the applicant's deprivation of liberty.

(d) From 18 to 21 December 2006

194. The applicant maintained that his arrest from 18 to 21 December 2006 (see paragraph 98 above) had been arbitrary.

195. The Government submitted that the first applicant had been remanded in custody under a judicial decision in compliance with the legislation on preventive measures in criminal proceedings.

196. The Court emphasises that in order for deprivation of liberty to be considered free from arbitrariness within the meaning of Article 5 § 1 of the Convention, it does not suffice that this measure is executed in conformity with national law; it must also be necessary in the circumstances (see *Nešťák v. Slovakia*, no. 65559/01, § 74, 27 February 2007; and *Khayredinov v. Ukraine*, no. 38717/04, §§ 27-28, 14 October 2010).

197. Regarding the present case, the Court notes that the Khmelnytsky City Court decided on 18 December 2006 to change the preventive measure imposed on the applicant from an undertaking not to abscond to remand in custody, for the following three reasons: gravity of the charges, risk of

absconding and risk of influencing witnesses (see paragraph 98 above). None of those reasons appears valid. The gravity of the charges had not changed significantly, being limited to reclassification on 30 November 2006 of the actions of which the applicant was suspected, without any new facts or circumstances being revealed. As to the stated risk of absconding, neither the prosecutor nor the courts referred to any examples of the applicant's behaviour, while under the undertaking not to abscond, which could indicate such a risk. Finally, the witnesses' alleged fears for their safety were apparently confined to their impression about being followed by some unspecified persons and were not based on any evidence of the first applicant's involvement (see paragraph 99 above). On the other hand, the courts made no assessment of the arguments advanced by the applicant in favour of his release pending trial, such as his frail health, or family and personal situation, all of which were supported by documentary evidence.

198. In the light of the foregoing, the Court considers that in the circumstances of the present case the domestic authorities failed to advance comprehensive reasoning to justify the first applicant's deprivation of liberty from 18 to 21 December 2006, which therefore cannot be regarded as being free from arbitrariness.

199. Accordingly, the Court finds that there has been a violation of Article 5 § 1 of the Convention on that account as well.

(e) From 23 February to 21 March 2007

200. The first applicant submitted that his detention during this period had not been covered by any decision and was therefore unlawful.

201. The Government disagreed, noting that the impugned detention had been in compliance with the domestic legislation.

202. The Court observes that during the said period, which indeed does not appear to have been covered by any decision, the pre-trial investigation in the applicant's case was declared complete and the case was sent by the prosecution authorities to a court and later transferred to another court (see paragraphs 103-106 above).

203. The Court notes that while the relevant domestic law regulated the procedural steps in committal proceedings, it did not set clear rules as to by what authority, on what grounds and for what term the detention of the accused could be extended (see *Solovey and Zozulya*, cited above, § 72).

204. The Court has already examined and found a violation of Article 5 § 1 of the Convention in many cases concerning the practice of holding defendants in custody solely on the basis of the fact that a bill of indictment has been submitted to the trial court. It has held that the practice of keeping defendants in detention without a specific legal basis or clear rules governing their situation – with the result that they may be deprived of their liberty for an unlimited period without judicial authorisation – is incompatible with the principles of legal certainty and protection from

arbitrariness, which are common threads throughout the Convention and the rule of law (see, for example, *Yeloyev*, cited above, §§ 50-51, with further references). This problem, which has been found to be of the structural nature in Ukraine (see *Kharchenko*, cited above, §§ 98 and 101), has also manifested itself in the present case.

205. The Court therefore concludes that the applicant's detention during this period was not in accordance with Article 5 § 1 of the Convention and finds a violation of that provision.

2. Article 5 § 2 of the Convention

206. The applicant submitted that he had not received any information about the grounds for his arrest on 20 May 2004 for several hours, whereas the administrative detention report subsequently produced confined those grounds to a mere reference to a legal provision which did not mean anything to him. Lastly, the applicant insisted that his administrative detention had been based on fictitious grounds and had in fact been a pretext for questioning him as a suspect in the criminal investigation into a murder.

207. The Government disagreed. They noted that the applicant had been arrested on suspicion of illegal drug possession and that the police report in that regard had been sufficiently clear.

208. The Court reiterates that Article 5 § 2 of the Convention contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty. By virtue of this provision any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness (see *Fox, Campbell and Hartley*, cited above, § 40).

209. As regards the present case, the Court has already found in the context of its examination of the first applicant's complaints under Article 5 § 1 of the Convention that there was no clearly announced suspicion against him at the time of his arrest on 20 May 2004 and that he was treated as a criminal suspect in a murder case while being formally detained on suspicion of an administrative offence (see paragraphs 177-178 above). Furthermore, the Court observes that the police report on the first applicant's administrative detention merely referred to a legal provision as a ground for the detention, and there is no indication that more comprehensive information was provided to the applicant verbally (for the facts see paragraph 9 above; and for case-law where the Court has considered the bare indication of a legal provision as a basis for the arrest to be insufficient for the purposes of Article 5 § 2 of the Convention, see *Fox, Campbell and Hartley*, cited above, § 41).

210. It is not discernible from these circumstances how the first applicant could have been aware of the factual and legal grounds for his detention. On the contrary, he must consequently have been left in a state of

uncertainty and confusion as to why he had been deprived of his liberty on 20 May 2004.

211. It follows that there has been a violation of Article 5 § 2 of the Convention in the present case.

3. *Article 5 § 3 of the Convention*

(a) **The right to “be brought promptly before a judge”**

212. The first applicant contended that the six-day delay in bringing him before a judge following his arrest on 20 May 2004 was not compatible with the aforementioned right.

213. The Government stressed that on 20 May 2004 the applicant had been arrested on suspicion of an administrative offence, and that the legal procedure for that type of arrest did not require that he be brought before a judge.

214. The Court reiterates that prompt judicial control is an essential feature of the guarantee embodied in Article 5 § 3, which is intended to minimise the risk of arbitrariness and to secure the rule of law, one of the fundamental principles of a democratic society (see *Brogan and Others v. the United Kingdom*, 29 November 1988, § 58, Series A no. 145-B). While promptness has to be assessed in each case according to its special features (see, among other authorities, *Aquilina v. Malta* [GC], no. 25642/94, § 48, ECHR 1999-III), the strict time constraint imposed by this requirement of Article 5 § 3 leaves little flexibility in interpretation, otherwise there would be a serious weakening of a procedural guarantee to the detriment of the individual and the risk of impairing the very essence of the right protected by this provision (see *McKay v. the United Kingdom* [GC], no. 543/03, § 33, ECHR 2006-X).

215. In the present case, the Court considers, in the light of its findings in paragraphs 177-179 and 182 above, that the first applicant's detention within the meaning of Article 5 § 1 (c) of the Convention commenced on 20 May 2004 and was not subjected to any judicial scrutiny until 26 May 2004. There is no objective justification for that delay. Moreover, the Court has established that during the aforementioned period the first applicant was detained in an unlawful and arbitrary manner and suffered serious ill-treatment at the hands of the police (see paragraphs 154, 159 and 182 above). Prompt judicial control might have prevented all that from happening, but there was none for six days, which the Court considers an unacceptably long time.

216. The Court therefore finds a violation of Article 5 § 3 of the Convention in respect of the first applicant's right to “be brought promptly before a judge”.

(b) The right to “trial within a reasonable time or to release pending trial”

217. The first applicant maintained that the overall length of the periods of his pre-trial detention from 20 May 2004 to 5 May 2005 and from 18 December 2006 to 31 August 2007 was unreasonable.

218. The Government considered that the first applicant's administrative detention from 20 to 23 May 2004 had to be excluded from the period to be taken into consideration for the purposes of Article 5 § 3 of the Convention (from 23 May 2004 to 5 May 2005). In the Government's view, the length of that period was not unreasonable given the seriousness of the charges against the applicant, the complexity of the case, the amount of the inherent investigation work, and the diligence demonstrated by the investigation authorities and the trial court. They also noted that during the aforementioned period the first applicant had never requested a change in the preventive measure. As regards the applicant's detention from 18 December 2006 to 31 August 2007, the Government submitted that, on the one hand, it had been based on adequate and sufficient grounds, and, on the other hand, the competent authorities had been dealing with the case with due diligence.

219. The Court reiterates that the issue of whether a period of detention is reasonable cannot be assessed *in abstracto*. Whether it is reasonable for an accused to remain in detention must be assessed in each case according to its special features. Continued detention may be justified in a given case only if there are clear indications of a genuine public interest which, notwithstanding the presumption of innocence, outweighs the right to liberty (see *Ječius v. Lithuania*, no. 34578/97, § 93, ECHR 2000-IX). The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the validity of the continued detention. However, after a certain lapse of time it does not in itself justify deprivation of liberty and the judicial authorities should give other grounds for continued detention (see *Jabłoński v. Poland*, no. 33492/96, § 80, 21 December 2000). Those grounds, moreover, should be expressly mentioned by the domestic courts, and the arguments brought for and against release must not be “general and abstract” (see *Howiecki v. Poland*, no. 27504/95, § 61, 4 October 2001, and *Smirnova v. Russia*, nos. 46133/99 and 48183/99, § 63, ECHR 2003-IX).

220. Having regard to the Court's considerations and findings in paragraphs 172-205 above, it considers that the periods to be taken into consideration were from 20 May 2004 to 5 May 2005 and from 18 December 2006 to 31 August 2007 and lasted in total for one year and eight months (see, for the calculation approach, *Isayev v. Russia*, no. 20756/04, § 144, 22 October 2009).

221. The Court notes that Article 5 § 3 of the Convention forms a whole with Article 5 § 1 (c) and that these two provisions must be read in conjunction with each other (see *Smirnova*, cited above, § 56, and *Ciulla*

v. Italy, 22 February 1989, § 38, Series A no. 148). Thus, in the present case, the Court has already examined certain periods of the first applicant's detention from the angle of Article 5 § 1 (c) of the Convention, namely: the period from 14 October 2004 to 5 May 2005 and from 21 March to 31 August 2007, being based on judicial decisions without giving reasons or setting time-limits for the detention, which, in its turn, was not contrary to the domestic law; the applicant's repeated remand in custody on 18 December 2006 without due justification; and from 23 February to 21 March 2007, being a period not covered by any decision (see paragraphs 189, 199 and 205, respectively, above).

222. To supplement its aforementioned findings under Article 5 § 1 (c), the Court will assess whether the first applicant's continued detention can be considered reasonable within the meaning of Article 5 § 3 of the Convention.

223. It notes that, as regards the first term complained of (from 20 May 2004 to 5 May 2005), the Khmelnytsky City Court, in its rulings of 26 May and 20 July 2004, justified the first applicant's continued detention by relying, in a general and abstract manner, on the seriousness of the charges against him and the inherent risk of his absconding or hindering the investigation if at large. It did not consider the applicant's personality or any other specific facts regarding his situation which could have corroborated or, by contrast, dispelled those fears.

224. As regards the second term in question (from 18 December 2006 to 31 August 2007), it appears from the documents on the domestic proceedings at the Court's disposal that during that period the Ukrainian courts extended the applicant's pre-trial detention twice in December 2006 and January 2007 (with the exact dates being illegible in the available copies). The Court notes that it has found flawed the reasoning advanced by the domestic courts for the first applicant's re-arrest on 18 December 2006 (see paragraphs 198-199 above). It further observes that their reasoning for continuing his detention thereafter did not evolve to meet the standards of Article 5 § 3 of the Convention.

225. The Court therefore concludes that there has been a violation of Article 5 § 3 of the Convention on account of the insufficiency of the grounds for the first applicant's continued pre-trial detention during the above-mentioned periods.

4. Article 5 § 5 of the Convention

226. The first applicant contended that he had no enforceable right to compensation in respect of the alleged breaches of Article 5.

227. The Government submitted that, in the absence of recognition by the domestic courts of the unlawfulness of the applicant's detention as alleged, his compensation claim had been without basis.

228. The Court reiterates that Article 5 § 5 guarantees an enforceable right to compensation to those who have been the victims of arrest or detention in contravention of the other provisions of Article 5 (see *Steel and Others v. the United Kingdom*, 23 September 1998, § 81, *Reports* 1998-VII).

229. In the present case the Court has found several violations of Article 5 § 1 in conjunction with which the present complaint is to be examined (see paragraphs 182, 189, 193, 199 and 205, as well as paragraph 169, above). It follows that Article 5 § 5 of the Convention is applicable. The Court must therefore establish whether Ukrainian law afforded or now affords the first applicant an enforceable right to compensation for the breaches of Article 5 § 1 of the Convention in his case.

230. The Court observes that it has found violations of Article 5 § 1 on account of the first applicant's detention: from 20 to 26 May 2004; from 14 October 2004 to 5 May 2005; from 22 to 23 November 2006; upon his re-arrest from 18 to 21 December 2006; as well as his detention from 23 February to 31 August 2007 (follow the references given in paragraph 229 above).

231. The Court notes that the issue of compensation for unlawful detention is regulated in Ukraine by the Law "On the Procedure for the Compensation of Damage caused to Citizens by the Unlawful Actions of Bodies in charge of Operational Enquiries, Pre-trial Investigation Authorities, Prosecutors or Courts" ("the Compensation Act" – see paragraphs 140-141 above). Before its amendments of 1 December 2005, it provided for compensation for unlawful detention only in case of the ultimate acquittal of the detainee or termination of the criminal proceedings against him/her on exonerative grounds. Following those amendments, the right to such compensation also arose where the unlawfulness of the detention was established by a judicial decision.

232. The Court observes that at the time of the first period of the applicant's detention found to be unlawful (from 20 to 26 May 2004) the Compensation Act was not applicable to his situation unless the charges against him were dropped. As regards his detention from 14 October 2004 to 5 May 2005, from 23 February to 31 August 2007 and his re-arrest on 18 December 2006, they were not contrary to the domestic law, and the first applicant would therefore have had no prospect of their recognition as unlawful by the Ukrainian courts. Lastly, as to the applicant's detention from 22 to 23 November 2006, the courts found it to be lawful, thus depriving the applicant of any basis for a compensation claim in that regard.

233. It follows that in the first applicant's case the Compensation Act did not provide for an enforceable right to compensation. It does not appear that such a right was or is secured under any other provision of the Ukrainian legislation, given the absence of any legally envisaged procedure for bringing proceedings to seek compensation for the deprivation of liberty

found to be in breach of one of the other paragraphs by the Strasbourg Court.

234. The Court concludes that the first applicant did not have an enforceable right to compensation for his unlawful detention, as required by Article 5 § 5 of the Convention. There has therefore been a violation of that provision.

III. ALLEGED VIOLATIONS OF ARTICLE 5 § 4 OF THE CONVENTION IN RESPECT OF THE FIRST APPLICANT

235. The first applicant also raised a number of complaints under Article 5 § 4 of the Convention which reads as follows:

“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

A. The parties' submissions

236. The first applicant denied that any effective procedure had been available to him for judicial review of the lawfulness of his detention. He contended that there had been violations of Article 5 § 4 of the Convention on the following grounds: (a) the alleged procedural unfairness of the court hearing of 18 December 2006 following which he had been remanded in custody instead of the earlier measure, an undertaking not to abscond (namely, no timely access to the prosecutor's application or other materials in the case file essential for his defence); (b) the same issues alleged in respect of the hearing of 21 December 2006, further exacerbated by the fact that it had taken place in the first applicant's absence; (c) the lack of any possibility for the first applicant to obtain judicial review of the lawfulness of his detention during the pre-trial investigation; and (d) the lack of any legally-enshrined guarantees of speedy judicial review of the lawfulness of his pre-trial detention during the judicial proceedings.

237. The Government disagreed. They noted that it had been open to the applicant to challenge on appeal the court rulings ordering his detention delivered before the trial, but that neither he nor his lawyer had done so. Furthermore, the first applicant had not been limited in his right to introduce requests for release during the judicial proceedings, but had refrained from doing so for unknown reasons. The Government also maintained that the courts had provided adequate judicial review of the lawfulness of the first applicant's detention where they had had that duty under the criminal procedure legislation (namely, during the preparatory hearings and when examining the prosecutor's applications for the detention extension).

238. In his observations in reply to those of the Government, the first applicant further submitted that in those cases where the domestic courts had examined the lawfulness of his detention following the prosecutor's applications, they had failed to make any assessment of the arguments in favour of his release.

B. The Court's assessment

1. General principles

239. The Court reiterates that the purpose of Article 5 § 4 is to assure to persons who are arrested and detained the right to judicial supervision of the lawfulness of the measure to which they are thereby subjected (see, *mutatis mutandis*, *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, § 76, Series A no. 12, and *Ismoilov and Others v. Russia*, no. 2947/06, § 145, 24 April 2008). A remedy must be made available during a person's detention to allow that person to obtain speedy judicial review of the lawfulness of the detention, capable of leading, where appropriate, to his or her release. The accessibility of a remedy implies, *inter alia*, that the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy (see, *mutatis mutandis*, *Čonka v. Belgium*, no. 51564/99, §§ 46 and 55, ECHR 2002-I).

240. The requirement of procedural fairness under Article 5 § 4 does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances. Although it is not always necessary that an Article 5 § 4 procedure be attended by the same guarantees as those required under Article 6 for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question (see *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 203, ECHR 2009-..., with further references). The possibility for a detainee to be heard either in person or through some form of representation features among the fundamental guarantees of procedure applied in matters of deprivation of liberty (see *Kampanis v. Greece*, 13 July 1995, § 47, Series A no. 318-B). Furthermore, although the Convention does not compel the Contracting States to set up a second level of jurisdiction for the examination of the lawfulness of detention, “a State which institutes such a system must in principle accord to the detainees the same guarantees on appeal as at first instance” (see, for example, *Navarra v. France*, 23 November 1993, § 28, Series A no. 273-B).

241. Lastly, the Court stresses that the question whether a person's right under Article 5 § 4 has been respected has to be determined in the light of the circumstances of each case (see *Rehbock v. Slovenia*, no. 29462/95, § 84, ECHR 2000-XII).

2. *Application in the present case*

242. The Court will examine the first applicant's complaints in the order presented in his application.

(a) **Alleged unfairness of the hearing of 18 December 2006**

243. The Court observes that this complaint concerns the following two aspects: firstly, the judicial review of the first applicant's detention from 22 to 23 November 2006, which took place at the hearing in question, and, secondly, his repeated remand in custody. The Court notes in respect of the first-mentioned aspect that, since the purpose of the remedy required by Article 5 § 4 is to facilitate a detained person's release (see paragraph 239 above), it was no longer applicable to the applicant's situation following his release on 23 November 2006 prior to any judicial control (see *Fox, Campbell and Hartley*, cited above, § 45). As to the second-mentioned aspect, the Court notes that the judicial review complained of was incorporated in the applicant's initial placement in pre-trial detention on 18 December 2006, which the Court has already examined from the angle of Article 5 § 1 of the Convention (see paragraph 194-199 above). In any event, the Court notes that the applicant failed to raise the allegation about his lack of timely access to the case file, which is his major argument in support of the procedural unfairness allegation, before the appellate court (see also paragraph 244 below). Accordingly, he cannot be considered to have exhausted the domestic remedies, and this part of the application must be rejected under Article 35 §§ 1 and 4 of the Convention.

(b) **Alleged unfairness of the hearing of 21 December 2006**

244. In so far as the first applicant complained about the alleged procedural unfairness of the hearing of the Khmelnytsky Regional Court of 21 December 2006, the Court observes that the proceedings in question were those at appellate level in respect of the ruling of the Khmelnytsky City Court of 18 December 2006. As to the applicant's allegation about the limited possibility of the defence to study the case file, the Court observes that although the applicant lodged before this Court the same complaint in respect of the first-instance proceedings, neither he nor any of his representatives had mentioned that grievance in their appeals against the ruling of 18 December 2006 (see paragraphs 99 and 243 above). The Court therefore finds them unsubstantiated. Regarding the examination of the case by the Khmelnytsky Regional Court in the first applicant's absence, the Court notes that, in principle, it is permissible for the court of appeal reviewing a detention order issued by a lower court to examine only the detainee's lawyer, subject to sufficient procedural guarantees at the hearing before the first-instance court (see *Lebedev v. Russia*, no. 4493/04, § 114, 25 October 2007). Given that the first applicant had personally participated

in the first-instance proceedings on 18 December 2006 (see paragraph 98 above) and noting that he did not allege any concrete matters which would have made his personal presence in the appellate-level hearing indispensable, the Court finds that his absence from that hearing was not incompatible with the Article 5 § 4 safeguards.

245. The Court therefore rejects this complaint as being manifestly ill-founded under Article 35 §§ 3 (a) and 4 of the Convention.

(c) Alleged inability of the first applicant to obtain judicial review of the lawfulness of his detention during the pre-trial investigation

246. The Court notes that the first applicant has not provided any information or documents showing that he challenged on appeal the court rulings on his remand in custody and on the extension of his detention, of 26 May and 20 July 2004 respectively, although such a possibility was envisaged by the national legislation (see the case referred to in paragraph 130 above). The Court cannot examine *in abstracto* the quality and speediness of a judicial review which was not sought by the applicant and did not therefore take place (see *Shalimov v. Ukraine*, no. 20808/02, § 57, 4 March 2010).

247. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

(d) Alleged inability of the first applicant to obtain speedy judicial review of the lawfulness of his detention during the judicial proceedings

248. The Court notes that indeed at that stage of the proceedings the judicial review of the first applicant's detention (still considered pre-trial, before the delivery of a judgment on the merits) was dependent on the schedule of hearings in the case, as the Code of Criminal Procedure did not differentiate between requests for release and any other applications examined in the course of the trial hearings. The Court has examined this issue in a number of other cases against Ukraine and found it to be a recurring problem due to lack of clear and foreseeable provisions that would provide for the procedure during the trial stage which is compatible with requirements of Article 5 § 4 of the Convention (see *Molodorych v. Ukraine*, cited above, § 108; and *Kharchenko v. Ukraine*, cited above, § 86).

249. It follows that there has been a violation of Article 5 § 4 of the Convention in the present case.

IV. ALLEGED VIOLATIONS OF ARTICLE 6 §§ 1 AND 3 (C) OF THE CONVENTION IN RESPECT OF THE FIRST APPLICANT'S PRIVILEGE AGAINST SELF-INCRIMINATION AND RIGHT TO DEFENCE

250. The first applicant complained that he had been convicted on the basis of statements given under torture and without the assistance of a lawyer while being held in police custody. He relied on Article 6 §§ 1 and 3 (c) of the Convention, which in so far as relevant provides:

“In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...

3. Everyone charged with a criminal offence has the following minimum rights: ...

(c) to defend himself in person or through legal assistance of his own choosing ...”

A. Admissibility

251. The Government submitted that the above complaints concerned the first applicant's confession statements before the commencement of the criminal proceedings against him and were therefore incompatible *ratione materiae* with Article 6 § 1 of the Convention.

252. The first applicant maintained that at the time he had made the confessions complained of he had been treated *de facto* as a criminal suspect and had therefore been subject to the protection guaranteed by Article 6 § 1.

253. The Court notes that the time from which Article 6 applies in “criminal” matters depends on the circumstances of the case. The prominent place held in a democratic society by the right to a fair trial prompts the Court to prefer a “substantive”, rather than a “formal”, conception of the “charge” contemplated by Article 6 § 1 (see *Šubinski v. Slovenia*, no. 19611/04, § 62, 18 January 2007).

254. As regards the present case, the Court has already upheld the above assertion of the first applicant in the context of the examination of his complaint under Article 5 § 1 (see paragraph 178 above). It therefore concludes that Article 6 § 1 of the Convention was applicable to him from the time of his arrest by the police on 20 May 2004.

255. Accordingly, the Court rejects the Government's objection. It further notes that these complaints are neither manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention nor inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. *The parties' submissions*

256. The first applicant maintained that he had been coerced into confessing to the murder and attempted robbery of Ms I. in the absence of any legal assistance. He stressed the serious nature and degree of the coercion applied to him, considering it to amount to torture and noted that the confessions in question had had a considerable probative value in securing his conviction. The first applicant stressed that his legal representation had been mandatory under the domestic legislation from the time of his arrest, given the possibility of a life sentence. He further submitted that the contracted lawyer had not had regular access to him, and that he had continued to fear ill-treatment by the police even after being legally represented.

257. The Government disagreed. They submitted that the first applicant had been questioned in a lawyer's presence on 23 May 2004 – from his very first interrogation as a suspect in the criminal proceedings – and thereafter, whereas his earlier confessions had not been decisive for his trial. The Government emphasised that the admissibility of evidence was primarily a matter for regulation under national law, and that the applicant had been given an opportunity to challenge the evidence against him in adversarial proceedings with the benefit of legal advice. They noted that his grievances in that regard had been duly verified and dismissed as unsubstantiated by the domestic courts in the course of his trial.

2. *The Court's assessment*

(a) **The right not to incriminate oneself**

258. As regards the use of evidence obtained in breach of the right to silence and the privilege against self-incrimination, the Court emphasises that these are generally recognised international standards which lie at the heart of the notion of fair procedures under Article 6 of the Convention. Their rationale lies, *inter alia*, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (see *Saunders v. the United Kingdom*, 17 December 1996, § 68, *Reports* 1996-VI).

259. Although the admissibility of evidence is, as a matter of principle, a prerogative of domestic courts, with the role of this Court being limited to

assessing the overall fairness of the proceedings, particular considerations apply to evidence recovered by a measure found to violate Article 3 of the Convention. Thus, according to the Court's case-law, admission of statements obtained as a result of torture as evidence to establish the relevant facts in criminal proceedings renders the proceedings as a whole unfair irrespective of their probative value and of whether their use was decisive in securing the defendant's conviction (see *Gäfgen v. Germany*, cited above, § 166, with further references).

260. The Court has found in the present case that the first applicant's initial confessions had been extracted from him by ill-treatment amounting to torture within the meaning of Article 3 of the Convention (see paragraphs 154-159 above). It also notes that the domestic courts admitted those confessions as evidence in his trial (see paragraph 109 above). In the light of the principles of its case-law as outlined above, the Court considers that this extinguished the very essence of the first applicant's privilege against self-incrimination irrespective of the weight of the impugned confessions in the evidential basis for his conviction and regardless of the fact that he had confessed again several times during the investigation.

261. Accordingly, there has been a violation of Article 6 § 1 of the Convention in this respect.

(b) The right to defence

262. The Court emphasises that, although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial (see *Krombach v. France*, no. 29731/96, § 89, ECHR 2001-II). As a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right (see *Salduz v. Turkey* [GC], no. 36391/02, § 55, 27 November 2008). The right to defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction (*ibid*).

263. The Court has consistently viewed early access to a lawyer as a procedural guarantee of the privilege against self-incrimination and a fundamental safeguard against ill-treatment, noting the particular vulnerability of an accused at the early stages of the proceedings when he is confronted with both the stress of the situation and the increasingly complex criminal legislation involved. Any exception to the enjoyment of this right should be clearly circumscribed and its application strictly limited in time. These principles are particularly called for in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies (see *Salduz*, cited above, § 54).

264. Although it is not known in the present case when exactly the applicant became legally represented, it transpires from the facts of the case and is not disputed by the parties that it was not before 23 May 2004. The Court emphasises that by having formally placed the applicant in administrative detention but in fact treating him as a criminal suspect, the police deprived him of access to a lawyer, which would have been obligatory under the Ukrainian legislation had he been charged with the offence of murder committed by a group of persons and/or for profit, an offence in respect of which he was in fact being questioned.

265. The Court notes that the first applicant confessed several times to assault and murder at the early stage of his interrogation when he was not assisted by counsel, and was undoubtedly affected by the restrictions on his access to a lawyer in that his confessions to the police were used for his conviction (see *Salduz*, cited above, § 58). Although the first applicant repeated his confessions in the lawyer's presence, the Court considers that the early restrictions of his defence rights were not remedied in the course of the trial, as the courts failed to give an adequate response to the first applicant's complaint of ill-treatment.

266. Furthermore, as admitted by the domestic authorities, once legally represented the first applicant did not enjoy unimpeded access to his contracted lawyer (see paragraphs 58 and 84 above).

267. The Court therefore concludes that there has been a violation of Article 6 § 3 (c) of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION IN RESPECT OF THE FIRST APPLICANT ON ACCOUNT OF THE REASONING OF THE DOMESTIC COURTS' JUDGMENTS, BY WHICH HE WAS CONVICTED

268. The first applicant complained that his conviction by the Ternopil Court and the Supreme Court's ruling upholding that judgment had been manifestly ill-reasoned.

A. Admissibility

269. The Court notes that this complaint is neither manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention nor inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

270. The first applicant submitted that the domestic courts had failed to make any assessment of the circumstances in which the statements of Mr K. as the key witness for the prosecution had been obtained, even though the

defence had consistently referred to specific facts and documents suggesting that the investigation had resorted to coercion of that witness.

271. The Government contended that the judicial decisions convicting the first applicant had been well-reasoned. They noted in particular that the statements of the witness Mr K. had been duly assessed and admitted in evidence. The Government stressed that the first applicant, having been legally represented and having participated personally in the hearings of the courts at two levels of jurisdiction, had an adequate opportunity to contest that evidence.

272. The Court notes that, according to its established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case (see *García Ruiz v. Spain* [GC], no. 30544/96, § 26, ECHR 1999-I, with further references).

273. The Court also reiterates that its duty, according to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law (see *Schenk v. Switzerland*, 12 July 1988, § 45-46, Series A no. 140, and *Teixeira de Castro v. Portugal*, 9 June 1998, § 34, *Reports* 1998-IV). It is not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair (see *Allan v. the United Kingdom*, no. 48539/99, § 42, ECHR 2002-IX).

274. In that context, regard must also be had, in particular, to whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use. The quality of the evidence is also taken into account, including whether the circumstances in which it was obtained cast doubts on its reliability or accuracy (see *Jalloh v. Germany* [GC], no. 54810/00, § 96, ECHR 2006-IX).

275. The Court observes that, in the present case, in their finding of the first applicant's guilt the domestic courts relied on the statements of Mr K., whom they considered to be a key witness in the case (see paragraphs 63 and 81 above). The first applicant alleged during his trial that Mr K. had incriminated him under pressure from the police, which Mr K. himself denied in the hearing. On the surface, the procedural safeguards appear to

have been respected. Having regard to the particular circumstances of this case, the Court considers, however, that the first applicant was not allowed an adequate opportunity to challenge the probative value of those statements.

276. The Court thus observes that the first applicant referred to specific facts and documents showing that at the time of his questioning by the investigator Mr K. (a taxi-driver without any criminal record or history of other offences mentioned in the case-file materials) had been in administrative detention on account of a drug-related offence. As contended by the first applicant (and confirmed by the Khmelnytsky City Court in its judgment of 5 May 2005), the statements of Mr K. changed during that particular period of time to the first applicant's disadvantage. The applicant also submitted to the trial court an audiotape of a conversation he had had with Mr K., in which the latter had allegedly admitted to having slandered the first applicant under police pressure (see paragraph 112 above).

277. The Court finds the responses of both the first-instance court and the Supreme Court to those arguments to be strikingly scant and inadequate. While dismissing as unfounded the first applicant's allegations about pressure on the witness and noting that “there [was] no information from which it could be discerned [otherwise]” (see paragraphs 108 and 114 above), the courts failed to comment on the undisputed fact of the administrative detention of Mr K. and ignored the existence of the audiotape referred to by the applicant even though it had been included in the case-file materials (see paragraph 112 above).

278. By way of contrast, the Court refers to its decision of 16 March 2000 in the case of *Camilleri v. Malta* (no. 51760/99), in which it rejected as manifestly ill-founded the applicant's complaint that his conviction had been based on an incriminating statement by his cellmate because: firstly, the domestic courts had given detailed reasons for its decision to attach weight to the accusatory statement of that key witness; secondly, it was established that the statement in question had been given of the witness' own volition; and, lastly, it had remained consistent throughout the investigation.

279. Turning to the present case, the Court notes that: firstly, the courts decided to attach weight to the accusatory statements of Mr K. in disregard of specific and pertinent facts with a potential to undermine their reliability and accuracy; secondly, it was never established in a convincing manner that Mr K. had made those statements of his own free will – the fact that he had pursued that approach in the court might merely have resulted from continuing intimidation; and, lastly, the statements of Mr K. became consistently unfavourable for the first applicant from the time of his questioning, coinciding with his own detention.

280. The Court has held, in the context of its examination of the fairness of civil proceedings, that by ignoring a specific, pertinent and important

point of the applicant, the domestic courts fall short of their obligations under Article 6 § 1 of the Convention (see *Pronina v. Ukraine*, no. 63566/00, § 25, 18 July 2006). It observes a similar issue in the present case, where that requirement, although being even more stringent in the context of criminal proceedings, was not met.

281. Having regard to the above considerations, the Court concludes that there has been a violation of Article 6 § 1 of the Convention in this regard.

VI. OTHER ALLEGED VIOLATIONS OF THE CONVENTION IN RESPECT OF THE FIRST APPLICANT

282. The first applicant raised a general complaint about the allegedly inadequate conditions of his detention in the Khmelnytskyi ITT from 21 May to 22 June 2004. Referring to the allegedly unlawful and unjustified transfer of his case for trial to the Ternopil Court, he further complained that he had not been tried and convicted by “an independent and impartial tribunal established by law” as required by Article 6 § 1 of the Convention. The first applicant also complained under the same provision that the length of the criminal proceedings against him had not been reasonable. He next complained under Article 6 § 2 that the Shepetivka Court and the Ternopil Court violated the principle of the presumption of innocence by their rulings of 10 July and 4 October 2006, having allegedly, *de facto*, found him guilty while remitting the case for additional investigation. The first applicant further alleged a violation of Article 18 of the Convention in respect of his arrests on 22 November and 18 December 2006, contending that their actual purpose had been retaliation on the part of the authorities for his attempts to have criminal proceedings brought against the police officers. Lastly, he invoked Articles 8 and 13 of the Convention, without being more specific.

283. However, in the light of all the material before it, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the provisions on which the applicant relied.

284. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

VII. ALLEGED VIOLATIONS OF THE CONVENTION IN RESPECT OF THE SECOND APPLICANT

A. Article 3 of the Convention

285. The second applicant complained that on 21 May 2004 she had been subjected to threats and humiliations by the police, which had

amounted to degrading treatment contrary to Article 3 of the Convention given her condition at that time (being in the eighth month of pregnancy).

286. The Court reiterates that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (see *Ireland v. the United Kingdom*, cited above, § 162). The assessment of this minimum is relative and 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.

287. Having regard to all those factors in the present case, the Court observes that, while the second applicant's questioning in the police station might have been a source of stress and anxiety for her, it cannot be said to have reached the threshold proscribed by Article 3 of the Convention.

288. Consequently, this part of the application must be rejected under Article 35 §§ 3 (a) and 4 of the Convention as being manifestly ill-founded.

B. Article 5 § 1 of the Convention

289. The second applicant also complained that on 21 May 2004 the police had deprived her of liberty for about four hours in the absence of any grounds or the safeguards envisaged by Article 5 § 1 of the Convention.

290. The Court notes that the second applicant failed to challenge the refusal of the prosecution authorities to initiate a criminal investigation into the matter – if a formal decision had been taken in that regard, which is not clear from the facts of the case; or to contest the inaction of the prosecution authorities – if no decision had been issued following her complaint (for the applicable legislation, see paragraphs 131 and 134 above).

291. Accordingly, the Court considers that she cannot be regarded as having exhausted domestic remedies as required by Article 35 § 1 and rejects this complaint under Article 35 § 4 of the Convention.

VIII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

292. 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.”

293. Having found no violations of the Convention or the Protocols thereto in respect of the second applicant, the Court notes that Article 41 of the Convention is not applicable to her. It will therefore not examine her just satisfaction claims.

A. Damage in respect of the first applicant

294. The first applicant claimed EUR 80,000 in respect of non-pecuniary damage.

295. The Government contested that claim.

296. The Court notes that it has found a combination of violations in the present case and accepts that the first applicant has suffered non-pecuniary damage which cannot be compensated for solely by the findings of violations. The Court therefore finds it appropriate to award him EUR 35,000 under that head.

297. Furthermore, given the Court's findings regarding the unfairness of the domestic proceedings resulting in the first applicant's conviction and having regard to the extremely grave and disconcerting circumstances of this case, including the fact that confessions obtained in violation of the absolute prohibition on torture were admitted into evidence, the Court considers it indispensable for the proper protection of human rights that a retrial (a possibility of which is envisaged in the Ukrainian legislation) be provided forthwith should the first applicant so request. Any such trial must observe, strictly, the substantive and procedural safeguards enshrined in Article 6 of the Convention.

B. Costs and expenses in respect of the first applicant

1. Legal representation in the proceedings before the Court

298. The first applicant claimed EUR 14,444 in respect of his legal representation by Mr Bushchenko in the proceedings before the Court, which included: EUR 12,950 for legal work at EUR 100 per hour; EUR 1,036 for administrative costs (including translation services, photocopying, etc.); and EUR 458 for postal expenses. To substantiate that claim, he submitted a legal assistance contract of 8 August 2004, which stipulated that it would remain valid until the completion of the proceedings in Strasbourg and that payment would be made thereafter and within the limits of the sum awarded by the Court in costs and expenses. The first applicant also submitted seven time-sheets and expense reports completed by Mr Bushchenko in respect of the work done over the period 2004-2010.

299. The Government emphasised that the first applicant had been granted legal aid by the Council of Europe, without disputing the details of the calculations submitted by him.

300. The Court must establish, firstly, whether the costs and expenses indicated by the first applicant were actually incurred and, secondly, whether they were necessary (see *McCann and Others v. the United Kingdom*, 27 September 1995, § 220, Series A no. 324).

301. As is apparent from the case-file materials, Mr Bushchenko has been representing the first applicant throughout the proceedings before the Court and is therefore entitled to seek payment of his fees under the contract. Accordingly, the Court considers those fees to have been “actually incurred” (see *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*, no 37083/03, § 106, ECHR 2009-...).

302. Taking into account the complexity of the present case as well as the quality and volume of the legal work carried out, the Court does not consider that the claim is excessive and awards it to the first applicant in full, namely EUR 13,594 (which is equal to the requested amount of EUR 14,444 less EUR 850 as the sum received by way of legal aid), plus any value-added tax that may be chargeable to the first applicant.

2. Legal representation in the domestic proceedings

303. The first applicant also claimed EUR 15,000 in respect of his legal representation in the domestic proceedings, without submitting any documents.

304. The Government contested the claim as being exorbitant and not supported by documents.

305. In the absence of any evidence before it as to whether the costs claimed were actually and necessarily incurred, the Court makes no award under this head.

3. Other expenses

306. The first applicant claimed USD 374 in respect of the travel expenses of his father, who was his representative in the domestic proceedings, and USD 227 in respect of the travel expenses of his other family members.

307. The Government contested those claims.

308. Regard being had to the information and documents in its possession and the criteria regarding the reimbursement of costs and expenses set out in its case-law (see paragraph 300 above), the Court rejects these claims.

C. Default interest

309. 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 UNANIMOUSLY

1. *Declares* the complaints of the first applicant under Article 3, Article 5 §§ 1, 2, 3 and 5, Article 5 § 4 (on account of the lack of the adequate procedure for judicial review of the lawfulness of his pre-trial detention during the judicial proceedings), Article 6 § 1 (on account of the privilege against self-incrimination and reasoning of the domestic courts' judgments, by which he was convicted) and Article 6 § 3 (c) of the Convention admissible and the remainder of the application inadmissible;
2. *Holds* that the first applicant has been subjected to torture in violation of Article 3 of the Convention;
3. *Holds* that there has been a violation of Article 3 of the Convention on account of the lack of an effective investigation into the first applicant's allegation of torture by the police;
4. *Holds* that there has been a violation of Article 5 § 1 of the Convention on account of the first applicant's detention from 20 to 26 May 2004;
5. *Holds* that there has been a violation of Article 5 § 1 of the Convention on account of the first applicant's detention from 14 October 2004 to 5 May 2005 and from 21 March to 31 August 2007;
6. *Holds* that there has been a violation of Article 5 § 1 of the Convention on account of the first applicant's arrest from 18 to 21 December 2006;
7. *Holds* that there has been a violation of Article 5 § 1 of the Convention on account of the first applicant's detention from 23 February to 21 March 2007;
8. *Holds* that there has been a violation of Article 5 § 2 of the Convention in respect of the first applicant;
9. *Holds* that there has been a violation of Article 5 § 3 of the Convention as regards the first applicant's right to "be brought promptly before a judge";
10. *Holds* that there has been a violation of Article 5 § 3 of the Convention as regards the first applicant's right to "trial within a reasonable time or to release pending trial";

11. *Holds* that there has been a violation of Article 5 § 4 of the Convention in respect of the first applicant on account of the lack of the adequate procedure for judicial review of the lawfulness of his pre-trial detention during the judicial proceedings;
12. *Holds* that there has been a violation of Article 5 § 5 of the Convention in respect of the first applicant;
13. *Holds* that there has been a violation of Article 6 § 1 of the Convention as regards the first applicant's privilege against self-incrimination;
14. *Holds* that there has been a violation of Article 6 § 1 of the Convention as regards the reasoning of the domestic courts' judgments, by which the first applicant was convicted;
15. *Holds* that there has been a violation of Article 6 § 3 (c) of the Convention;
16. *Holds*
 - (a) that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Ukrainian hryvnias at the rate applicable at the date of settlement:
 - (i) EUR 35,000 (thirty-five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 13,594 (thirteen thousand five hundred and ninety-four euros), plus any tax that may be chargeable to the first applicant, in respect of costs and expenses;
 - (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;
17. *Dismisses* the remainder of the first applicant's claim for just satisfaction.

Done in English, and notified in writing on 21 April 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Elisabet Fura
President