



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

FOURTH SECTION

CASE OF NAZARENKO v. UKRAINE

(Application no. 39483/98)

JUDGMENT

STRASBOURG

29 April 2003

FINAL

29/07/2003

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

In the case of Nazarenko v. Ukraine,

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

Sir Nicolas BRATZA, *President*,

Mr M. PELLONPÄÄ,

Mrs E. PALM,

Mr J. MAKARCZYK,

Mrs V. STRÁŽNICKÁ,

Mr V. BUTKEVYCH,

Mr R. MARUSTE, *judges*,

and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 25 March 2003,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 39483/98) against Ukraine lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Igor Nikolayevich Nazarenko ("the applicant"), on 12 September 1997.

2. The applicant was represented by Mr A. Khramtsov, a lawyer practising in Sudak (Crimea). The Ukrainian Government ("the Government") were represented by their Agent, Mrs V. Lutkovska, from the Ministry of Justice.

3. The applicant complained, in particular, that the conditions to which he was subjected on death row in Simferopol Prison amounted to inhuman and degrading treatment.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

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

6. Having consulted the parties, the President of the Chamber decided that in the interests of the proper administration of justice, the proceedings in the present case should be conducted simultaneously with those in the cases of Dankevich v. Ukraine, Aliev v. Ukraine, Khokhlich v. Ukraine,

Poltoratskiy v. Ukraine and Kuznetsov v. Ukraine (applications nos. 40679/98, 41220/98, 41707/98 and 38812/97 and 39042/97 (Rule 43 § 2)).

7. By a decision of 25 May 1999, the Chamber declared the application partly admissible. On 4 October 1999 the Court carried out a fact-finding visit to Simferopol Prison.

8. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Fourth Section.

9. The Government, but not the applicant, filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Outline of events

10. On 23 October 1995 the applicant was arrested by the militia and detained on remand in the Isolation Block of the Central Department of the Ministry of the Interior of the Autonomous Republic of Crimea (*слідчий ізолятор Головного Управління міністерства внутрішніх справ Автономної Республіки Крим*).

11. On 26 April 1996 the Criminal Division of the Supreme Court of the Autonomous Republic of Crimea (*судова колегія з кримінальних справ Верховного суду Автономної Республіки Крим*) convicted the applicant of the murder of two persons and sentenced him to death.

12. On the same day the Administration of the Isolation Block of the Central Department of the Ministry of the Interior of the Autonomous Republic of Crimea (*адміністрація слідчого ізолятору Головного Управління Міністерства внутрішніх справ Автономної Республіки Крим*) decided to move the applicant to a separate cell to await his execution, in accordance with the 1993 Pre-trial Detention Act (hereinafter “the Act”).

13. On 25 July 1996 the Criminal Division of the Supreme Court of Ukraine (*судова колегія з кримінальних справ Верховного суду України*) upheld the judgment of the first-instance court.

14. On 20 February, 27 March, 15 May, 26 June and 23 July 1997 the applicant's mother was permitted to visit her son. On 7 October 1997 she was again allowed to visit the applicant, together with the latter's brother.

15. On 24 October 1997 the Vice-President of the Supreme Court of Ukraine rejected an application for leave to lodge an extraordinary appeal, introduced by the applicant's lawyer.

16. On 23 December 1997 the applicant's mother visited her son again. Her next visit took place on 30 January 1998, when she was accompanied by the applicant's brother.

17. A moratorium on executions was declared by the President of Ukraine on 11 March 1997. In judgment no. 11пп/99 of 29 December 1999 the Constitutional Court held that the provisions of the Criminal Code concerning the death penalty were contrary to the Constitution of Ukraine. The death penalty was abolished and replaced by life imprisonment by Act no. 1483-III of 22 February 2000.

18. On 26 June 2000 the Supreme Court of the Autonomous Republic of Crimea commuted the applicant's death sentence to life imprisonment.

B. Oral evidence before the Court Delegates

19. Evidence from the applicant was taken by a Court Delegation in Simferopol Prison on 4 October 1999. The Delegation was composed of Judges M. Pellonpää, J. Makarczyk and R. Maruste. The evidence taken may be summarised as follows:

1. The applicant

(a) General conditions of the applicant's detention on death row

20. The applicant was admitted to Simferopol Prison on 26 October 1995. On the day of the Court Delegates' visit, he confirmed that he had been informed about his rights and obligations. Actually, three or four days earlier, he signed a sheet of paper containing these rights and obligations.

21. He stated that he had been allowed to have a hot shower every Tuesday and could shave with an individual razor blade. At the same time, his hair was cut. Until autumn 1998, he could wash himself only once every ten days. Since the same date he could use an individual razor. According to him, the death row inmates started having soap and cold water in their cells in 1998. Previously, there had been water taps, but the inmates could not switch them on or off, this being done by a guard for all the prisoners. Small windows had been installed in the cells which the inmates could open to let fresh air in.

22. According to the applicant, an iron sheet covered the window in his cell until summer 1998. He confirmed that, at present, the light was enough to read or write, his cell being equipped by two lamps - a normal one and a dimmed one. He said that as far as his cell was concerned, the installation

of the lamps, water taps, mirrors, new iron beds and windows had started two weeks before the Delegates' visit.

23. The applicant did not have any contacts with other prisoners. When he shared his cell with another inmate, they were taken together to the shower or for a walk. To the Court Delegates' question: "What was the longest period for which you did not have any contacts with other prisoners?", he answered: "That was during the investigation, for about three months." He also said that during the investigation, which had lasted six months, he had been kept in solitary confinement following a Prosecutor's decision, based on a written complaint about his allegedly inappropriate behaviour towards another inmate. According to him, the prisoners had a choice between being detained in double or single cells. He confirmed that, until the present day, he had been in the double cell.

24. He confirmed that since 1996 inmates could buy books in the prison shop and since 1999 they were allowed to get about ten newspapers. In prison there was a public radio - a loudspeaker, which was switched off at ten p.m.

25. To the Court Delegates' question: "Do you have any complaints about the food?", the applicant answered: "How can we complain about the food when people who work do not get their salaries?"

26. According to the applicant, inmates had been examined by a medical assistant (*фельдшер*) on a daily basis, and once a week by the prison doctor who could also be called in case of emergency.

27. The applicant confirmed that when he broke the rules, he was punished by being barred from having visits and receiving parcels. Since the investigation period, he had not broken any rules. As regards the general situation, he had not heard about other inmates being subjected to such treatment.

28. He also confirmed that he saw the prison governor on Thursdays. If he had some questions or complaints, he could lodge an application.

29. When the applicant wished to see his lawyer, he sent an application to the lawyer through the prison governor. Prison guards were present during the visits of the applicant's lawyer. The applicant did not write any detailed complaints or requests, discussing all those issues with his lawyer during their meetings in prison.

(b) Prison practice concerning correspondence

30. The applicant was allowed to send and receive letters at the end of 1998. During his stay in Simferopol Prison, he had received four or five letters. He had written to his mother almost every month. He did not receive his mother's letter sent in September 1999, but he did not know whether it was due to the prison censorship control.

- (c) **Prison practice concerning receipt of parcels and small packets** [*Nota: Parcels to be forwarded to a prisoner may be sent by post (носилка) or brought in person to the prison (передача). Small items like books or periodicals can be sent by post as a small packet (бандероль - literally a "bundle")*]

31. The applicant started to receive packages in approximately September 1998. He stated that he had been allowed to get six parcels (*носилка, передача*) and three small packets (*бандероль*) per year. He considered this number satisfactory even though he would have preferred to receive one parcel every month. He confirmed that his relatives were permitted to send him food.

- (d) **Prison clothing**

32. The applicant was not allowed to wear any other type of clothes than those provided by the prison officials, except for underwear and socks. In summer the prisoners had to wear jackets and in winter they were given a warm coat and fur hats. According to him, the winter clothes were sufficient for that season.

- (e) **Daily outdoor walks**

33. The applicant confirmed that he had started having daily one-hour outdoor walks in summer 1998. The prison guards had not required the wearing of handcuffs since August or September 1999.

2. *Mr V. M. Yelizaryev*

34. The witness was the governor of Simferopol Prison during the time of the applicant's detention there.

- (a) **General conditions of the applicant's detention on death row**

35. The witness said that on the day of the Court Delegation's visit, about 3,000 prisoners were serving a sentence in the prison, of whom 30 were on death row.

36. According to him, every death row prisoner was aware of his rights and duties. A copy of the list of rights and duties was posted in every cell. He confirmed that there was no secrecy as to the rights and obligations of prisoners and that after the decree about rights and obligations had been published, the prisoners were fully aware of them.

37. He also confirmed that he saw the applicant once a week which was, according to him, regular practice. He said that the applicant had never complained of the conditions of his detention, but disagreed with his sentence to death. He also said that the applicant had been informed about the new instructions and about the new decree concerning the rights and duties of death row inmates.

38. The witness considered the heating conditions sufficient. The prison had its own boiler and there was a fresh-air ventilation system in the cells. According to him, the prisoners had a hot shower once every seven days, when the bed linen was also changed. He denied the applicant's allegation that all death row prisoners were using the same razor, which would have created health problems on account of the risk of infection. He said that the prisoners shaved separately with blades given to them by the prison administration.

39. He stated that in the daytime there were two lamps lit plus natural light from windows in the cells, which he considered sufficient. At night, they had only one lamp lit. He said that every death row inmate had a cell of not less than 12 square metres. There was a possibility of reading books and literature using both natural and artificial light.

40. The witness said that the inmates underwent an X-ray examination twice a year. Once a week the head of the medical division visited them, and every day a medical assistant conducted an inspection.

(b) Prison practice concerning correspondence

41. The witness said that death row prisoners had the right to communicate with the outside world without any limitation, both to send and receive letters. He further said that this situation had improved since May 1999. He admitted that under the existing procedure, inmates' correspondence was censored, but he did not remember any case when an incoming letter had been stopped without being given to its addressee, including letters from the European Commission of Human Rights. He confirmed that the applicant's correspondence had been registered in the journal. Moreover, any death row prisoner could complain of any violation of the right to exchange letters to the governor, to the Prosecutor who supervised the prison, or to any other official in this department.

(c) Prison practice concerning receipt of parcels and small packets

42. According to the witness, the possibilities for receiving parcels improved in May 1999. Since then, the prisoners were allowed to receive six food parcels (*посилка, передача*) and two small packets (*бандероль*) per year. Previously, they had not been allowed to receive any parcel until the judgment in their criminal case had become final. Moreover, the prisoners could buy food in the prison shop. They could spend Ukrainian hryvnas 55 (UAH) per month at prices which were the same as in state-owned shops from which the prison bought the food.

(d) Daily outdoor walks

43. According to the witness, prior to May 1998 the inmates had not been not allowed to go for daily outdoor walks. Since then, they had been taken out for one hour without handcuffs.

3. *Mr Vladimir G. Babchinskiy*

44. The witness was the doctor in Simferopol Prison, where he had been working since 1992.

45. He said that the prison medical staff included six doctors (four general practitioners, one psychiatrist and one radiologist), medical assistants (*фельдшер*), an X-ray laboratory assistant, a pharmacist and a clinical assistant. According to him, medical services were provided 24 hours a day. Any inmate could apply at any time and get urgent medical assistance. The death row prisoners were seen by a medical assistant every day during their daily walk. They could ask him for any medical assistance and, if his help was not sufficient, they could request to see the doctor. Besides, they could apply directly to the doctor. Every inmate had a medical file compiled upon his arrival where all details and results of medical examinations were recorded and which was kept during the period of his imprisonment.

46. The witness said that on 26 October 1995 the applicant, upon his arrival at the prison, had complained about having been beaten. In March 1997 he had requested help because he suffered from a respiratory virus infection.

47. He also said that HIV testing of inmates was not obligatory and was only conducted upon individual request. The test was preceded by a confidential interview between the doctor and the prisoner. The witness did not confirm whether there were inmates infected with the HIV virus, claiming that this was confidential information. The only other person who knew about inmates infected by HIV was the doctor responsible for the testing and the preceding consultations.

48. As far as complaints about hygienic conditions in the prison were concerned, the witness had received no such complaints. He considered that the changes in regime for the death row prisoners, especially the possibility of having outdoor walks and natural light in their cells, had improved their health conditions.

4. *Mr Yuriy N. Govorun*

49. The witness was a medical assistant having been working in Simferopol Prison for two and a half years. He was responsible for the daily control of the inmates' health conditions, while the doctor made visits and attended emergency situations. He considered that there were particular problems with death row inmates and, in fact, he worked mostly with them. He accompanied these prisoners during their daily outdoor walks.

50. He confirmed that the improvement of living conditions in the death row prisoners' cells had had a positive influence on their health. Since then he had not received any further complaints from them regarding health and hygiene.

51. The witness stated that he had never seen any signs of guards' brutality against the death row inmates or any bodily injuries. He had never heard about such complaints made to other staff in the prison. He examined the inmates on a weekly basis and he reported to his superiors. According to him, the applicant had not complained more than other inmates. He confirmed that he had been observing the applicant for two and a half years without noticing any changes in his mental state. He had not witnessed any strong symptoms of depression of the applicant.

5. Mrs Nadezhda M. Kuzyayeva

52. The witness was the applicant's mother. In her letter of 29 May 1998 to the Court she complained that her son had been beaten. She confirmed that during his detention in custody, the applicant had been beaten and had not been provided with any medical assistance. He had been interrogated for two hours and, after another two hours, he had been taken to hospital. She could still see traces of the beatings on his face during her meeting with him six months later. She had been allowed to meet her son for the first time six months after the sentence had been pronounced. In this meeting, she had asked her son about the beatings and he confirmed that he had been beaten.

(a) Prison practice concerning correspondence

53. She did not have any complaints about the administration regarding receiving and sending letters. She rather complained generally about the prison system. She started to correspond with her son in 1998. However, she was unable to give any details in this regard. She had written her last letter to her son in mid-September 1999 but to date, he had not received it. On the other hand, she confirmed that letters had never been lost.

54. To the Government representative's questions: "During the last two or three months, how often did you send letters to your son? Can you send them every week?", the witness answered: "If there is a need, I write him a letter." To the Government representative's questions: "And how often do you get letters from him? Can he write to you more than once a month?", the witness answered: "A year ago we were allowed to send one letter a month, and now there are no limitations, we can write letters as often as we want."

(b) Prison practice concerning receipt of parcels and small packets

55. The witness confirmed that she started to send parcels (*посилка*) to her son in 1998. Since then, she had had no complaints against the prison administration in this regard.

(c) Prison practice in connection with visits of prisoners' relatives

56. The witness saw the applicant once a month during a visit lasting for about 15-20 minutes or 30 minutes at the most. She had not complained about the duration of her visits or that they had been suddenly interrupted by a prison guard who was always present, being happy to have even these short visits. She spoke with her son over the telephone, seeing him through the glass. She could not see whether he was handcuffed.

57. To the Government representative's question: "And what do you think about the duration of the meetings? Could you tell, judging by the atmosphere, whether if you had asked for the meeting to be extended to one hour or longer, you would have been allowed?", the witness answered: "I have never asked to prolong the meetings. I think if the administration says it is over, then it is over." To the Government representative's information: "You have the right to two-hour meetings now", the witness answered: "It is difficult to talk through glass for two hours."

58. The witness said that the applicant had never complained in his letters about ill-treatment, beatings or about the prison administration. He had complained about parcels, letters and visits. She admitted that the situation was improving, and that the prison administration understood that inmates sentenced to the death penalty were like other inmates.

C. Inspection of Simferopol Prison

59. On 4 October 1999 the Delegates visited the prison. The size of the applicant's cell area was about 12 square metres. The cell was in order and clean. There was an open toilet, a washbasin with one tap with cold water only, two beds fixed on the floor, central heating and a window with bars. There were some books, a newspaper, a stock of soap and toilet paper. The cell was sufficiently heated and ventilated.

60. The Delegates were shown the prison shower area, which was reasonably clean. They also visited an exercise yard.

D. Documentary evidence

61. According to the prison shop records, the applicant bought goods on the following occasions:

On 25 September 1997 he bought foodstuffs for 5.47 (UAH), on 6 October 1997 he purchased foodstuffs and matches for UAH 9.34, on 23 October 1997 he bought foodstuffs for UAH 5.61, on 5 November 1997 he purchased foodstuffs paying UAH 5.43, on 20 November 1997 the applicant bought toiletries and foodstuffs UAH 6.40, and on 3 December 1997 he bought foodstuffs for UAH 7.36, on 18 December 1997 the applicant purchased different items for UAH 8.41.

On 9 January 1998 the applicant purchased foodstuffs and matches spending UAH 9.7, on 22 January 1998 he bought foodstuffs for UAH 6.06, and on 4 February 1998 he bought foodstuffs and matches paying UAH 15.59.

62. From the applicant's medical file which was created on 26 October 1995 it appears *inter alia* that the applicant underwent an X-ray examination on 26 October 1995, on 18 May and 12 November 1996, on 23 May and 3 November 1997 and on 30 May and 14 November 1998.

II. RELEVANT DOMESTIC LAW

A. Constitution of Ukraine

63. Under Article 8 §§ 2 and 3, the Constitution is directly applicable. There is a guaranteed right to lodge an action in defence of the constitutional rights and freedoms of the individual and of the citizen directly on the basis of the Constitution of Ukraine.

64. Article 9 § 1 provides that international treaties, which are in force and agreed on as binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine.

65. Article 15 § 3 prohibits censorship.

66. Under Article 19 the legal order in Ukraine is based on the principles according to which no one may be forced to do what is not envisaged by the legislation. State authorities and local self-government bodies and their officials are obliged to act only according to these principles, within the limits of their authority, and in the manner envisaged by the Constitution and the laws of Ukraine.

67. Article 22 provides that human and citizens' rights and freedoms are guaranteed and may not be diminished by the adoption of new laws or the amendment of laws that are in force.

68. Under Article 29 §§ 2 and 4 no one may be arrested or held in custody other than pursuant to a reasoned court decision and only on grounds and in accordance with procedures established by law. Everyone arrested or detained must be informed without delay of the reasons for his arrest or detention, apprised of his rights, and from the moment of detention must be given the opportunity to defend himself in person, or to have the assistance of a defence lawyer.

69. Under Article 55 §§ 2 and 4 everyone is guaranteed the right to challenge the decisions, actions or omissions of State authorities, local self-government bodies, officials and officers of a court of law. After exhausting all domestic legal remedies everyone has the right to appeal for the protection of his or her rights and freedoms to the relevant international

judicial institutions or to the relevant authorities of international organisations of which Ukraine is a member or participant.

70. Under Article 59 everyone has the right to legal assistance. Such assistance is provided free of charge in cases envisaged by law. Everyone is free to choose the defender of his rights. In Ukraine the Bar (*адвокатура*) ensures the right to a defence against charges and the provision of legal assistance in deciding cases in courts and before other State authorities.

71. Article 63 § 3 provides that a convicted person enjoys all human and citizens' rights, subject only to restrictions determined by law and established by a court ruling.

72. Under Article 64 human and citizens' rights and freedoms guaranteed by the Constitution may not be restricted, except in cases envisaged by the Constitution of Ukraine.

B. Statutory regulations governing the conditions on death row

73. Conditions on death row in the Ukrainian prison system were successively governed by an Instruction of 20 April 1998 on conditions of detention of persons sentenced to capital punishment (hereinafter “the Instruction”) and by Temporary Provisions of 25 June 1999 on the conditions of detention of persons sentenced to capital punishment in the isolation blocks (hereinafter “the Temporary Provisions”).

74. The Instruction provided that after the sentence had become final, persons sentenced to death had to be kept in isolation from other prisoners in specially designed cells. Save in exceptional cases, no more than two such prisoners were to be detained in one cell. The cell area allocated to one prisoner in a single cell had to be not less than 4 square metres, and in a double cell not less than 3 square metres. They were provided with an individual sleeping-place and with bed linen. The inmates wore a uniform designed for the category of especially dangerous recidivists. Reference was also made to their legal status and obligations. This determined the frequency of meetings with relatives and the number of letters inmates could send and receive: they were allowed one visit per month and could send one letter per month. There was no limitation on the mail they could receive. The inmates could receive two small packets a year. They were allowed to have a daily one-hour walk in the fresh air. Outside their cells, inmates were handcuffed. They were not allowed to work.

Prisoners were also allowed to read books, magazines and newspapers borrowed from the prison library and/or bought through the prison distribution network; they could receive money transfers; they could keep personal objects and food in their cells, and buy food and toiletries in the prison shop twice a month (up to the value of the statutory minimum wage), and play board games. They could meet lawyers. The inmates were also

allowed to have visits from lawyers. Medical treatment was provided in accordance with national legislation.

The prisoners could lodge complaints with state authorities. Such complaints had to be dispatched within three days. Complaints to the Public Prosecutor were not censored.

75. The Temporary Provisions extended the rights of persons sentenced to capital punishment in comparison with the Instruction. In particular, prisoners were allowed to have eight hours of sleep during the night, they could receive six parcels and three small packets per year, buy food and toiletries in the prison shop (up to the value of 70% of the statutory minimum wage), pray and read religious literature and have visits from a priest, and write complaints to State authorities. They were allowed to send and receive letters without any limits and to have monthly visits of up to two hours from their relatives. A prison official had to be present during visits.

C. Pre-trial Detention Act 1993 (“the Act”)

76. According to the Code of Criminal Procedure, pre-trial detention is a preventive measure in respect of an accused, a defendant or a person suspected of having committed a crime punishable with imprisonment, or a convicted person whose sentence has not yet been enforced.

77. In accordance with section 8(4) of the Act, persons sentenced to capital punishment whose sentence had not become final were held separately from all other detained persons.

78. Section 9(1) of the Act provides *inter alia* that detainees have the right (a) to be defended in accordance with the rules of criminal law, (b) to be acquainted with the rules of detention, (c) to take a one-hour daily walk, (d) to receive twice a month a parcel weighing up to eight kilograms and to receive unlimited money transfers and amounts of money by way of remittance or personal delivery, (e) to buy foodstuffs and toiletries to the value of one month's statutory minimum wage, paying by written order, as well as unlimited amounts of stationery, newspapers and books in prison shops, (f) to use their own clothing and footwear and to have with them documents and notes related to their criminal case, (g) to use TV sets received from relatives or other persons and board games, newspapers and books borrowed from the library in their previous place of imprisonment or bought at shops, (h) individually to perform religious rituals and use religious literature and objects made of semi-precious materials pertaining to their beliefs, provided that this does not lead to a breach of the rules applicable to places of pre-trial detention or restrict the rights of other persons, (i) to sleep eight hours a night, during which time they are not required to participate in proceedings or to do anything else except in cases of extreme emergency and (j) to lodge complaints and petitions and send

letters to State authorities and officials in accordance with the procedure prescribed by section 13 of the Act.

79. Under section 11, detainees are required to be provided with everyday conditions that meet sanitary and hygiene requirements. The cell area for one person may not be less than 2.5 square metres. Detainees are to be supplied with meals, an individual sleeping-place, bedclothes and other types of materials and everyday provisions free of charge and according to the norms laid down by the Government. In case of need, they are to be supplied with clothes and footwear of a standard form.

80. In accordance with section 12(1), permission for relatives or other persons to visit a detainee (in principle, once a month for one to two hours) can be given by the administrative authorities of the place of detention, but only with the written approval of an investigator, an investigative authority or a court dealing with the case. Under paragraph 4, detainees have the right to be visited by defence counsel, whom they may see alone with no restrictions on the number of visits or their length, from the moment the lawyer in question is authorised to act on their behalf, such authorisation being confirmed in writing by the person or body dealing with the case.

81. Pursuant to section 13(1), detainees can exchange letters with their relatives and other persons and enterprises, establishments and organisations with the written permission of an authority dealing with the case. Once a sentence starts to run, correspondence is no longer subject to any limitations.

D. Correctional Labour Code (“the Code”)

82. According to Article 28 of the Code (Main requirements of the regime in detention institutions), the main features of the regime in detention establishments are: the compulsory isolation and permanent supervision of sentenced persons, so as to exclude any possibility of the commission of new crimes or other acts against public order; strict and continuous observance of obligations by these persons; and various detention conditions dependent on the character and gravity of the offence and the personality and behaviour of the sentenced person.

Sentenced persons must wear a uniform. They must also be searched; body searches must be conducted by persons of the same sex as the person searched. Correspondence is subject to censorship, and parcels and packages subject to opening and checking. A strict internal routine and rules must be established in corrective labour establishments.

Sentenced persons are prohibited from keeping money and valuables, or other specified objects, in corrective labour establishments. Any money and valuables found are to be confiscated and, as a rule, transferred to the State in accordance with a reasoned decision of the governor of the institution, sanctioned by a prosecutor.

A list of objects which sentenced persons are allowed to possess, showing the number or quantity of each item and the procedure for confiscating objects whose use is prohibited in corrective labour establishments, must be established by the internal regulations of such establishments.

Under the procedure established by the Code, sentenced persons are allowed to buy food and toiletries, paying by written order, to be visited, to receive parcels, postal parcels, packages and money by remittance, to correspond and to send money to relatives by remittance.

83. Article 37 § 1 (Purchase of food and toiletries by sentenced persons) provides that sentenced persons are allowed to buy food and toiletries, paying by written order, from the money received by remittance.

84. Article 40 provides *inter alia* that a lawyer may be given permission to meet his client on presentation of his licence and identity card. Visits are not limited as to their number and length and, at the lawyer's request, may be carried out without a prison warder being present.

85. Under Article 41 (Receipt of parcels and small packets by persons sentenced to imprisonment) sentenced persons held in corrective labour colonies (*виправно-трудова колонія*) are allowed to receive, per year: seven parcels in colonies subject to the general regime (*колонія загального режиму*), six parcels in colonies subject to the strengthened regime (*колонія посиленого режиму*) and five parcels in colonies subject to the strict and special regime (*колонія суворого режиму*). Sentenced persons held in educational labour colonies (*колонія виховно-трудова*) are allowed to receive per year: ten parcels in colonies subject to the general regime and nine parcels in colonies subject to the strengthened regime.

Convicted offenders serving their sentence in a prison are not allowed to receive parcels.

Irrespective of the type of regime under which they are held, sentenced persons are allowed to receive not more than two small packets per year, and to buy literature through the sales distribution network without any restrictions.

The quantity of parcels and small packets of all types is not restricted for sentenced persons held in corrective labour colony camps (*виправно-трудова колонія-поселення*).

A list of foodstuffs and toiletries which sentenced persons are allowed to receive in postal parcels and small packets, as well as the procedure for their receipt by and delivery to the sentenced persons, is to be established in the internal regulations of corrective labour establishments.

86. Under Article 42 (Receipt and sending of money by sentenced persons by remittance) sentenced persons are allowed to receive unlimited amounts of money by remittance, as well as to send money to their relatives and, if this is permitted by the authorities of the corrective labour

establishments, to other persons. The money received by remittance is transferred to the personal account of the sentenced person.

87. Article 43 § 2 (Correspondence of persons sentenced to imprisonment) provides that sentenced persons held in prisons may receive unlimited mail and may send letters as follows: one letter per month for those held under the general regime and one letter every two months for those held under the strengthened regime.

E. Public Prosecutor's Office Act

88. According to section 12(1) the public prosecutor deals with petitions and complaints concerning breaches of the rights of citizens and legal entities, except complaints that are within the jurisdiction of the courts. Paragraph 4 provides that an appeal lies from the prosecutor's decision to the supervising prosecutor and, in certain cases, to the court. Paragraph 5 provides that the decision of the Prosecutor General is final.

89. Under section 38 the prosecutor or his deputy has the power to make a request to a court for any materials in a case where a judgment or another decision has come into force. If there are any grounds for reopening the proceedings, the prosecutor challenges the court judgment or any other decision.

90. Under section 44(1) the matters subject to the public prosecutor's supervision are: adherence to the legal rules on pre-trial detention, and corrective labour or other establishments for the execution of sentences or coercive measures ordered by a court, adherence to the procedures and conditions for holding or punishing persons in such establishments; the rights of such persons and the manner of carrying out by the relevant authorities of their duties under the criminal law and legislation on the enforcement of sentences. The public prosecutor may at any time visit places of pre-trial detention, establishments where convicted persons are serving sentences or establishments for compulsory treatment or reform, in order to conduct interviews or peruse documents on the basis of which persons have been detained, arrested or sentenced or subject to compulsory measures; he may also examine the legality of orders, resolutions and decrees issued by the administrative authorities of such establishments, terminate the implementation of such acts, appeal against them or annul them where they do not comply with the law, and request officials to give explanations concerning breaches which have occurred.

III. RELEVANT DOCUMENTS OF THE COUNCIL OF EUROPE

Resolution 1097 (1996) of the Parliamentary Assembly on the abolition of the death penalty in Europe

91. In its Resolution, the Assembly deplored the executions which, reportedly, had been carried out recently in Latvia, Lithuania and Ukraine. In particular, it condemned Ukraine for apparently violating its commitments to introduce a moratorium on executions of the death penalty upon its accession to the Council of Europe. It called upon this country to honour its commitments regarding the introduction of a moratorium on executions and the immediate abolition of capital punishment warning it that further violation of its commitments, especially the carrying out of executions, would have consequences under Order No. 508 (1995).

Resolution 1112 (1997) on the honouring of the commitment entered into by Ukraine upon accession to the Council of Europe to put into place a moratorium on executions

92. The Assembly confirmed in this Resolution that it had received official information that, in the first half of 1996, eighty-nine executions had been carried out in Ukraine, and regretted that the Ukrainian authorities had failed to inform it of the number of executions carried out in the second half of the year. The Assembly was particularly shocked that executions in Ukraine had been shrouded in secrecy, with apparently not even the families of the prisoners having been informed, and that the executed had been reportedly buried in unmarked graves. It condemned Ukraine for having violated its commitment to put into place a moratorium on executions, deplored the executions that had taken place, and demanded that it immediately honour its commitments and halt any executions still pending.

Resolution 1179 (1999) and Recommendation 1395 (1999) on the honouring of obligations and commitments by Ukraine

93. In these texts, the Assembly noted that Ukraine had clearly failed to honour its commitments (212 persons had been executed between 9 November 1995 and 11 March 1997, according to official sources). At the same time, it noted that since 11 March 1997 a *de facto* moratorium on executions had been in effect in Ukraine. The Assembly insisted that the moratorium be reconfirmed *de jure* and that the Verkhovna Rada ratify Protocol No. 6 to the Convention. It stressed the importance of the *de facto* moratorium on executions and firmly declared that, if any further executions took place, the credentials of the Ukrainian parliamentary delegation would

be annulled at the following part-session of the Assembly, in accordance with Rule 6 of its Rules of Procedure.

IV. REPORTS OF THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN AND DEGRADING TREATMENT AND PUNISHMENT (CPT)

94. Delegates of the CPT visited places of detention in Ukraine in the years 1998, 1999, and 2000. Reports on each of the visits were published on 9 October 2002, together with the Responses to the Reports of the Ukrainian Government.

1998 Report

95. The visit of the delegation, which took place from 8 to 24 February 1998, was the CPT's first periodic visit to Ukraine. In the course of the visit the delegation inspected, *inter alia*, the pre-trial prison (SIZO) ("investigation isolation" establishment) No. 313/203 in Kharkiv. On the ground floor of building No. 2 of SIZO No. 203 were housed at the time of the visit fifteen prisoners who had been sentenced to death, although as was recorded in a footnote to the Report, the delegation had received assurances that since 11 March 1997 a *de facto* moratorium on executions had been observed.

96. In its Report (paragraph 131), the CPT expressed at the outset its serious concern about the conditions under which these prisoners were being held and about the regime applied to them. It was noted that prisoners sentenced to death were usually accommodated two to a cell, the cell measuring 6.5-7m². The cells had no access to natural light, the windows being obscured by metal plates. The artificial lighting, which was permanently on, was not always sufficiently strong with the result that some cells were dim. To ventilate the cells, prisoners could pull a cord that opened a flap; despite this the cells were very humid and quite cold (paragraph 132).

The equipment in the cells was described in the Report as being rudimentary, consisting of a metal bed and/or sloping platform (equipped with a thin mattress, sheets of dubious cleanliness and a blanket which was manifestly insufficient to keep out the cold), a shelf and two narrow stools. Prisoners were supposed to be able to listen to radio programmes via a speaker built into the wall of the cell, but it had been reported to the delegation that the radio only functioned sporadically (*ibid.*).

All the cells had un-partitioned toilets which faced the living-area; as a result, a prisoner using the toilet had to do so in full view of his cellmate. As regards toiletries, prisoners sentenced to death were in a similarly

difficult situation as many of the other inmates; items such as soap and toothpaste were rarities (*ibid.*).

It was further recorded that prisoners sentenced to death had no form of activity outside their cells, not even an hour of outdoor exercise. At best they could leave their cells once a week to use the shower in the cell-block, and for an hour a month, if they were authorised to receive family visits. In-cell activities consisted of reading and listening to the radio when it worked. Apart from the monthly visits which some inmates received, human contact was limited essentially to the occasional visit by an Orthodox priest or a member of the health-care staff, who spoke to the prisoners through a grill in the cell-door (paragraph 133).

97. The CPT summarised its findings in this regard as follows:

“In short, prisoners sentenced to death were locked up for 24 hours a day in cells which offered only a very restricted amount of living space and had no access to natural light and sometimes very meagre artificial lighting, with virtually no activities to occupy their time and very little opportunity for human contact. Most of them had been kept in such deleterious conditions for considerable periods of time (ranging from 10 months to over two years). Such a situation may be fully consistent with the legal provisions in force in Ukraine concerning the treatment of prisoners sentenced to death. However, this does not alter the fact that, in the CPT's opinion, it amounts to inhuman and degrading treatment.” (paragraph 134).

It was further recorded that the delegation had received numerous complaints from prisoners sentenced to death about the fact that they lacked information with regard to their legal situation, the progress of their cases, follow-up to applications for cases to be reviewed, examination of their complaints etc. (paragraph 138).

98. In its Response to the 1998 Report, the Ukrainian Government recorded that a number of organisational and practical steps had been taken to resolve the problems identified by the CPT. In particular, the Temporary Regulations had been introduced to guarantee to prisoners sentenced to death the right to be visited once a month by relatives, to be visited by a lawyer to get legal assistance, to be visited by a priest and to receive and send correspondence without limitation. It was further noted

- (i) that prisoners sentenced to death would have daily walks in the open air and that for this purpose 196 yards of the pre-trial prisons had been rebuilt or re-equipped;
- (ii) that, in order to improve natural lighting and air of all cells, the blinds and metal peakes over cell windows had been removed; and
- (iii) that, for the purposes of informing inmates sentenced to death of their rights and legal status, extracts from the Temporary Regulations had been placed on the walls of each cell.

1999 Report

99. A CPT delegation visited Ukraine from 15 to 23 July 1999 in the course of which they again inspected SIZO No. 313/203 in Kharkiv where, at the time of the visit, there were detained 23 prisoners who had been sentenced to death. The Report noted that certain changes had occurred since the previous visit. In particular, the cells had natural light and were better furnished and the prisoners had an hour of exercise per day in the open air, although it was observed that there was insufficient space for real physical exercise (paragraphs 34-35). The Report further recorded that important progress had been made in the right of prisoners to receive visits from relatives and to correspond (paragraph 36). However, the CPT noted certain unacceptable conditions of detention including the fact that prisoners continued to spend 23 out of 24 hours a day in their cells and that opportunities for human contact remained very limited (paragraph 37).

2000 Report

100. A third visit to Ukraine took place from 10 to 21 September 2000, in the course of which the delegation inspected, *inter alia*, the pre-trial prison (SIZO No.15) in Simferopol. The CPT welcomed the decision of the Ukrainian authorities to abolish the death penalty and noted that most of the approximately 500 prisoners subject to the death sentence had had their sentences commuted to life imprisonment.

101. Despite these welcome steps, the CPT recorded that the treatment of this category of prisoner was a major source of concern to the Committee (paragraph 67). It was noted that, further to a provisional instruction issued in July 2000 and pending the establishment of two high-security units specifically intended for life prisoners, such prisoners were subjected to a strict confinement regime (paragraph 68). While living space in the cells was generally satisfactory and while work had started on refurbishing cells in all the establishments visited, there were major deficiencies in terms of access to natural light and the quality of artificial light and ventilation (paragraph 69). Moreover, life-sentence prisoners were confined in their cells for 23 ½ hours a day with no form of organized activities and, by way of activities outside their cells, were entitled to only half an hour outdoor exercise, which took place in unacceptable conditions. There was virtually no human contact: since the entry into force of the July 2000 instruction, visits from relatives had been forbidden and prisoners were only allowed to send one letter every two months, although there were no restrictions on receiving letters (paragraph 70).

102. In their Response to the Report the Ukrainian Government noted further legal amendments which ensured that life prisoners had one hour of exercise per day and two family visits of up to four hours per month.

Further, to ensure adequate access to light, metal shutters had been removed from windows in all cells.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

103. The Government reiterated the objection they had made at the admissibility stage of the proceedings. They submitted that the applicant, who had been on death row for four years, had not once applied to the executive or the judicial authorities at any level regarding the alleged violations of his rights. Therefore, he had not granted the Government an opportunity to react properly to the alleged violations of his rights and to remedy them through the national machinery for the protection of the rights allegedly violated.

104. The Government underlined that the existing national legal system (primarily the Constitution and other legislative Acts) afforded a real possibility of effective judicial protection of human rights. They relied on Article 55 § 1 of the Constitution, according to which “everyone is guaranteed the right to challenge before a court decisions, actions or omissions of State authorities, local self-government bodies, officials and officers”. The Government referred in this regard to the Constitutional Court's decision of 25 December 1997, in which the court had stated: “Article 55 § 1 of the Constitution should be construed to mean that everyone is guaranteed the protection of their rights and freedoms before a court. The latter cannot refuse justice if the rights and freedoms of a citizen of Ukraine, a foreigner or a person without citizenship are violated or their realisation is obstructed or limited in any other way.”

105. The Government further reiterated that, according to Article 248 § 1 of the Code of Civil Procedure, “a citizen has a right of access to a court if he or she considers that his or her rights have been violated by actions or omissions of a State authority, a legal entity or officials acting in an official capacity. Among the entities whose actions or omissions may be challenged before the relevant court listed in the first paragraph of this provision are the bodies of State executive power and their officials”.

106. The applicant disputed the Government's submissions, alleging that he had exhausted all the domestic remedies at his disposal.

107. The relevant principles relating to exhaustion of domestic remedies have been set out *inter alia* in the Court's judgment of 28 July 1999 in the case of *Selmouni v. France* (no. 25803/94, §§ 74-77, ECHR 1999-V). The purpose of Article 35 § 1 of the Convention is to afford the Contracting

States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court. However, the only remedies to be exhausted are those which are effective. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time.

Once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from this requirement. One such reason may be the national authorities' remaining totally passive in the face of serious allegations of misconduct or infliction of harm by State agents, for example where they have failed to execute a court order. In such circumstances, the burden of proof shifts once again, so that it becomes incumbent on the respondent Government to show what they have done in response to the scale and seriousness of the matters complained of.

108. The Court emphasises that the application of this rule must make due allowance for the context. Accordingly, it has recognised that Article 35 must be applied with some degree of flexibility and without excessive formalism. The Court has recognised that the rule of exhaustion of domestic remedies is neither absolute nor capable of being applied automatically; in reviewing whether the rule has been observed, it is essential to have regard to the particular circumstances of the individual case. This means, amongst other things, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants (see *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1211, § 69).

109. In the present case the Court notes that it is clear that the applicant did not lodge any complaint - oral or written - with the prison governor where he is imprisoned or with the public prosecutor. During the Court Delegates' visit on 4 October 1999, he only confirmed that he had discussed all those issues with his lawyer during their meetings in the prison (see paragraph 29 above). The Court also notes that it was not disputed between the parties that the governor came to see the applicant regularly in his cell, i.e. once a week, and that the applicant could submit any complaint he might have.

110. On the other hand, the Court observes that although the prison governor stated that every prisoner on death row had been made aware of his rights and duties and that the inmates had signed the list containing their rights and obligations, the applicant signed this list only shortly before the Court Delegates' visit.

111. Insofar as it is suggested that the applicant failed to lodge a formal complaint to the prison authorities concerning his conditions of detention, the Court accepts the evidence of the applicant that he had only signed a document containing his rights and obligations as a prisoner a few days before the visit of the Delegates (see paragraph 20 above). The Government have adduced no evidence to show that the applicant was otherwise made aware of his rights or of the appropriate means by which he might seek redress for his complaints. In these circumstances, it cannot be held against the applicant that he did not lodge a formal complaint about his conditions of detention through the correct channels.

112. The Court also gave consideration to the fact that the applicant seemed to have regular visits from his counsel during which legal matters - including the applicant's conditions of detention - could have been discussed. It is undisputed, however, that the prison authorities had insisted on having guards present at the applicant's meetings with his counsel and his relatives (see paragraphs 29 and 56 above). The applicant - who could not in these circumstances communicate freely with his counsel or his relatives - cannot be blamed for choosing not to submit any complaint concerning his detention conditions which would involve allegations concerning the prison administration. Moreover, the applicant was aware that his mail was censored, or at least read by the prison authorities (see paragraphs 30 and 41 above).

The Court considers that the possible intimidatory effects of such practices on the applicant and his failure to complain to his counsel or family members cannot be seen as a negligent or wilful refusal to exercise his right to complain.

113. As to the possibility of lodging a civil action in the courts, the Court reiterates that the Article 35 § 1 requires not only that a domestic remedy is available, but that it is effective to redress the alleged breach of an individual's Convention rights. While it is true that the present applicant did not bring civil proceedings to complain of his conditions of detention, the Court notes that the Government have not shown how recourse to such proceedings could have brought about an improvement in those conditions. Nor have they supplied any example from domestic case-law to show that such proceedings by a prisoner would have stood any prospect of success.

114. In these circumstances, the Court considers that it has not been established with sufficient certainty that recourse to the remedies suggested by the Government would have afforded redress to the applicant in relation to his complaint concerning his conditions of detention. Accordingly, the Court decides that the Government's objection on grounds of failure to exhaust domestic remedies cannot be upheld.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

115. The applicant complained of the conditions to which he was subjected on death row in Simferopol Prison, alleging that these conditions subjected him to treatment falling within the scope of Article 3 of the Convention, which reads as follows:

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

He submitted that he was prevented from sending any mail to his mother and brother or receiving any mail from them, from receiving parcels with warm clothes and food, and from taking outdoor walks. He further stated that he had been kept in solitary confinement for about two years.

A. The submissions of the parties

116. The Government submitted that all the relevant detention rules had been applied to the applicant, including those relating to cell facilities, medical treatment, visits and correspondence laid down in sections 1, 8, 9, 11, 12 and 13 of the Act, in certain provisions of the Code of Criminal Procedure, in Articles 28, 37, 41, 42 and 43 of the Code, and in the Instruction of 20 April 1998 and the Temporary Provisions of 25 June 1999. The Government further stated that medical assistance, treatment, and prophylactic and anti-epidemic measures concerning persons sentenced to capital punishment were carried out under the legislation on health protection.

117. The Government noted that the applicant's relatives had applied for a visit on 6 August, 12 September, 15 October, 20 November and 20 December 1996, 20 February, 27 March, 15 May, 26 June, 23 July, 7 October and 23 December 1997 and 30 January 1998. All visits had been granted. As of 26 April 1996 the applicant had never applied to the Prison Administration for a visit from his relatives; nor had he sent any letter to, or received any letter from, them. Moreover, the applicant had never made any application to the prison authorities with regard to the receipt of packages.

118. They further noted that the applicant could buy food in the prison shop. Between December 1997 and July 1998 he purchased foodstuffs and other articles on fourteen occasions for a total of UAH 115.02.

119. In their additional observations, the Government submitted that their Agent had visited the place of the applicant's detention in July 1999. He had confirmed that the conditions of detention on death row had been compatible with the legislation then in force, in particular with the Instruction. The Government underlined that they had undertaken all necessary measures to improve the legal status of persons sentenced to capital punishment pending the legislative debate on the abolition of the

death penalty. To this end, the Temporary Provisions were adopted on 25 June 1999 and entered into force on 11 July 1999.

120. The applicant disputed the Government's arguments. He reiterated that he had been forbidden to correspond with his relatives ever since he had been taken into custody on 23 October 1995, that since his sentence had been passed on 26 April 1996, he had been deprived of the right to use his own clothes and shoes, as well as of the right to receive parcels weighing up to 8 kilograms twice a month. Since December 1997 he had been denied the opportunity to buy food in the prison shop because of the lack of funding by the government to stock the shop. He also noted that all his requests for a permission to correspond had been rejected.

121. In his letter to the Court of 24 July 1999, the applicant's lawyer stated that the conditions of the applicant's detention had significantly improved after he had applied to the Court. His relatives had been permitted to bring him warm clothes and sent parcels with food up to two times per month. Further monthly visits from his relatives had been permitted without any limitation. According to the lawyer, there was no limitation as regards correspondence, the applicant was allowed to have outdoor walks and to buy food in the prison shop up to a value of UAH 55 per month he could receive legal aid from his lawyer without any restrictions. The applicant's lawyer considered that the complaints raised in the application to the Court had been resolved and he requested the Court not to consider his case further. This request was agreed to by the applicant.

122. In her letter to the Court of 8 July 1999, the applicant's mother mentioned the same improvements in Simferopol Prison, with regard to correspondence, outdoor walks and buying foodstuff in the prison shop.

B. The Court's assessment

123. The Court has taken note of the view of the applicant's lawyer that, as a result of the improvements which have occurred in the applicant's conditions of detention, his complaints have been resolved, as well as of his request to the Court not to consider the applicant's case further. However, the Court observes that the applicant's complaint raised serious issues of a general nature affecting the application of Article 3 of the Convention in relation to the conditions of detention of those sentenced to death in Ukraine. It considers that respect for human rights as defined in the Convention requires the Court's continued examination of the complaint.

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

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

126. The Court has consistently stressed that the suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. Measures depriving a person of his liberty may often involve such an element. In accordance with this provision the State must ensure that a person is detained under conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to such distress or hardship exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured (see *Kudła v. Poland* [GC], no. 30210/96, §§ 93-94, ECHR 2000-XI).

127. In addition, as underlined by the Court in the *Soering v. the United Kingdom* judgment, present-day attitudes in the Contracting States to capital punishment are relevant for the assessment whether the acceptable threshold of suffering or degradation has been exceeded (see *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, p. 41, § 104). Where the death penalty is imposed, the personal circumstances of the condemned person, the conditions of detention awaiting execution and the length of detention prior to execution are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3 (*ibid.*). When assessing conditions of detention, account has to be taken of the cumulative effects of those conditions, as well as the specific allegations made by the applicant (see *Dougoz v. Greece*, no. 40907/98, § 46, ECHR 2001-II; and *Kalashnikov v. Russia*, no. 47095/99, § 95, ECHR 2002-VI).

128. The Court notes that the applicant complained of certain aspects of the conditions to which he had been subjected in Simferopol Prison, where he was detained. It reiterates in this regard that the Convention only governs, for each Contracting Party, facts subsequent to its entry into force

in respect of that Party. The Court therefore has jurisdiction to examine the applicant's complaints in so far as they relate to the period after 11 September 1997, when the Convention came into force in respect of Ukraine. However, in assessing the effect on the applicant of the conditions of his detention, the Court may also have regard to the overall period during which he was detained as a prisoner, including the period prior to 11 September 1997, as well as to the conditions of detention to which he was subjected during that period (see *Kalashnikov v. Russia*, cited above, § 96).

129. The Court further observes that the applicant was detained under a sentence of death until his sentence was commuted to one of life imprisonment in June 2000. As is noted above (see paragraphs 91-93 above), the use of capital punishment in Ukraine was the subject of strong and repeated criticism in Resolutions of the Parliamentary Assembly of the Council of Europe, in which it was recorded that between 9 November 1995 and 11 March 1997 a total of 212 executions had been carried out in the State. However, on the latter date a *de facto* moratorium on executions was declared by the President of Ukraine; on 29 December 1999 the Constitutional Court held the provisions of the Criminal Code governing the use of the death penalty to be unconstitutional; and on 22 February 2000 the death penalty was abolished by law and replaced by a sentence of life imprisonment (see paragraph 17 above). The applicant was sentenced to death in April 1996, some 11 months before the moratorium came into effect. The Court accepts that, until the formal abolition of the death penalty and the commutation of his sentence, the applicant must have been in a state of some uncertainty, fear and anxiety as to his future. However, it considers that the risk that the sentence would be carried out, and the accompanying feelings of fear and anxiety on the part of those sentenced to death, must have diminished as time went on and as the *de facto* moratorium continued in force.

130. In making its assessment in the present case, the Court has taken into account its Delegates' findings, the parties' written observations and documents submitted by them, as well as the Reports of the CPT covering the period in question, so far as relevant.

131. At the time of the murders in respect of which the applicant was convicted he was twenty-six years old. He was brought to Simferopol Prison on 23 or 26 October 1995 for the purposes of pre-trial detention (see paragraphs 10 and 20 above). He remained there after his death sentence had been pronounced by the Supreme Court of the Autonomous Republic of Crimea on 26 April 1996 and upheld by the Supreme Court of Ukraine on 25 July 1996.

132. The Court notes that the applicant was initially unaware of the prison rules and of his rights and obligations. However, on the day of the Delegates' visit, he confirmed that he had been informed about them three or

four days before and that he had signed a document containing these rights and duties (see paragraph 20 above). The evidence he gave before the Delegates was convincing in this respect and the Government did not adduce any evidence indicating any earlier date on which the applicant had been informed of his rights and obligations.

133. The Court notes that on the date of its Delegates' visit, thirty "death row" inmates in Simferopol Prison, including the applicant, were kept in single or double cells without the possibility of communicating with other inmates (see paragraphs 23 and 35 above). The light in the applicant's cell was on 24 hours per day, but in the applicant's cell two lamps – a normal one and a dimmed one - were installed and the dimmed one was switched on at night. The Court has been unable clearly to establish precisely when the lamps were installed. Nevertheless, the applicant confirmed that the light in his cell was enough to read and write by (see paragraph 22 above). From the evidence available to it the Court finds it established that the window in the applicant's cell was covered by an iron sheet until at earliest May 1998 when it was removed. The court also finds that at about the same time an individual water tap and a mirror were installed in the cell. The radio was switched on during the day and switched off at ten p.m. (see paragraph 24 above).

134. At the time of the Delegates' visit, the applicant's cell, which he shared with another inmate, was in order and clean. It was about 9 square metres. There was an open toilet, a washbasin with a cold water tap, two beds fixed on the floor, central heating and a window with bars. There were some books, a newspaper, a stock of soap and toilet paper. During the Delegates' visit on 4 October 1999 the cell was sufficiently heated (see paragraph 59 above). The Court points out that its Delegates visited Simferopol Prison during a period of the year when temperatures tend to rise to 20°C.

135. The Court notes that, according to the applicant, until the summer of 1998 he did not have an opportunity to have daily outdoor walks and was handcuffed during his daily walks until August or September 1999 (see paragraph 33 above). This information was partially corroborated by the governor of the prison (see paragraph 43 above) and by the 1998 Report of the CPT (see paragraph 96 above), although the governor disputed that prisoners were handcuffed during their walks.

136. The Court further established during its Delegates' visit that the applicant started receiving mail at the end of 1998 at the latest and parcels approximately in September of the same year (see paragraphs 30-31 and 53 above). The Court accepts the applicant's evidence which was partly corroborated by the testimony of the prison governor, that by the date of the Delegates' visit, he was allowed to receive six parcels and three small packets per year (see paragraph 31 above). While he was detained in Simferopol Prison, he received four or five letters, and wrote to his mother

almost every month. The applicant did not receive his mother's letter sent in September 1999, but the Court cannot establish with sufficient clarity whether this was due to the censorship of prisoners' correspondence by the prison staff. According to the applicant's mother, any letter she had sent to her son had never been lost (see paragraph 53 above). In any event, it was not a matter of dispute before the Court that the applicant had received all letters written by his relatives, or that the applicant's and his relatives' letters were censored.

137. Concerning the visits from the applicant's relatives, the Court notes that according to the prison records, the applicant's mother and/or other relatives were given permission to visit him on 20 February, 27 March, 15 May, 26 June, 23 July and 7 October 1997 and 30 January 1998 (see paragraphs 14-16 above). It further notes that according to the applicant's evidence corroborated by his mother, a guard was present during the relatives' visits to him. This guard was authorised to interrupt their conversation and to end the visit at any time he considered it appropriate (see paragraphs 56 and 57 above). The applicant's mother said that her visit to her son had not lasted more than 30 minutes at the most (see paragraph 56 above).

138. Concerning the applicant's original complaint that he was prevented from receiving parcels of warm clothes and food, the Court notes that during his interview with the Delegates he confirmed that since September 1998 he could receive parcels of food. It observes that the Instruction provided for two small packets per year, but it cannot be determined whether any parcel or small packet was sent or brought to the applicant by his relatives before September 1998.

According to the applicant, he was not allowed to wear any other type of clothes than those provided by the prison officials except for underwear and socks. The Court notes in this respect that this practice was in accordance with the provisions of the Instruction, which was subsequently approved by the Temporary Provisions. It is understood that under the circumstances described by the applicant, his complaint was not directed against the prison requirement as such but rather connected with lack of warm clothes during the winter time and with the impossibility for his relatives to send him parcels of those clothes.

139. The Court considers that although the requirement for prisoners to wear prison clothes may be seen as an interference with their personal integrity, it is undoubtedly based on the legitimate aim of protecting the interests of public safety and preventing public disorder and crime. It observes that on the day of the Delegates' visit, the applicant accepted that the prison clothes were adequate and warm enough for the winter period (see paragraph 32 above). Similarly, from the applicant's lawyer's letter to the Court of 24 July 1999 it appears that the conditions on death row in respect of the applicant had significantly improved after the introduction of

his application to the Court, the applicant's relatives having been permitted to bring him warm clothes.

140. The Court further observes that according to the same lawyer's letter, there was no limitation as regards correspondence and the applicant was allowed to have outdoor walks and to buy food in the prison shop up to the value of UAH 55 per month. He could receive legal assistance from his lawyer without any restrictions and meet his relatives. The Court notes that this was substantially confirmed by the applicant's mother in her letter to the Court of 8 July 1999 (see paragraph 122 above).

141. The Court has examined as a whole the conditions to which the applicant was subject during his detention in Simferopol Prison. While it cannot establish with complete clarity the conditions of detention to which the applicant was subjected prior to the Court Delegates' visit, certain facts are beyond dispute and clearly established. The Court views with particular concern that, until at earliest May 1998, the applicant, in common with other prisoners detained in the prison under a death sentence, was locked up for 24 hours a day in cells which offered only a very restricted living space, that the windows of the cells were covered with the consequence that there was no access to natural light, that there was no provision for any outdoor exercise and that there was little or no opportunity for activities to occupy himself or for human contact. In common with the observations of the CPT concerning the subjection of death row prisoners in Ukraine to similar conditions, the Court considers that the detention of the applicant in unacceptable conditions of this kind amounted to degrading treatment in breach of Article 3 of the Convention. The Court further finds that the applicant's situation was aggravated by the fact that he was throughout this period subject to a death sentence, although, as noted in paragraphs 17 and 129 above, a moratorium had been in effect since 11 March 1997.

142. The Court considers that in the present case there is no evidence that there was a positive intention of humiliating or debasing the applicant. However, although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3 of the Convention (see *V. v. the United Kingdom* [GC], no. 24888/94, § 71, ECHR 1999-IX; and *Kalashnikov v. Russia*, cited above, § 101). It considers that the conditions of detention, which the applicant had to endure in particular until May 1998, must have caused him considerable mental suffering, diminishing his human dignity.

143. The Court acknowledges that, between May 1998 and the date of the visit to Ukraine of the Court's Delegates in October 1999, substantial and progressive improvements had taken place, both in the general conditions of the applicant's detention and in the regime applied within the prison. In particular, the coverings over the windows of the cells were removed, daily outdoor walks were introduced and the rights of prisoners to

receive visits and to correspond were enhanced. Nevertheless, the Court observes that, by the date of introduction of these improvements, the applicant had already been detained in these deleterious conditions for a period of over 24 months, including a period of 8 months after the Convention had come into force in respect of Ukraine.

144. The Court has also borne in mind, when considering the material conditions in which the applicant was detained and the activities offered to him, that Ukraine encountered serious socio-economic problems in the course of its systemic transition and that prior to the summer of 1998 the prison authorities were both struggling under difficult economic conditions and occupied with the implementation of new national legislation and related regulations. However, the Court observes that lack of resources cannot in principle justify prison conditions which are so poor as to reach the threshold of treatment contrary to Article 3 of the Convention. Moreover, the economic problems faced by Ukraine cannot in any event explain or excuse the particular conditions of detention which it has found in paragraph 141 to be unacceptable in the present case.

145. There has, accordingly, been a breach of Article 3 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

146. In his original application to the Court, the applicant complained that he had been prevented from sending letters to and receiving letters from his family and from receiving postal parcels with warm clothes and food. In his observations on the admissibility and merits he submitted that since the judgment of the Supreme Court of Ukraine of 26 April 1996, he could not receive parcels and postal parcels weighing up to 8 kilograms, and that since December 1997 he had not been allowed to buy foodstuffs from the prison shop.

147. The Court considers that the applicant's complaints fall to be examined under Article 8 of the Convention, which provides:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

148. The Court first reiterates that the Convention only governs, for each Contracting Party, facts subsequent to its entry into force in respect of that Party. The Court therefore has jurisdiction to examine the applicant's

complaints in so far as they relate to the period after 11 September 1997, when the Convention entered into force in respect of Ukraine.

149. It was established during the Court Delegates' visit to Simferopol Prison that the applicant started receiving mail at the end of 1998. During the time of his detention, he received four or five letters from his family. However, the Court could not establish with sufficient clarity the dates on which these letters were sent to and received by the applicant and whether the number of letters the applicant had received corresponded to the number of letters which had been sent to him. The Court reiterates in this connection that, according to the Instruction, the applicant was entitled to send one letter a month and receive an unlimited number of letters (see paragraph 74 above). Moreover, it has already been noted that the applicant had written to his mother almost every month and that he had not received her letter sent to him in September 1999 (see paragraphs 30 and 53 above).

150. The Court notes that, according to the statement of the witnesses heard by the Delegates, the situation with regard to sending and receiving mail significantly improved after the Temporary Provisions had become effective, i.e. on 11 July 1999 or shortly beforehand (see paragraphs 41 and 54 above). It also notes that the applicant had started to receive parcels in approximately September 1998 (see paragraph 31 above). He could receive parcels with food, but as far as clothes were concerned, he had not been allowed to wear any other type of clothes than those provided by the prison officials, except for underwear and socks.

151. The Court considers that the above-mentioned restrictions by the public authorities interfered with the applicant's right to respect for his correspondence guaranteed by Article 8 § 1 of the Convention and that those restrictions can only be justified if the conditions in the second paragraph of this provision are met.

152. In particular, if it is not to contravene Article 8, such interference must be "in accordance with the law", pursue a legitimate aim and be necessary in a democratic society in order to achieve that aim (see *Silver and Others v. the United Kingdom*, judgment of 25 March 1993, Series A no. 61, p. 32, § 84; and *Petra v. Romania*, judgment of 23 September 1998, Reports 1998-VII, p. 2853, § 36).

153. The Court must first consider whether the interference was "in accordance with the law". This expression requires firstly that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and be compatible with the rule of law (see *Kruslin v. France* and *Huvig v. France*, judgments of 24 April 1990, Series A no. 176-A, p. 20, § 27; and Series A no. 176-B, p. 52, § 26, respectively).

154. The Government referred in their written observations to the Act. In their additional observations, they added a reference to the Correctional

Labour Code (“the Code”), the Instruction and the Temporary Provisions (see paragraph 116 above).

A. Period between 11 September 1997 and 11 July 1999

155. The Court observes that the Act governs the conditions of detention until a sentence becomes final (see paragraph 76 above). It appears from the statements of the witnesses heard by the Delegates and the documents submitted by the Government that after the sentence became final, the conditions of detention of persons sentenced to capital punishment were mainly governed by the Instruction issued by the Ministry of Justice, the Prosecutor General and the Supreme Court (see paragraphs 73-75 above). However, the Code provides a general legal basis for the conditions of detention (see paragraph 82 above).

1. Correctional Labour Code

156. The Court notes that although the Code satisfies the second requirement resulting from the phrase “in accordance with the law”, namely that the law be accessible, this is not true of the third requirement, namely that the law be foreseeable as regards the meaning and nature of the applicable measure.

157. It observes that the Government refer to Article 41(3) of the Code according to which “irrespective of the type of regime under which they are held, sentenced persons are not allowed to receive more than two small packets per year” (see paragraph 85 above). However, this provision constitutes a part of Article 41, which establishes the rules concerning receipt of parcels and packages by persons sentenced to imprisonment. The Court considers that it is not clear that persons sentenced to death are included among persons sentenced to imprisonment (*позбавлення волі*) within the meaning of the Code, a death sentence being imposed because the offender is deemed incapable of reform through imprisonment. The Court observes that the legal position is made more uncertain by the second paragraph of Article 41 of the Code which provides that “sentenced persons serving their sentence in a prison are not allowed to receive parcels” (*ibid.*). In the present case, the applicant was continuously detained in Simferopol Prison but not in a corrective labour colony, an educational labour colony or a corrective labour colony camp mentioned in the first and fourth paragraphs of the same Article (*ibid.*).

158. In the light of these circumstances, the Court finds that the restrictions imposed by the Code referred to by the Government in the present case were not sufficiently foreseeable to comply with the requirement of the second paragraph of Article 8 of the Convention in that the applicant could not know with sufficient certainty whether the limits laid

down in the Code as to the number of parcels and small packets which prisoners were allowed to receive from relatives applied to him.

2. Instruction

159. The Court notes that the Instruction was an internal document which was not accessible to the public: the Government submitted only a part of it to the Court.

160. The Court finds that in these circumstances it cannot be said that the interference with the applicant's right to respect for his correspondence was "in accordance with the law" as required by Article 8 § 2 of the Convention. It is true that the Instruction was replaced by the Temporary Provisions approved by the State Department on Execution of Sentences on 25 June 1999 as Order no. 72, and registered on 1 July 1999 under no. 426/3719 in the Ministry of Justice which entered into force on 11 July 1999 and which are accessible to public. However, the Temporary Provisions have no application to the facts occurring before 11 July 1999.

161. There has consequently been a violation of Article 8 of the Convention as regards the period between 11 September 1997 and 11 July 1999.

B. Period after 11 July 1999

162. Concerning the period after 11 July 1999, the Court recalls that the applicant's lawyer confirmed in his letter to the Court of 24 July 1999 that the detention conditions on death row in respect of the applicant had significantly improved. The applicant's relatives had been permitted to bring him warm clothes and send parcels of food up to two times per month, monthly visits from his relatives had been permitted without any limitation and there was no limitation as regards correspondence. It has already been noted that similar information was communicated to it by the applicant's mother in her letter of 8 July 1999.

163. The Court observes that the applicant has made no complaint that his correspondence was controlled during this period.

164. As regards the restrictions imposed by the Temporary Provisions whereby the applicant was allowed to receive six parcels and three small packets a year, it is accepted that such a limitation constitutes an interference with the right to respect for correspondence. Such an interference is "in accordance with the law", namely the Temporary Provisions, and can be regarded as pursuing the legitimate aim of the "prevention of disorder or crime", bearing in mind the interest of the prison authorities in ensuring that material harmful to prison security is not smuggled into prisons.

165. As regards the necessity of the interference, the Court must take into account the logistical problem involved in processing an unrestricted

quantity of parcels arriving in a large penitentiary, in this case an establishment with over 3,000 inmates. Granting permission to inmates to receive an unlimited number of parcels or small packets would involve a substantial amount of work on the part of prison staff in checking each parcel with a view to safeguarding prison security. The security regime inside the prison is aimed at protecting the public at large from dangerous offenders and also in protecting the prison inmates themselves. The prison authorities thus have a legitimate interest in protecting security by means which seek to reduce or limit security risks. At the same time a proper balance must be struck between the interests of security and respect for the right of inmates to maintain contact with the outside world.

166. In the present case the Court considers that the possibility of receiving parcels or small packets every sixth week can be regarded as respecting such a balance, bearing in mind that the prison authorities provide clothing, meals and medical care for all prisoners during their detention. In addition, the Court has heard evidence from the Government that there is no restriction on relatives sending money to inmates to enable them to purchase extra provisions at the prison shop.

167. Against this background and bearing in mind the margin of appreciation afforded to the Government in the regulation of prison life, the Court considers that the measures are proportionate to the aim of preventing disorder or crime.

168. There has accordingly been no violation of Article 8 of the Convention as regards the period after 11 July 1999.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

169. 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.”

170. The applicant did not submit any claim for pecuniary damage or costs. However, he did claim, through his mother, 3,000,000 US dollars (USD) (3,064,038 euros (EUR)) by way of compensation for non-pecuniary damage.

171. The Government submitted that the applicant's mother did not have *locus standi* to act before the Court on behalf of the applicant. They pointed out that the power of attorney was presented to the Court only after the claims for just satisfaction were submitted.

172. The Court, bearing in mind its finding above regarding the applicant's complaints under Articles 3 and 8 of the Convention, considers that the applicant suffered some moral damage in connection with the general conditions of his detention and the restrictions by the public

authorities on his right to respect for his correspondence (see paragraph 139 below). Making its assessment on an equitable basis, the Court awards the applicant EUR 2,000 (two thousand euros) for non-pecuniary damage, plus any tax that may be chargeable.

Default interest

173. The Court considers it appropriate that the default interest should be based on an annual rate equal to the marginal lending rate of the European Central Bank to which should be added three percentage points (see *Christine Goodwin v. the United Kingdom*, no. 28957/95, § 124, 3 July 2002, to be published in ECHR 2002).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objection;
2. *Holds* that there has been a violation of Article 3 of the Convention as regards the conditions of detention to which the applicant was subjected on death row;
3. *Holds* that there has been a violation of Article 8 of the Convention as far as the period between 11 September 1997 and 11 July 1999 is concerned;
4. *Holds* that there has been no violation of Article 8 of the Convention as far as the period after 11 July 1999 is concerned;
5. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 2,000 (two thousand euros) in respect of non-pecuniary damage, to be converted into Ukrainian hryvnas at the rate applicable at the date of settlement, plus any tax that may be chargeable;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 29 April 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President