

## Torture and unlawful detention of criminal suspect

In today's Chamber judgment in the case **Nechiporuk and Yonkalo v. Ukraine** (application no. 42310/04), which is not final<sup>1</sup>, the European Court of Human Rights held, unanimously, that there had been:

**A violation of Article 3 (prohibition of torture and inhuman or degrading treatment)** of the European Convention on Human Rights on account of the first applicant's having been tortured and of the lack of an effective investigation into his complaints in that respect; **violations of Article 5 §§ 1, 2, 3, 4 and 5 (right to liberty and security)** on account of his detention during five separate periods between 2004 to 2007; **violations of Article 6 §§ 1 and 3 (c) (right to a fair trial)** as regards the proceedings against the first applicant.

The case concerned in particular the first applicant's allegation that he was tortured during his police custody in order to make him confess to a murder, that his detention was unlawful and that the criminal proceedings against him were not fair.

### Principal facts

The applicants are two Ukrainian nationals, Ivan Nechiporuk, who was born in 1982 and is currently serving a 15-year prison sentence in Kolomyia Prison, and his wife, Natalya Yonkalo, who was born in 1981 and lives in Kharkiv.

Mr Nechiporuk was apprehended by the police on 20 May 2004 and placed in "administrative detention" in a police station on suspicion of illegal drug possession. A written note by one of the arresting officers explained his arrest with his suspicious behaviour in the street. His relatives were not informed of his whereabouts. During the first night of his arrest, Mr Nechiporuk, according to his submissions, was urged by two police officers under threat of violence, to confess to the murder of a woman who had been shot by armed intruders at the door of her flat in Khmelnytskyi one week before his arrest. After he refused to confess, he was handcuffed, suspended from a metal bar and given electric shocks to his ankles and coccyx. The officers further beat him up and threatened to give his eight-month pregnant wife, who was also in custody to be questioned, the same treatment. Mr Nechiporuk then wrote a confession, allegedly under dictation from a police officer, stating that he had committed the murder together with another person.

Mr Nechiporuk complained about his alleged ill-treatment to the prosecutor's office of the city of Khmelnytskyi and to the court subsequently examining the prosecutor's request for his detention in custody. His relatives and lawyer repeated the complaints to the

<sup>1</sup> Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: [www.coe.int/t/dghl/monitoring/execution](http://www.coe.int/t/dghl/monitoring/execution)

prosecutor. Three days after the incident, Mr Nechiporuk was examined by a forensic doctor who noted injuries to his ankles, which he considered “unspecific”, and expressed doubts as to the plausibility of Mr Nechiporuk’s allegation, findings, which were confirmed by another medical report a few weeks later. In June 2004, the prosecutor’s office issued a decision refusing criminal prosecution of the police officers for lack of evidence, relying mainly on the questioning of the officers involved and on the medical reports. Mr Nechiporuk challenged that refusal and it was subsequently quashed and upheld again three times. His complaint was included in the case file concerning the criminal proceedings against him (below). In June 2005, two experts of a private forensic medical centre appointed by Mr Nechiporuk’s lawyer issued a report in which they concluded, in particular, that his injuries might have been inflicted by contacts with electric wires. The report was submitted to the court dealing with Mr Nechiporuk’s case at the time.

In the meantime, three days after his first arrest in May 2004, criminal proceedings were opened against Mr Nechiporuk on suspicion of assault with intent to commit robbery and murder for profit. The city court remanded him in custody, referring to the gravity of the charges against him and the risk of his absconding or obstructing justice. On the same day he withdrew his earlier confessions, stating that they had been extracted by force, but two days later made another confession after allegedly having been beaten by police officers again; he subsequently repeated his confession in the presence of his lawyer. The charges having been changed to grievous bodily harm causing death, Mr Nechiporuk was acquitted in May 2005 by the city court, which found in particular that his confession had been extracted by force.

On appeal by the victim’s relatives, the regional court quashed the acquittal and the case was transferred to another city court within the same region, which remitted the case to the prosecutor, indicating numerous shortcomings in the investigation, in particular that the confessions by Mr Nechiporuk and a co-defendant and witness statements lacked consistency. In November 2006, Mr Nechiporuk was again arrested by the investigator and detained for two days on suspicion of premeditated murder. After formal charges had been brought against him, the city court remanded him in custody at the prosecutor’s request, and his pre-trial detention was subsequently extended twice.

In August 2007, the regional court found Mr Nechiporuk guilty of a number of offences including premeditated murder for profit committed following a conspiracy with a group of persons and sentenced him to fifteen years’ imprisonment. The court relied in particular on the witness statement of a taxi driver who had been in administrative detention on suspicion of a drug-related offence at the time of his questioning. He recognised Mr Nechiporuk and stated that he had taken two passengers to the building where the crime was committed, had waited there for about half an hour and then driven them away. It also took into consideration the testimony of the victim’s son and Mr Nechiporuk’s confession early in the proceedings. The court found his allegation of ill-treatment unsubstantiated.

In his appeal, Mr Nechiporuk stressed in particular that the forensic medical report corroborating his allegation of having been tortured by electric shocks had remained ignored and that the taxi driver’s testimony had drastically changed over time to his disadvantage and in suspicious circumstances. He pointed out that the case file contained a transcript – which the court had dismissed as evidence – of a conversation he had had with the taxi driver and in which the latter stated that the police had forced him to incriminate the defendants, including Mr Nechiporuk. In March 2008, the Supreme Court upheld the conviction, referring mainly to his confessions during the pre-trial investigation, including those given in the presence of his lawyer. As to the allegation of ill-treatment, it found, judging from the videotape of the investigative activities, that Mr Nechiporuk had given his confessional account of the events in a free and detailed manner and that there had been no injuries on his body.

In a separate set of proceedings, Mr Nechiporuk's wife complained about her detention on the day of the questioning in May 2004. The prosecution did not bring any charges.

### Complaints, procedure and composition of the Court

Relying on Article 3, Mr Nechiporuk complained that he had been tortured while in police custody and that the domestic authorities had failed to investigate the complaint. He made a number of complaints under Article 5 §§ 1, 2, 3, 4 and 5 about the unlawfulness of his detention. Relying on Article 6 §§ 1 and 3 (c), he further complained about the unfairness of the proceedings against him.

Relying on Article 3 and Article 5 § 1, Mr Nechiporuk's wife complained that she had been subjected to threats and humiliation by the police and that she had been detained for about four hours without any grounds. The Court declared her complaints inadmissible.

The application was lodged with the European Court of Human Rights on 13 November 2004.

Judgment was given by a Chamber of seven, composed as follows:

Elisabet **Fura** (Sweden), *President*,  
Karel **Jungwiert** (the Czech Republic),  
Boštjan M. **Zupančič** (Slovenia),  
Mark **Villiger** (Liechtenstein),  
Ann **Power** (Ireland),  
Ganna **Yudkivska** (Ukraine),  
Angelika **Nußberger** (Germany), *Judges*,

and also Claudia **Westerdiek**, *Section Registrar*.

### Decision of the Court

#### Article 3

It was undisputed by the parties that two forensic medical examinations, undertaken on the investigator's orders three days and about two weeks after the incidents respectively, had found injuries on Mr Nechiporuk's body. The Court was not convinced by the Government's explanation, supported by the official medical records, that the injuries "might have been caused by blunt objects", without any further details given. Nor did it accept the view that Mr Nechiporuk's failure to raise a complaint about his alleged ill-treatment before the administration of the temporary detention facility where he was placed undermined his plausibility, as he might have been discouraged by its structural link with the police. What mattered was that he had promptly brought the complaints to the attention of the prosecution authorities.

In that light, and given the authorities failure to challenge or explain the medical evidence in support of Mr Nechiporuk's allegations of ill-treatment by electric current, the Court found it established to the standard of proof required in Convention proceedings that the injuries recorded in the medical reports had been the result of the treatment of which he complained and for which the Government bore responsibility. Having regard to the fact that he confessed to the murder for the first time while being formally under arrest for an unrelated offence and noting the allegations of his beatings by the police prior to his renewed confessions, the Court considered it probable that the police had intentionally ill-treated him with the aim of extracting confessions. Given that he and his pregnant wife were questioned by the police at the same time, his allegation of having

been threatened with her torture was plausible. Those threats had to have exacerbated considerably his mental suffering.

In view of those considerations, the Court found that Mr Nechiporuk was a victim of very serious and cruel suffering that may be characterised as torture; there had accordingly been a violation of Article 3 on that account.

Although it had never been disputed that Mr Nechiporuk had sustained injuries in police custody, the authorities had consistently confined their reasoning to finding implausible the allegation that he had been tortured with electric shocks. His attempts to challenge the refusal to prosecute the police officers had been dismissed in particular under the pretext that the matter would be examined in the context of his own trial. The Court questioned the adequacy of that approach, given that the purpose of the criminal proceedings was to find him innocent or guilty of the criminal charges rather than to attribute responsibility for alleged beatings or afford redress for an alleged breach of Article 3.

The Court further found it striking that the domestic trial court ignored altogether the findings of the experts of the private medical centre supporting Mr Nechiporuk's allegation. In its subsequent examination of the case, the Supreme Court had confined its efforts to analysing the video-recording of the investigative activities in which no injuries were visible, which had been sufficient for it to find that the complaint was unsubstantiated. Overall, the Court concluded that Mr Nechiporuk had been denied an effective investigation of his complaint of ill-treatment by the police, in violation of Article 3 in its procedural aspect.

### Article 5

The Court found that there had been violations of Mr Nechiporuk's right to liberty and security under **Article 5 § 1** in respect of his detention during five separate periods between 2004 to 2007.

In particular, while his initial three-day detention in May 2004 had been documented by the police as based on an administrative offence suspicion, he had been treated as a suspect in the criminal case concerning a murder, without safeguarding his procedural rights as a suspect, notably the right to defence. His subsequent detention for another three days had been in breach of the safeguards of national legislation, which allowed detention without a reasoned court decision only for a maximum of three days as a response to an urgent need to prevent a crime. The same objection applied to his detention without a reasoned court decision in November 2006. His subsequent custody on remand by court order had been based on reasons which did not appear valid, as neither the gravity of the charges had changed significantly nor had the risk of absconding increased; the decision therefore could not be considered free from arbitrariness.

As regards his detention on the basis of court rulings during two periods in 2004-2005 and in 2007, the courts had not given specific reasons nor had they fixed any time-limits. That had been in accordance with the domestic legislation in force at the time, which had led the Court to find violations of Article 5 in respect of other similar complaints against Ukraine. A further structural problem was reflected in the fact that his detention for about one month in 2007, after the pre-trial investigation had been completed, had not been covered by any decision, as domestic law did not set clear rules governing that situation.

The Court further found a violation of Mr Nechiporuk's right to be promptly informed of the charges against him under **Article 5 § 2**, as there had been no clearly announced suspicion against him at the time of his initial arrest and he had been treated as a

criminal suspect in a murder case while being formally detained on suspicion of an administrative offence.

His initial detention for six days had also been in violation of his right to “be brought promptly before a judge” under **Article 5 § 3**, and the overall length of his pre-trial detention, lasting in total for one year and eight months, had been in breach of his right to “trial within a reasonable time or to release pending trial” under the same article.

There had been a violation of **Article 5 § 4** on account of his inability to obtain speedy judicial review of the lawfulness of his detention during the judicial proceedings. In particular, there had been no clear and foreseeable provisions in place that would have provided for the procedure of judicial review during the trial stage.

Finally, there had been a violation of Mr Nechiporuk’s right to compensation under **Article 5 § 5** for having been detained in breach of his Convention rights, as domestic law did not provide for an enforceable right to compensation in his case.

## Article 6

Mr Nechiporuk’s initial confessions, which had been extracted from him by ill-treatment amounting to torture within the meaning of Article 3, had been admitted as evidence in his trial by the domestic courts. The Court considered that that extinguished the very essence of his privilege against self-incrimination, irrespective of the weight of the confessions in the evidential basis for his conviction and regardless of the fact that he had confessed again several times during the investigation. There had accordingly been a violation of his right not to incriminate himself under **Article 6 § 1**.

It was undisputed by the parties that Mr Nechiporuk had not become legally represented until having spent three days in detention. By having formally placed him in administrative detention but in fact treating him as a criminal suspect, the police had deprived him of access to a lawyer, which would have been obligatory under the domestic legislation had he been charged with the offence in respect of which he was in fact being questioned. He had confessed several times to murder at the early stage of his interrogation when he was not assisted by counsel, and had undoubtedly been affected by the restrictions on his access to a lawyer in that his confessions to the police were used for his conviction. The early restrictions of his defence rights had not been remedied in the course of the trial, as the courts had failed to give an adequate response to his complaint of ill-treatment. The Court concluded that that there had been a violation of his right to defence under **Article 6 § 3 (c)**.

The Court further found the responses of the domestic courts to Mr Nechiporuk’s arguments against the testimony of the key witness to be strikingly inadequate. In particular they had failed to comment on the undisputed fact that the witness had been in administrative detention and ignored the existence of the audiotape documenting a conversation in which the witness had allegedly admitted to having slandered Mr Nechiporuk under police pressure. By ignoring these specific and important arguments, the domestic courts had fallen short of their obligations under **Article 6 § 1**; there had accordingly been a violation of this article on account of the domestic courts’ reasoning.

## Article 41

Under Article 41 (just satisfaction) of the Convention, the Court held that Ukraine was to pay the applicant 35,000 euros (EUR) in respect of non-pecuniary damage and EUR 13,594 in respect of costs and expenses.

*The judgment is available only in English.*

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