

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

FIFTH SECTION

# CASE OF KYYKO v. UKRAINE

*(Application no. 26371/16)*

JUDGMENT

STRASBOURG

19 June 2025

*This judgment is final but it may be subject to editorial revision.*



**In the case of Kyyko v. Ukraine,**

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

Andreas Zünd*, President*,
Kateřina Šimáčková,
Mykola Gnatovskyy*, judges*,
and Martina Keller, *Deputy Section Registrar,*

Having regard to:

the application (no. 26371/16) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 19 April 2016 by a Ukrainian national, Mr Sergiy Oleksandrovych Kyyko ("the applicant"), who was born in 1980, lives in Dnipro and was represented by Mr M.O. Sosyedko, a lawyer practising in Kyiv;

the decision to give notice of the complaints under Article 3 of the Convention concerning the alleged ill-treatment of the applicant, and under Articles 6, 8 and 13 of the Convention, concerning the allegedly unlawful interception of the applicant's telephone conversations and their use as evidence against him, to the Ukrainian Government ("the Government"), represented by their Agent, Ms M. Sokorenko, of the Ministry of Justice, and to declare the remainder of the application inadmissible;

the parties' observations;

Having deliberated in private on 28 May 2025,

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

# SUBJECT MATTER OF THE CASE

1. The application mainly concerns the applicant's complaints under Articles 6, 8 and 13 of the Convention that his telephone conversations had been recorded without prior judicial authorisation and that the results had been used as evidence against him. He also complained under Article 3 of the Convention of his ill-treatment by law-enforcement officials and the lack of an effective investigation into it.

## I. CRIMINAL PROCEEDINGS AGAINST THE APPLICANT

2. On 11 July 2014, and 3 March and 5 November 2015, the Synelnykove Town Court, the Dnipropetrovsk Regional Court of Appeal ("the Court of Appeal") and the Higher Specialised Civil and Criminal Court respectively found the applicant and his co-defendants guilty of several episodes of theft of transformer oil, committed as part of a group between May 2011 and 3 May 2012, and attempted theft of transformer oil on 4 May 2012. They were sentenced to three years and six months' imprisonment but were

exempted from serving their sentences following the application of the Amnesty Act by the Court of Appeal. In establishing the applicant's guilt, the courts relied, *inter alia*, on the recordings of intercepted mobile phone conversations between the defendants during the period from 18 April to 4 May 2012, which indicated that they were coordinating the time and place to commit the crimes.

3. The applicant and his lawyer had access to the transcripts of those conversations during the pre-trial investigation, but the applicant chose not to comment, exercising his right to remain silent. The transcript of the conversations, prepared by the police on 27 July 2012, stated that the wiretapping of the mobile phones belonging to B. and S., the applicant's alleged accomplices, had been carried out while documenting the alleged criminal activities committed by the group. The transcript mentioned that permission had been obtained from the Court of Appeal for the measure but provided no details, such as the date and registration number of the relevant judicial decision.

4. During the trial at the first-instance court, the applicant and his co-defendants requested access to the judicial authorisation for the interception of their telephone conversations, pointing out that no such documents were included in the case file. In response, the trial court made enquiries with the police and the Court of Appeal. The police informed the court that the telephone calls had been intercepted in accordance with the law, but access to the relevant Court of Appeal decision, which was stored in police files, could not be granted as it were classified as a State secrets for five years under the applicable legislation. The Court of Appeal stated that the period for which the decision in issue had to remain classified had not yet expired. Having not been provided with the decision in question, the applicant argued before the trial court that no such decision existed and that the recordings of his conversations with the defendants had not been authorised by a court, in breach of domestic law. He also argued that no technical examination of the audio recording had been carried out to prove that the voice on the tape belonged to him and that the recordings contained no direct evidence of his involvement in the offences. On those grounds, he claimed that the recording in question should therefore not have been admitted as evidence.

5. In their judgments, relying on the above-mentioned information from the domestic authorities, the domestic courts confirmed that the measure had been authorised by a court in accordance with the law and declared the relevant evidence admissible.

## II. ALLEGED ILL-TREATMENT BY THE POLICE

6. On 30 November 2013 the applicant and his co-defendants were transferred from the Synelnykove police station to Dnipro SIZO no. 4. According to the applicant, he was being taken for a walk when officers at

the Synelnykove police station entered the courtyard, used force against him and handcuffed him, saying that he was resisting transfer to the SIZO – even though that was not the case – and that force would be used against him. Other officers were also present; some of them filmed the events. When getting into their vehicle, one of the officers pushed the applicant, causing him to fall. As a result, he sustained injuries and was transported in the vehicle with his hands restrained behind his back.

7. The reports on the use of restraints by the police officers that day indicated that handcuffs had been applied to the applicant and his co-accused. One of the two available reports specified that this action had been taken because they had disobeyed lawful orders and refused to leave the police station and board the vehicle for transfer to the SIZO. It also mentioned that no physical force or close combat measures had been used.

8. When the applicant arrived at the SIZO on the same day, he was examined by the SIZO's general practitioner. According to an entry in the SIZO's register of bodily injuries, which was provided to the Court by the applicant, the doctor noted circular redness around both of the applicant's wrists and a bruise on his right eyebrow.

9. On 1 December 2013 criminal proceedings were initiated in response to the applicant's complaint concerning the use of force against him on 30 November 2013. Those proceedings were later merged with those initiated following similar complaints by the applicant's co-defendants. During the investigation, the applicant and his co-accused were questioned as victims, while the police officers from the Synelnykove police station were interviewed as witnesses. The officers denied any allegations of ill-treatment.

10. Between December 2013 and December 2018 the investigation was closed five times by the prosecutor, citing a lack of evidence, and subsequently reopened following appeals lodged by the applicant. The courts consistently pointed out the prosecutor's failure to follow earlier instructions, including conducting a forensic medical examination, reviewing the alleged video recordings of the events and data from the police station's cameras, and addressing contradictions in witnesses' testimonies.

11. The documents submitted by the Government indicate that a forensic medical examination was carried out on 14 December 2018. According to the Government, the examination report stated that the applicant's diagnosis of "a bruise on the right eyebrow and circular redness around both wrists" had not been confirmed and had therefore not been taken into account in the assessment of the severity of the bodily injury. No copy of the forensic report was submitted to the Court.

12. On 29 December 2018 the criminal proceedings were terminated again owing to the absence of a criminal offence. Based on statements from the police officers, the prosecutor concluded that on 30 November 2013, the applicant and his co-accused had refused to comply with police orders to leave their cells for transfer to the SIZO. They had threatened to harm

themselves and to disrupt the police vehicle in order to cause an accident and prevent their transfer. Handcuffs had been used. During the journey, the applicant had attempted self-harm but had been unsuccessful owing to the fact that he had been restrained. The prosecutor also noted, relying on the forensic medical examination report, that the investigation had not confirmed any bodily injuries inflicted on the applicant by police officers.

# THE COURT'S ASSESSMENT

## I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

13. The applicant complained that he had been tortured by the police on 30 November 2013 and that his complaint in this respect had not been properly investigated. Although he relied on Articles 3 and 13 of the Convention, the Court considers it appropriate to examine this complaint only under Article 3 of the Convention (see, for instance, *Pomilyayko v. Ukraine*, no. 60426/11, § 41, 11 February 2016).

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

15. Reviewing the facts of the present case in the light of the general principles established in its case-law (see Bouyid v. Belgium [GC], no. 23380/09, §§ 81-90 and 114-23, ECHR 2015), the Court considers that the applicant's bodily injuries recorded by the SIZO doctor (see paragraph 8 above) constituted an arguable claim that he might have been ill-treated by the police. Those claims triggered an obligation on the national authorities to carry out an effective and thorough investigation with a view to establishing the origin of the applicant's alleged and documented injuries and identifying and punishing those responsible should the allegation of ill-treatment have proved to be true.

16. It does not appear from the documents before the Court that the domestic investigation, although initiated promptly, reflected a serious effort to determine the relevant facts. No forensic medical examination was carried out shortly after the events to secure evidence of the alleged physical injuries and to explain their origin. Despite clear instructions from the domestic courts in this regard, the examination was not carried out until five years after the alleged events. In the absence of a copy of the expert's report, it remains unclear whether the medical certificate issued by the SIZO doctor attesting to the applicant's injuries was made available to the expert and, if so, why the injuries recorded therein were not taken into account. It also appears that no examination of the allegedly available video recordings of the events and the data from the security cameras was ever carried out, contrary to the instructions of the domestic courts, which repeatedly overturned the prosecutor's decisions to close the investigation, pointing to the deficiency of

the investigation and the prosecutor's failure to follow instructions (see paragraph 10 above). Lastly, the Court cannot but note the length of the investigation which lasted for more than five years.

17. The Court notes that in *Kaverzin v. Ukraine* (no. 23893/03, §§ 173-80, 15 May 2012) it found that the reluctance of the authorities to ensure a prompt and thorough investigation into complaints of ill-treatment lodged against police authorities constituted a systemic problem for the purposes of Article 46 of the Convention. In view of the circumstances of the present case and its previous case-law, the Court considers that it constitutes another example of a failure to ensure a thorough investigation.

18. The Court further notes that the applicant consistently and coherently alleged that physical force had been used against him when he had been handcuffed, for no reason, and that he had been pushed by the police officers on the way to the police vehicle, which had caused him further injuries. As is evident from the case file, the medical examination, conducted in the SIZO on the day of the incident in question revealed that the applicant had sustained circular redness around both wrists and a bruise on his right eyebrow.

19. The Court reiterates that where the events at issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during such detention. In such cases, the burden of proof may be regarded as resting on the authorities to explain, in a satisfactory and convincing manner, the sequence of events and to provide solid evidence to refute the applicant's allegations (see, in particular, *Tagayeva and Others v. Russia*, nos. 26562/07 and 6 others, § 586, 13 April 2017, and also, by way of example, *Adnaralov v. Ukraine*, no. 10493/12, § 45, 27 November 2014; *Kulik v. Ukraine*, no. 10397/10, § 59, 19 March 2015; and *Yaroshovets and Others v. Ukraine*, nos. 74820/10 and 4 others, § 85, 3 December 2015). In the absence of such evidence from the Government, the Court is able to draw adverse inferences.

20. In the present case, the origin of the applicant's injuries, as recorded by the SIZO doctor, was never properly established in the course of the domestic investigation. In their observations, the Government likewise failed to provide any explanation as to the origin of the above-mentioned physical injuries, limiting themselves to repeating the findings of the investigation as to the sequence of events on the day in question (see paragraph 12 above) and pointing out, in particular, that the investigation had not confirmed that the applicant had sustained any physical injuries.

21. In these circumstances, the Court concludes that the Government have failed to discharge their burden of proof and to satisfactorily establish that the applicant's injuries, recorded on his arrival at the SIZO shortly after the incident in question, were wholly caused by anything other than ill-treatment while in police custody. Accordingly, the State's responsibility for the applicant's ill-treatment is engaged.

22. The above findings are sufficient for the Court to establish that the applicant was subjected to ill-treatment which must be classified as inhuman and degrading.

23. The Court therefore concludes that the applicant's complaints disclose a breach of Article 3 of the Convention in respect of his ill-treatment under both its procedural and substantive limbs.

## II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

24. The applicant complained that his telephone conversations had been recorded without prior judicial authorisation as the decision authorising the interception of his mobile telephone communications had not been disclosed to him.

25. Relying on the material in the case file, including the transcript of the relevant surveillance conversations (see paragraph 3 above), the Government stated that the interception of telephone communications had been authorised by the Court of Appeal and was conducted by the police only with respect to S. and B., the applicant's alleged accomplices. The applicant's mobile phone had not been tapped, however, his conversations had been recorded during the surveillance operation because he had communicated with S., whose phone had been monitored. The Government admitted that the operational-search activities in question had constituted an interference with the applicant's rights under Article 8 of the Convention but argued that the interference had been lawful. The domestic courts had duly examined and rejected the applicant's complaints in that connection. The interference had pursued a legitimate aim: the prevention of disorder or crime and the protection of the rights and freedoms of others. The procedure and safeguards against potential abuse set forth in domestic law had been observed, which had ensured that the interference had been "necessary in a democratic society". The Government provided the Court with a copy of the Court of Appeal's decision from 11 July 2012 to demonstrate that the extraction of outgoing and incoming call records from the suspects' mobile phones – which had also served as evidence against them – had been duly authorised in accordance with the law.

26. The applicant insisted that there had been no judicial decision authorising the surveillance measures, in breach of domestic law. The information provided by the investigating authorities and the Court of Appeal on the matter had been general and vague. The domestic courts had taken the existence of a decision authorising the surveillance measures on faith, without verifying it and without allowing the applicant to examine it, despite his repeated requests to that effect.

27. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. It must therefore be declared admissible.

28. The general principles concerning secret measures of surveillance have been summarised in *Roman Zakharov v. Russia* ([GC], no. 47143/06, §§ 227-34, ECHR 2015, with further references).

29. It is common ground between the parties that the recording of the applicant's telephone conversations, even assuming that his own telephone line was not placed under surveillance, as the Government suggested, constituted an interference with the applicant's rights under Article 8 of the Convention. The Court sees no reason to hold otherwise (see, as regards conversations intercepted as a result of the covert monitoring of someone else's telephone lines, Terrazzoni v. France, no. 33242/12, § 43, 29 June 2017).

30. The Court further observes that in the present case the applicant did not complain that the interception of the telephone communications in his case had had no basis in domestic law or that the quality of the law had fallen short of Convention standards. He rather challenged the authorities' refusal to disclose to him a judicial decision authorising the contested measure, which he took as proof that no such authorisation had been given in his case, contrary to the requirements of domestic law.

31. The Court notes that there may be good reasons to keep a covert surveillance authorisation, or some parts of it, secret from its subject even after he or she has become aware of its existence. Indeed, a full disclosure of the authorisation may in some cases reveal the working methods and fields of operation of the police or intelligence services and even possibly identify their agents (see, *mutatis mutandis*, *Roman Zakharov*, cited above, § 287). At the same time, the information contained in decisions authorising covert surveillance might be critical for the person's ability to bring legal proceedings to challenge the legal and factual grounds for authorising covert surveillance (see *Avanesyan v. Russia*, no. 41152/06, § 29, 18 September 2014). Accordingly, in the Court's opinion, when dealing with a request for the disclosure of a decision authorising a covert operation, the domestic courts are required to ensure a proper balance between the interests of the surveillance subject and the public interest. The surveillance subject should be granted access to the documents in question, unless there are compelling concerns to prevent such a decision (see *Radzhab Magomedov v. Russia*, no. 20933/08, § 82, 20 December 2016).

32. The Court has thus to examine whether the retrospective judicial review of the lawfulness of the contested measure was carried out "in accordance with the law", and whether the judicial review provided additional safeguards against arbitrariness during the adjudication of the criminal proceedings against the applicant.

33. In the instant case, the Ukrainian authorities refused to disclose the decision authorising the interception of the defendants' telephone communications either to the applicant, in the course of the criminal proceedings against him, or to the Court, following the communication of the

applicant's complaint to the Government. It also appears from the material submitted that the domestic courts dealing with the criminal proceedings against the applicant did not have access to the decision in question either, since the State authority conducting the interception appeared to be entitled under the domestic law to retain exclusive possession of such judicial authorisations.

34. In response to the applicant's request for disclosure of the court order and in rejecting his plea of inadmissibility of the audio recording in question, the national courts merely limited themselves to stating, on the basis of general information provided to them by the police and the Court of Appeal, that the surveillance measure had been authorised by the Court of Appeal, and had therefore been lawful, but that the decision in question was classified. They did not carry out any balancing exercise as regards the applicant's interests and those of the public in the detection and prosecution of crime and did not explain why disclosure of the decision – after the mobile phone communications between the defendants had already been recorded and the audio recordings had already been disclosed to the applicant – would have impeded the effective administration of justice or any other legitimate public interests.

35. Moreover, there is no indication that the national courts verified whether the judicial authorisation referred to by the investigating authorities indeed existed and was part of the file, what their content was, whether there were relevant and sufficient grounds for authorising the covert surveillance or whether the investigating authorities had complied with the conditions of the judicial authorisation when carrying out the surveillance. In the light of these omissions, the domestic courts did not carry out an effective judicial review of the lawfulness and "necessity in a democratic society" of the contested surveillance measures and failed to furnish sufficient safeguards against arbitrariness within the meaning of Article 8 § 2 of the Convention (see, for a similar reasoning, *Šantare and Labazņikovs v. Latvia*, no. 34148/07, §§ 60-62, 31 March 2016).

36. In these circumstances, the Court finds that in the course of his criminal proceedings, the applicant could not verify whether the interference with his rights under Article 8 of the Convention had been carried out on the basis of a prior judicial authorisation. The national courts did not provide for an effective judicial review of the lawfulness of the contested measure and failed to serve as additional safeguards against arbitrariness within the meaning of Article 8 § 2 of the Convention. The Government further relied on a copy of the Court of Appeal's decision from 11 July 2012 authorising the extraction of outgoing and incoming call records from the suspects' mobile phones. The Court notes, however, that this document does not constitute conclusive evidence that a similar authorisation existed for the wiretapping of the suspects' mobile phones.

37. There has therefore been a violation of Article 8 of the Convention.

38. Having regard to the foregoing conclusion, the Court does not consider it necessary to examine whether other requirements of paragraph 2 of Article 8 were complied with.

## III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 8 OF THE CONVENTION

39. The applicant also complained under Article 13 of the Convention of the lack of an effective domestic remedy to challenge the lawfulness of the interception of his mobile phone conversations by the police. In view of the above findings concerning the trial court's failure to carry out an effective judicial review of the lawfulness and "necessity in a democratic society" of the contested surveillance measures (see paragraphs 32-36 above), and given that the Government did not suggest the existence of any alternative remedy available to the applicant, the Court finds that the applicant did not have effective remedies in respect of his complaint under Article 8 of the Convention.

40. Accordingly, there has been a violation of Article 13 taken together with Article 8 of the Convention.

## IV. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

41. The applicant complained that the results of the recording of his telephone conversations had been used as evidence against him in the criminal proceedings.

42. The Government submitted that the applicant's complaint under Article 6 was ill-founded, as it was a "fourth-instance" complaint and the reasoning of the domestic courts had not been based on a manifest error resulting in a "denial of justice". The recordings had not been the sole or decisive evidence and had been corroborated by other evidence. In any event, the material had been obtained legally and the conviction had been reviewed and upheld by the appeal and cassation courts.

43. According to the applicant, the conduct of the domestic courts and the admission of the telephone records in question as evidence against him in the absence of access to the decision authorising such a measure had rendered his conviction unfair.

44. The relevant general principles of the Court's case-law were recently summarised in *Berlizev v. Ukraine* (no. 43571/12, §§ 51-52, 8 July 2021).

45. In the present case, B.'s and S.'s conversations with other defendants, including the applicant, were secretly recorded and used as evidence by the trial court. The failure to reveal the judicial authorisation, if any, for recording the conversations constituted a breach of the Convention, as discussed above, under Article 8 of the Convention. As regards Article 6, it follows from the case file that the evidence collected as a result of the surveillance measure

had a limited impact on the applicant's conviction (compare *Khan v. the United Kingdom*, no. 35394/97, § 37, ECHR 2000-V, and *Lysyuk v. Ukraine*, no. 72531/13, § 69, 14 October 2021). As it follows from the case-file, the domestic courts based their decisions on a broader range of evidence, including confessions made by two of the applicant's co-defendants in the presence of their lawyers during the investigation, and by one of them in court, implicating the applicant in the crimes. They also relied on statements made by the co-defendants during confrontation interviews and crime scene reconstructions, as well as information regarding outgoing and incoming calls from the defendants' mobile phones between 1 and 4 May 2012, and the mobile phones' locations at the time of the offences. All of this evidence was deemed reliable and admissible. The courts also took into account witness testimony and material evidence when reaching their decisions.

46. Furthermore, there is no indication that the recording in question was unreliable or inaccurate. Indeed, the applicant was given an unrestricted opportunity to challenge the authenticity of the recording in adversarial proceedings at three levels of jurisdiction but failed to raise any meaningful argument to this effect. While in the domestic proceedings, he raised the plea of inadmissibility of the audio recording at issue, claiming that no technical examination had been conducted to verify that the voice on the recording belonged to him, he never suggested, either before the domestic courts or before this Court, that it was not his voice or that the conversation had never took place or had been forged (see and compare *Berlizev*, cited above, § 54, and *Dragojević v. Croatia*, no. 68955/11, § 131, 15 January 2015; and contrast *Bykov*, cited above, § 94, and *Niţulescu v. Romania*, no. 16184/06, §§ 53-55, 22 September 2015). Moreover, the applicant himself stated before the trial court that the recording in question contained no direct evidence of his involvement in the crime (see paragraph 4 above).

47. In the light of the above considerations, the Court is unable to conclude that the overall fairness of the criminal proceedings against the applicant was compromised. The present complaint is therefore manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

## APPLICATION OF ARTICLE 41 OF THE CONVENTION

48. The applicant claimed 50,000 euros (EUR) in respect of non-pecuniary damage. He also claimed EUR 7,600 in legal fees for his representation before the Court, requesting that the latter amount be paid directly into the account of his representative, Mr Sosiedko. To support this claim, the applicant submitted a legal aid agreement dated 23 August 2023 under which he undertook to reimburse the lawyer for costs and expenses at EUR 100 per hour. The applicant also provided a report of the completed

work dated 20 January 2024, stating that the lawyer had spent seventy-six hours on the case.

49. The Government reiterated that there had been no violation of the applicant's rights in the present case, therefore, the applicant's claims should be rejected.

50. Having regard to all the circumstances of the present case, the Court accepts that the applicant has suffered non-pecuniary damage which cannot be compensated for solely by the finding of a violation. Making its assessment on an equitable basis, and in view of the specific circumstances of the case, the Court awards the applicant EUR 4,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

51. The Court further considers it reasonable to award EUR 3,000 in respect of costs and expenses, plus any tax that may be chargeable to the applicant, to be paid into the bank account indicated by his representative.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints under Article 3, 8 and 13 of the Convention admissible and the complaint under Article 6 of the Convention inadmissible;

2. *Holds* that there has been a violation of Article 3 of the Convention under its procedural limb;

3. *Holds* that there has been a violation of Article 3 of the Convention under its substantive limb;

4. *Holds* that there has been a violation of Article 8 of the Convention;

5. *Holds* that there has been a violation of Article 13 read in conjunction with Article 8 of the Convention;

6. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 4,000 (four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 3,000 (three thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be paid into the bank account indicated by his representative;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 19 June 2025, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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| Martina Keller<br>Deputy Registrar | Andreas Zünd<br>President |