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

FOURTH SECTION

CASE OF KUZNETSOV v. UKRAINE

(Application no. 39042/97)

JUDGMENT

STRASBOURG

29 April 2003

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

In the case of Kuznetsov v. Ukraine,

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

Sir Nicolas BRATZA, *President*,
Mrs E. PALM,
Mr J. MAKARCZYK,
Mrs V. STRÁŽNICKÁ,
Mr M. FISCHBACH,
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. 39042/97) 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, Mikhail Sergeyevich Kuznetsov ("the applicant"), on 25 November 1997.

2. The applicant was represented by his mother, Mrs Mariya G. Kuznetsova, Mr Igor G. Voskoboynikov and later by Mr Oleg O. Kostyan. The Ukrainian Government ("the Government") were represented by their Agent, Mrs V. Lutkovska, from the Ministry of Justice.

3. The case concerned the conditions to which the applicant was subjected on death row in Ivano-Frankivsk Prison and his treatment there.

4. The application was declared partly admissible by the Commission on 30 October 1998. Between 23 and 26 November 1998 the Commission carried out a fact-finding visit to Kiev and to Ivano-Frankivsk Prison. In its report of 26 October 1999 (former Article 31 of the Convention), it expressed the opinion that it expressed the opinion that there had been no violation of Article 3 of the Convention due to ill-treatment of the applicant in prison (unanimously), that there had been a violation of Article 3 as a result of the conditions of the applicant's detention in Ivano-Frankivsk Prison (unanimously), that there had been a violation of Article 3 as a result of the failure to carry out an effective investigation into the applicant's allegations of ill-treatment in prison (by twenty-four votes to one), that there had been a violation of Article 8 (unanimously) and that there had been

a violation of Article 9 (unanimously) [*Note by the Registry*. A copy of the Commission's report is obtainable from the Registry.].

5. The application was referred to the Court, in accordance with the provisions applicable prior to the entry into force of Protocol No. 1 to the Convention, by the Commission on 11 September 1999 (Article 5 § 4 of Protocol No. 11 and former Articles 47 and 48 of the Convention). It 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 Nazarenko v. Ukraine, Aliev v. Ukraine, Dankevich v. Ukraine, Khokhich v. Ukraine and Poltoratskiy v. Ukraine (applications nos. 39483/98, 41220/98, 40679/98, 41707/98 and 38812/97) (Rule 43 § 2).

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

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.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Outline of events

9. On 12 December 1995 the Ivano-Frankivsk Regional Court *(обласний суд)* convicted the applicant of the murder of four persons and sentenced him to death and ordered the confiscation of his personal property.

10. On 22 February 1996 the Supreme Court *(Верховний суд)* upheld the judgment of the first-instance court. The applicant was transferred by the authorities in charge of the Isolation Block of the Ivano-Frankivsk Regional Directorate of the Ministry of the Interior *(Адміністрація слідчого ізолятору Управління міністерства внутрішніх справ)* to one of the cells for persons awaiting execution of their death sentence.

11. A moratorium on executions was declared by the President of Ukraine on 11 March 1997. In judgment no. 11рп/99 of 29 December 1999,

the Constitutional Court of Ukraine held that the provisions of the Criminal Code concerning the death penalty were contrary to the Constitution of Ukraine. Death sentences were therefore commuted to life imprisonment pursuant to Act no. 1483-III of 22 February 2000.

On 2 June 2000 the Ivano-Frankivsk Regional Court commuted the applicant's death sentence to life imprisonment.

B. The facts

12. The facts of the case concerning the conditions of the applicant's detention in Ivano-Frankivsk Prison and the events during his time there were disputed.

13. The facts as presented by the applicant are set out in paragraphs 16 to 19 below. The facts as presented by the Government are set out in paragraphs 20 to 25 below.

14. A description of the material submitted to the Commission and to the Court will be found in paragraphs 26 to 41 below.

15. The Commission, in order to establish the facts in the light of the dispute over the conditions of the applicant's detention and the events which occurred in Ivano-Frankivsk Prison, conducted its own investigation pursuant to former Article 28 § 1 (a) of the Convention. To this end, the Commission examined a series of documents submitted by the applicant and the Government in support of their respective assertions and appointed three delegates to take evidence from witnesses at a hearing conducted at the Ministry of Justice in Kiev on 23 and 26 November 1998, and in Ivano-Frankivsk on 24 and 25 November 1998. The Commission's evaluation of the evidence and its findings of facts are summarised in paragraphs 42 to 57 below.

1. Facts as presented by the applicant

16. On 12 December 1995 the Ivano-Frankivsk Regional Court convicted the applicant of the murder of four persons, sentenced him to death and ordered the confiscation of his personal property.

17. On 22 February 1996 the Supreme Court upheld the judgment of the first-instance court. Upon a decision of the Administration of the Isolation Block of the Ministry of the Interior, the applicant was transferred to a cell intended for prisoners awaiting the death penalty. According to the applicant, he was deprived of all his rights.

18. The applicant claimed that the Pre-Trial Detention Act (“the Act”) did not apply to him, since the relevant legislation was an Instruction which operated in secret. Pursuant to the Instruction, the applicant was not taken for an outside walk for more than two and a half years. He could be visited by his mother only once a month, he had been refused visits and, since July 1996, the number of visits had been reduced to one every three months.

19. Following his application for confession sent to the Greek Catholic Bishop of the Ivano-Frankivsk diocese, the clergy approached the investigative isolation unit on this matter. Since September 1997 both he and his mother had been forbidden to send any letters to each other.

2. Facts as presented by the Government

20. The Government stated that the legal status and the conditions governing the detention of persons sentenced to capital punishment were set out in the Act and the Code of Criminal Procedure. According to section 8 of the Act, a person sentenced to death was kept in custody away from other prisoners. The cell to which the applicant had been transferred after his sentence had become final complied with the sanitary and hygiene rules laid down in section 11 of the Act: the cell measured 9 square metres, it had a bed, a table, a radio, sufficient natural and electrical lighting, heating, running water and a toilet.

21. The applicant was provided with three meals a day, clothing and footwear of standard type as well as other articles of everyday use. Medical assistance, treatment, prophylactic and anti-epidemic measures were arranged and implemented in accordance with legislation on health protection.

22. According to section 12 of the Act, prior to the sentence being carried out, prisoners sentenced to death were, as a rule, allowed visits from relatives and other individuals not more than once a month, by written permission of the court within whose jurisdiction the case fell. The length of a visit was two hours maximum. After a case had been dealt with by an appellate court, visits by lawyers and legal assistants could be granted by the Head of the Central Directorate of the Ministry of the Interior, the Head of the Regional Directorate of the Ministry of the Interior or his deputy responsible for the isolation block. Visits by defence counsel were granted without any limits as to their number and length.

23. After the first-instance judgment had been given, on 14 December 1995 and 4 January 1996 the applicant's mother and, on 18 December 1995 and 17 January 1996, his solicitor requested permission to visit the applicant. The mother visited the applicant on 14 December 1995 and on 4 January 1996. The applicant's lawyer visited him on 18 December 1995 and on 18 January 1996. During the period from 22 February 1996 to 29 December 1997, the applicant's mother applied for a visit to the Ivano-Frankivsk Regional Directorate of the Ministry of the Interior on 29 February, 15 March, 4 April, 5 and 31 May, 23 September, 18 November and 19 December 1996, 3 and 6 June, 24 September 1997 and 4 January 1998. They were granted permission for visits on 29 February, 19 March, 9 April, 7 May, 7 June, 23 September and 4 December 1996, 4 March, 4 June, 4 September and 4 December 1997 and 4 March 1998. The applicant's solicitors applied for a visit on 12 March, 11 April,

23 September, 2 and 18 December 1996. Permission was granted for visits on 15 March, 29 April, 23 September, 2 and 20 December 1996.

24. Persons sentenced to death were allowed to send an unlimited number of letters. During the period 1995-1998, the applicant sent 24 letters: 16 letters relating to the criminal case and 8 letters to his relatives. On 6 October 1997, for the first time, the applicant applied to the Regional Directorate of the Ministry of the Interior for permission to send letters to his relatives. Thereafter he sent letters to his mother on 3 and 19 November, 9 and 30 December 1997, 19 and 29 January, 16 February, 12 March, 6 April, 6 May, 10 June, 2 July, 6 August, 1 September, 5 October, 4 November and 4 December 1998. He received letters from his relatives on 24 September, 8 and 24 October, 24 November and 25 December 1997, and 14 and 28 January, 5 and 10 February, 13, 16 and 30 March, 6, 9 and 16 April, 6, 12, 20 and 22 May, 3, 17, 22 June, 1, 15, 20 and 30 July, 19, 25 and 31 August, 15 and 17 September, 1, 10, 14 and 22 October, 10, 21 and 23 November and 4 and 17 December 1998.

25. The Government added that the Prosecutor General had conducted a thorough investigation into issues raised in the applicant's and his parents' complaints concerning the application of illegal methods of investigation in the applicant's case, namely torture and brutal and inhuman treatment. The allegations had not been proved and had been found unsubstantiated. In fact, complaints by the applicant and his mother were received on 18 April, 19 and 29 July and 26 August 1996, 31 January, 5 February, 15, 19 and 21 March, 14 and 16 May, 10 June, 16 July 1997, and were answered on 22 April, 24 July, 26 August, 16 September 1996, and on 4 and 7 February, 31 March, 19 and 20 May, 23 June and 23 July 1997. On 19 May 1997 the exchange of letters and the proceedings concerning the complaints filed by the applicant and his mother were terminated pursuant to section 12 of the Act.

C. Documentary evidence

26. On 23 October 1998 the applicant's mother submitted a request to the Ivano-Frankivsk Regional Prosecutor, the Ivano-Frankivsk Regional Directorate of the Ministry of the Interior and the prison governor. They requested that a medical commission of independent doctors be set up in order to examine the applicant's state of health. She alleged that the inmates had been tortured, which had resulted in a suicide attempt or an attempt on the applicant's life. On 3 November 1998 the applicant's mother was informed by the governor of the prison that her request had been rejected on the grounds that there had been no sign of torture or the use of any other physical violence against the applicant and that his state of health was satisfactory.

27. On 23 and 24 October 1998 the applicant's mother sent a letter to Mrs Leni Fischer, then President of the Parliamentary Assembly of the Council of Europe. She complained of torture inflicted on the applicant and one of his fellow-inmates, Poltoratskiy, which had resulted in the applicant's suicide attempt and alleged that they had been taken to hospital and that the applicant had been paralysed. The mother further complained that she had been prevented from seeing the applicant.

28. In a letter of 26 October 1998 the applicant's mother informed the Commission that "in establishment BI 304/199 in Ivano-Frankivsk there was an attempt to execute the unjustly condemned M. Kuznetsov and B. Poltoratskiy illegally, and that the Government tried to conceal this event".

29. On 26 October 1998 the applicant's mother sent a request to the Regional Prosecutor to set up a medical commission in order to examine the applicant's state of health. She stated that she had been informed that her son's health had been in danger.

30. The prison doctor issued a medical report on 28 October 1998. The report concluded that the applicant did not show any signs of having been beaten or tortured and that his state of health was satisfactory. It was confirmed and signed by the applicant.

31. In his handwritten statement of 28 October 1998 the applicant stated *inter alia* that no physical violence had been used against him, that he had been treated in a proper way by the prison administration, that his rights had not been violated, that he had no complaint to the prison administration, that he did not think about committing suicide again and that the prison administration had not been involved in his suicide attempt.

32. The Ivano-Frankivsk Regional Directorate for the Execution of Sentences of the Ministry of the Interior issued a report on 29 October 1998 in response to the applicant's mother's complaint about alleged torture and her request for a medical commission of independent doctors to examine the applicant's state of health. The report stated that on 28 October 1998 the applicant had been examined by the prison doctors who had found no signs of physical injuries. It also stated that the applicant denied that he had been tortured.

33. In a letter of 30 October 1998 the Deputy Head of the Ivano-Frankivsk Regional Directorate of the Ministry of the Interior informed the applicant's mother that her complaint concerning torture to which the applicant had allegedly been subjected had been examined and found to be unsubstantiated. A medical examination of the applicant had not confirmed any signs of torture. Accordingly, there was no reason to set up a medical commission to investigate the allegations.

34. In a letter of 2 November 1998 the Ivano-Frankivsk Deputy Regional Prosecutor informed the applicant's mother that her complaint

concerning visits to the applicant had been examined and that no violation of the applicant's rights in this regard had been found.

35. In his next letter of 18 December 1998, the Deputy Regional Prosecutor informed the Prosecutor General that there had been several medical examinations of the applicant during the last months in order to establish whether there had been any damage to his state of health caused by the prison administration. The last examination had been carried out on 28 October 1998 with the participation of the staff of the Protection of Health Department of the Ivano-Frankivsk Regional Directorate of the Ministry of the Interior. The examination had established that the applicant had not been treated in a manner which was degrading to his human dignity.

36. On 21 December 1998 the applicant requested permission from the Deputy Head of the Regional Directorate of the Ministry of the Interior, Mr Kmyta, to meet a priest. His request was granted and the applicant met a priest on 26 December 1998.

37. In his letter of 10 January 1999 the prison governor informed the applicant's mother that her son had attempted to commit suicide on 3 September 1998 and that he had been saved. He also said that a copy of the decision on refusal to institute criminal proceedings in connection with her son's suicide attempt had been sent to the Regional Prosecutor.

38. In a decision of 5 March 1999 the Senior Prosecutor rejected a criminal complaint by the applicant's mother's against the Ivano-Frankivsk Deputy Regional Prosecutor. He refused to institute criminal proceedings against the Deputy Regional Prosecutor on the ground that no offence committed by him had been found. He stated *inter alia* that the Act did not apply to the detention conditions of death row prisoners. These were governed by the Instruction, which was covered by the rules on State secrecy.

39. According to the prison records, the applicant's mother applied to visit the applicant on 24 September 1997, and on 4 and 26 March, 27 June, 27 August, 24 October and 30 November 1998. Permission was given on 7 October 1997, 4 March, 22 April, 1 July, 11 August, 17 November and 11 December 1998 for visits which took place on 4 December 1997 and 4 March, 4 June, 6 July, 11 August and 28 November 1998 and on 5 January 1999. The request of 27 August 1998 was not granted.

40. In an undated document Deputy Head of the Isolation Block, Y.M. Pavlyuk, declared that during the period from 11 September 1997 and 18 December 1998, neither the applicant nor his parents had asked for permission for the applicant to see a priest. He further declared that during this period no member of the clergy had asked for such permission.

41. According to the applicant's medical card, the applicant was found to be suffering from gastritis on 13 May and 16 July 1996. On 31 July, 20 August, 16 September, 1 and 6 November 1996, 10 and 15 January, 23 June, 28 August, 12 September, 30 October and 27 November 1997,

23 January, 1 April, 16 July and 4 December 1998 the applicant was found to be suffering from chronic gastritis.

On 3 September 1998 the applicant was hospitalised after his suicide attempt. On 4 September 1998 he returned to prison. Between 4 and 7 September 1998 he was administered medicines. On 7 and 18 September, 1, 18 and 28 October, 9, 19 and 27 November 1998 the applicant was seen by the prison psychiatrist and on 28 October and 4 December 1998 he was examined by the prison doctor.

D. The Commission's evaluation of the evidence and its findings of fact

42. Since the facts of the case were disputed, the Commission conducted an investigation, with the assistance of the parties, and accepted oral evidence taken from nineteen witnesses: the applicant; the applicant's parents; Mr Bronislav S. Stichinskiy, Deputy Minister of Justice; Mr Drishchenko, Deputy Prosecutor General; Mr Dotsenko, Head of the Penitentiary Department of the Prosecutor General's Office**;** Mr Ivan V. Shtanko, Deputy Minister of the Interior; Mr Petro A. Yaremkiv, governor of Ivano-Frankivsk Prison; Mr Bogdan V. Kachur, prison doctor; Mr Valeriy I. Slobodanyuk, prison psychiatrist; Mr Stanislav V. Prokhintskiy, medical assistant; Mr Yuriy M. Pindus, assistant to the prison governor who was on duty on 3 September 1998; Mr Fedir O. Savchuk, assistant to the prison governor who was on duty on the night of 2-3 September 1998; Mr. Mikhail D. Kozakievich, duty guard on duty on the night of 2-3 September 1998; Mr. Bogdan B. Galyas, duty guard on duty on the night of 3 September 1998; Mr Igor P. Ivashko, deputy prison governor; Mr Yaroslav M. Pavlyuk, Deputy Head of the Isolation Block; Mr Valentin M. Nabiulin, Head of the Department for Supervision over Isolation Blocks and Prisons with the Directorate for the Execution of Sentences; Mr Oleksand V. Kmyta, Deputy Head of the Ivano-Frankivsk Regional Directorate of the Ministry of the Interior; Mr Anatoliy O. Boyko, Head of the Ivano-Frankivsk Regional Department for the Execution of Sentences of the Ministry of the Interior.

The Commission's findings may be summarised as follows:

1. Alleged assaults of the applicant by prison officers

43. The applicant gave evidence before the Delegates that he had been beaten on 2 September 1998, because of a note which he had passed to another inmate, Poltoratskiy, while he had been mopping the floor in the corridor on 1 September 1998. He had informed Poltoratskiy about a letter he had received from his parents and about its contents. According to him, he had just wanted to communicate because he had been bored sitting alone in his cell. Next morning, he had been called out and beaten by six or seven

masked persons with clubs in the "cinema room" on his back, legs and shoulders but not on his head.

44. The Commission noted that the applicant had written and had signed a statement on 28 October 1998, to the effect, *inter alia*, that he had been treated in an appropriate manner by the prison administration, that no physical force had been used against him and that he had nothing to complain about. It took into account the fact that before the Delegates, the applicant had denied the contents of his statement and pointed out that the practice of a prison authority to order an inmate to confirm in writing that he had been treated correctly by prison officers raised suspicions.

45. The Commission considered that the applicant's account of his beating contained a number of details and elements which it would not have expected to find in a fabricated story. It noted, however, that there was no record of any occurrence relating to the ill-treatment described by the applicant. The Commission accepted the applicant's statement that he had not complained in order not to make things worse. However, his account of the events was not supported by any oral or written evidence produced before the Commission or its Delegates. It also noted that the applicant's examination on 3 September 1998 and his subsequent medical treatment between 4 and 7 September 1998 had revealed no sign of physical injury from the ill-treatment he had described. There was no record of such in his medical file by the prison doctor, the prison psychiatrist or the medical assistant .

46. On 3 September 1998 the applicant was found hanging in his cell, but was resuscitated. According to his mother, his suicide attempt was either the result of his ill-treatment by the prison administration or an attempt to execute him. The Commission accepted the evidence given by Mr Dorotsenko, Head of the Penitentiary Department of the Prosecutor General's Office, that on 3 September 1998, at 8.48, during a routine inspection the applicant had been found with a noose around his neck made out of a piece of blanket. The prison staff had taken all necessary medical measures to save his life. After that he had been taken to hospital, from which he had returned on the following day. His mother had last seen him in August 1998. The witness said that by his attempted suicide the applicant had violated prison rules, and had therefore been placed in solitary confinement for 15 days.

47. The Commission observed that the applicant's mother's account of the suicide attempt was not completely borne out by the applicant himself who had testified before the Delegates that he had hanged himself because of the beating by prison officers on 2 September 1998. However, he had not recalled any detail relating to the events of 3 September 1998. He had submitted that he had been in a nervous state and could not endure any longer the treatment to which he had been subjected. The Commission noted in this regard that the applicant's account that he had attempted to

commit suicide was supported by the testimony given by the prison governor, his two assistants and by the two warders on duty between 2 and 3 September 1998. The statements of these witnesses might not have been totally consistent in every detail. However, the Commission found such differences to be of a minor nature when considered against the detailed, precise and globally consistent accounts presented by them.

48. In this respect the Commission also attached relevance to the fact that the applicant had immediately been given external heart massage and mouth-to-month resuscitation which had saved his life. At the same time, the ambulance had been called and after the applicant had been examined by the ear, nose and throat specialist, he was transferred to the psycho-neurological hospital where he stayed one day. The Commission noted that three days after his return from hospital, the applicant had stated that he had not hanged himself at all. It considered, however, that the applicant had been then in a state of shock and of partial amnesia. Moreover, the testimony of the prison psychiatrist who had examined the applicant in detail stated that the applicant used to say that he could not see what had caused him to commit suicide and that he could not even imagine why he had done it. The Commission therefore found that it could not be considered as established beyond reasonable doubt that the applicant had been subjected to ill-treatment in prison on 2 and 3 September 1998.

2. Investigation into the applicant's and his parents' allegations

49. On 23 October 1998 the applicant's mother requested the Ivano-Frankivsk Regional Prosecutor, the Ivano-Frankivsk Regional Directorate of the Ministry of the Interior and the prison governor to set up an independent medical commission in order to examine the applicant's health. She alleged that inmates had been tortured which resulted in a suicide attempt by the applicant or in an attempt on his life. She repeated this request to the Ivano-Frankivsk Regional Prosecutor on 26 October 1998, stating that she had been informed that the applicant's state of health was in danger. On 30 October 1998 the applicant's mother was informed by Mr Kmyta, Deputy Head of the Regional Directorate of the Ministry of the Interior, that her complaint concerning the applicant's alleged torture had been examined and found to be unsubstantiated and that the latter's medical examination had not revealed any signs of torture. There was, accordingly, no reason to set up a medical commission to investigate the allegations. On 3 November 1998 the mother was informed by the prison governor that her request had been rejected on the grounds that there was no sign of torture or the use of any other form of physical violence against the applicant and that his health was satisfactory. In a letter of 20 November 1998 to the applicant's mother, the Deputy Regional Prosecutor confirmed that, on 28 October 1998, the applicant had undergone a medical examination which

had established that no violation of the applicant's rights in this regard had been found.

50. In the meantime, on 29 October 1998, the Ivano-Frankivsk Regional Department for the Execution of Sentences of the Ministry of the Interior had stated in its report, *inter alia*, that on 28 October 1998 the applicant had been examined by the prison doctors who had found no sign of physical injury.

51. On 18 December 1998 the Ivano-Frankivsk Deputy Regional Prosecutor sent a letter to the Deputy Prosecutor General in which he had stated, *inter alia*, that there had been several medical examinations of the applicant during the previous months which could have established whether the applicant's health had been damaged as a result of his treatment by the prison authorities. The last examination had been carried out on 28 October 1998, with the participation of the staff of the Protection of Health Department of the Ivano-Frankivsk Regional Directorate of the Ministry of the Interior, and it was found that the applicant had been treated in an appropriate manner. On 10 January 1998 the governor of the prison informed the applicant's mother that the applicant had attempted to commit suicide on 3 September 1998 and that he had been saved. He also informed her that a copy of the decision on refusal to institute criminal proceedings in connection with her son's suicide attempt had been sent to the Regional Prosecutor. The domestic investigations had then ended on 5 March 1999 with a decision by the Senior Prosecutor on the applicant's mother's criminal complaint against the Ivano-Frankivsk Regional Prosecutor. The Senior Prosecutor had refused to institute criminal proceedings on the ground that no offence had been established.

52. The Commission found that there were no contemporaneous records giving details of any investigation, which the domestic authorities had carried out into the applicant's mother's allegations of the events on 2 and 3 September 1998. It had not seen a single document proving that an investigation had been carried out by the domestic authorities other than those directly involved in the facts of which the applicant's mother complained. Moreover, although it appeared from the extract of the applicant's medical file and from the evidence given by Mr B.V. Kachur, prison doctor, that the applicant had been under medical care between 4 and 7 September 1998 and had been seen by the prison psychiatrist on 7 and 18 September and 1, 18 and 28 October 1998, the applicant's medical examination with the participation of the staff of the Ivano-Frankivsk Protection of Health Department had been carried out on 28 October 1998, i.e. more than one month after the applicant's alleged ill-treatment.

3. Conditions of the applicant's detention on death row

53. The Commission found that the eight "death row" inmates in Ivano-Frankivsk Prison, including the applicant, were kept in single cells without the opportunity to communicate with other inmates. The applicant's cell measured 2 by 5 by 3 metres. There was an open toilet, a washbasin with one tap with cold water, two beds, a table and a little bench, both fixed on the floor, central heating and a window with bars. The applicant had in his cell some books, onion, garlic, oil, a stock of soap and toilet paper. During the Delegates' visit on 24 and 25 November 1998, the cell had been overheated, particularly in comparison with other rooms in the prison. The light was on 24 hours a day and the central radio was switched off at night. The inmates were frequently observed by prison warders through a spy hole in the door of the cell which deprived them of any kind of private space. The cell was freshly painted, from which the inference may be drawn that conditions had been worse prior to the Delegates' visit. The Commission accepted the applicant's evidence that until May 1998, he had not been allowed to take daily outdoor walks and that the shutters had been removed from the window in his cell in November 1998. The Commission found the applicant's evidence - which was not contested by the Government - persuasive.

54. The Commission further accepted the applicant's mother's evidence that the applicant had been suffering from nervous disorder already before he had been sentenced and detained. On the ground of his mental illness he had been relieved from military service. Moreover, he had been suffering from chronic gastritis.

55. Concerning the applicant's mother's visits, the Commission found that apart from her request of 27 August 1998, all her requests for visits had been granted. The prison records showed that she had applied to visit her son on 24 September 1997 and 4 and 26 March, 27 June, 25 July, 24 October and 30 November 1998. Permission had been given on 7 October 1997 and 4 March, 22 April, 1 July, 11 August, 17 November and 11 December 1998 for visits which had taken place on 4 December 1997 and 4 March, 4 June, 6 July, 11 August, 28 November and 5 January 1999. The Commission pointed out that the mother's requests to visit to the applicant of 24 September 1997 and 26 March 1998 had been granted for 4 December 1997 and 4 June 1998, i.e. about three months after the requests had been submitted. Moreover, two warders had been present during the mother's visits, being authorised to interrupt the conversation if they considered that the mother or the applicant had said anything "untrue".

56. Regarding the applicant's correspondence, the Commission found that on 6 October 1997 the applicant had applied for the first time to the Ivano-Frankivsk Regional Directorate of the Ministry of the Interior for permission to send a letter to his relatives. Thereafter he had sent letters to his mother on 3 and 9 November 1997, 9 and 30 December 1997, and

19 and 29 January, 16 February, 12 March, 6 April, 6 May, 10 June, 2 July, 6 August, 1 September, 5 October, 4 November and 4 December 1998. He had received letters from his mother on 24 September, 8 and 24 October, 24 November and 25 December 1997, and 14 and 28 January, 5, and 10 February, 13, 16 and 30 March, 6, 9 and 16 April, 6, 12, 20 and 22 May, 3, 17 and 22 June, 1, 15, 20 and 30 July, 19, 25 and 31 August, 15 and 17 September, 1, 10, 14 and 22 October, 10, 21 and 23 November and 4 and 17 December 1998.

57. The applicant gave evidence that his mother had requested permission for a priest to come to see the applicant. However, from the undated document signed by Mr Y.M. Pavlyuk, Deputy Head of the Isolation Block, it appeared that during the period from 11 September 1997 to 18 December 1998, neither the applicant nor his mother nor a member of the clergy had asked for such permission.

II. RELEVANT DOMESTIC LAW

A. Constitution of Ukraine

58. 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.

59. 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.

60. Article 15 § 3 prohibits censorship.

61. 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 on these grounds, within the limits of their authority, and in the manner envisaged by the Constitution and the laws of Ukraine.

62. 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.

63. 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.

64. 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 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.

65. 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.

66. 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.

67. 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

68. 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").

69. 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. The prisoners were provided with an individual sleeping-place and with bed linen. They 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 correspondence 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. 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.

70. 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, 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")

71. 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.

72. 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.

73. 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.

74. 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 material 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.

75. 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.

76. Under 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")

77. 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 new crimes or other acts against public order being committed by them; 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 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 are 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 and small packets [*Nota*: Parcels to be forwarded to a prisoner may be sent by post *(посилка)* 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")] and money by remittance, to correspond and to send money to relatives by remittance.

78. 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.

79. 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.

80. 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 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.

81. 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.

82. 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

83. 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.

84. 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.

85. 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 subjected 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 cancel 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

86. 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

87. 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

88. 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)

89. 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

90. 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.

91. 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 grille in the cell-door (paragraph 133).

92. 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).

93. 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

94. 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

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.

95. 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 (paragraph70).

96. 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 COURT'S ASSESSMENT OF THE FACTS

97. The Court reiterates its settled case-law to the effect that under the Convention system prior to 1 November 1998 the establishment and verification of the facts was primarily a matter for the Commission (former Articles 28 § 1 and 31 of the Convention). While the Court is not bound by the Commission's findings of fact and remains free to make its own assessment in the light of all the material before it, it is, however, only in exceptional circumstances that it will exercise its powers in this area (see, among other authorities, *Akdivar and Others,* judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1214, § 78).

98. Having regard to the complexity of the factual aspects of the case, involving numerous witnesses and a large amount of documentary evidence, the Court finds that the Commission approached its task of assessing the evidence with the requisite caution, giving detailed consideration to the elements which supported the applicant's claims and those which cast doubt on their credibility. It therefore accepts the facts as established by the Commission.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

99. Article 3 of the Convention reads as follows:

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

A. Alleged assaults of the applicant in prison

100. Before the Commission's delegates, the applicant stated that he had been beaten on 2 September 1998. On 3 September 1998, at 8.48 a.m., he was found hanging in his cell. According to his mother, the suicide attempt had either resulted from the applicant's ill-treatment by the prison authorities or an attempt on his life.

101. Having examined the complaint according to the strict standards applied to the interpretation of Article 3 of the Convention, the Commission

found that it had not been established "beyond reasonable doubt" on the evidence that the applicant was subjected to ill-treatment in prison on 2 and 3 September 1998.

102. The Court, like the Commission, considers that on the basis of the evidence, oral and written, it has not been established to the requisite standard of proof that the applicant was assaulted in Ivano-Frankivsk prison in breach of Article 3 of the Convention.

103. The Court accordingly finds no violation of Article 3 of the Convention in this regard.

B. Adequacy of the investigation

104. The Court observes that the applicant's mother last visited the applicant on 11 August 1998 and that it was a fact that the applicant had been hospitalised on 3 September 1998, one day after he had been allegedly beaten by prison officers. It considers therefore that the applicant's mother was therefore justifiably anxious and that her complaints raise an arguable claim that the applicant may have been ill-treated in prison.

105. The Court recalls that where an individual raises an arguable claim that he has been subjected to ill-treatment by the police or other agents of the State unlawfully and in breach of Article 3 of the Convention, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. Such an investigation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible (see, in relation to Article 2 of the Convention, *McCann v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, p. 49, § 161; *Kaya v. Turkey*, judgment of 19 February 1998, *Reports* 1998-I, p. 324, § 86; and *Yasa v. Turkey*, judgment of 2 September 1998, *Reports* 1998-VI, p. 2438, § 98).

106. In its Report the Commission noted that, following the various complaints by the applicant's mother of his ill-treatment, the State authorities appeared to have carried out some investigation. However, the Commission was not satisfied that the investigation was sufficiently thorough and effective to meet the requirements of Article 3 of the Convention. In particular, it was noted that the decisions of the national authorities which had been produced to the Commission referred only to the fact of the dismissal of the complaints without demonstrating the steps taken by the domestic authorities during the investigation. It was further noted that, although it appeared from the medical file and from the evidence of the prison doctor that the applicant was under medical care between 4 and 7 September 1998 and was seen by the prison psychiatrist on 7 and 18 September and 1, 19 and 28 October 1998, the applicant's medical

examination with the participation of the medical staff of the Protection of Health Department of the prison was carried out only on 28 October 1998, that is, almost two months after the applicant's alleged ill-treatment. The Commission observed that there was a lack of any contemporaneous records which could demonstrate, step by step, the nature of the investigation into the allegations and that no external authority appeared to have been involved in any such investigations. In these circumstances, the Commission concluded that the investigations had been both perfunctory and superficial and did not reflect any serious effort to discover what had really occurred in the prison in September 1998.

107. In the light of its own examination of the material before it, the Court shares the findings and reasoning of the Commission and concludes that the applicant's arguable claim that he had been subjected to ill-treatment in prison was not subject to an effective investigation by the domestic authorities as required by Article 3 of the Convention.

108. There has therefore been a violation of Article 3 of the Convention in this regard.

C. Conditions of the applicant's detention on death row

109. In his original application, the applicant submitted that his right to see his mother had been restricted, that until September 1997, he had been prevented from sending and receiving any correspondence from her and that he had not been allowed to watch television or to have any communication with the outside world. He had not been allowed to see a priest.

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

111. 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 (see, among other authorities, *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, p. 65, § 162). Furthermore, in considering whether treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3. Even the absence of such a purpose cannot conclusively rule out a finding of a violation of this provision (see *Peers v. Greece*, no. 28524/95, §§ 67-68 and 74, ECHR

2001-III; and *Valašinas v. Lithuania*, no. 44558/98, § 101, ECHR 2001-VIII).

112. 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, §§ 92-94, ECHR 2000-XI).

113. 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 and 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; *Kalashnikov v. Russia*, no. 47095/99, § 95, ECHR 2002-VI).

114. The Court notes that the applicant complained of certain aspects of the conditions to which he had been subjected in Ivano-Frankivsk Prison, where he was awaiting execution of the death penalty pronounced by the Ivano-Frankivsk Regional Court on 12 December 1995 and upheld by the Supreme Court on 22 February 1996. It reiterates in this respect 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*, cited above, § 96).

115. 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 86-88), 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 11 above). The applicant was sentenced to death in December 1995, some 15 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.

116. Concerning the conditions of the applicant's detention on death row, the Court has had regard to the Commission Delegates' findings and especially to their conclusions concerning the size, lighting and heating of the applicant's cell, but also to those relating to prison practice concerning daily outdoor walks, the applicant's correspondence and his visits from his mother. It takes into account the fact that the Delegates investigated the applicant's complaints in depth, giving special attention, during their inspection, to the conditions in the place where the applicant had been detained. In these circumstances, the Court considers that the findings of the Commission's Delegates should be relied on.

117. The Court also has regard to the submissions by the applicant concerning the period from 26 October 1999, when the Commission adopted its report (former Article 31 of the Convention) to 2 June 2000, when the applicant's sentence was commuted to life imprisonment, as well as to the Reports of the CPT covering the period in question, so far as relevant.

118. At the time of the murders in respect of which the applicant was convicted he was nineteen years old. He was placed on death row in Ivano-Frankivsk Prison on 22 February 1996, when the Supreme Court upheld his sentence of capital punishment.

119. The Court notes the findings of the Commission that eight death row inmates were detained on the day of the Delegates' visit to Ivano-Frankivsk Prison in single cells without the possibility of communicating with other inmates. They were frequently observed by prison guards through a little window in the door of the cell. The light was on during

24 hours per day and the radio was switched off only at night. The Court further notes that according to the applicant's mother, the applicant had been suffering from nervous disorder already before he had been sentenced and detained. On the ground of his mental illness he had been relieved from military service. Moreover, he had been suffering from chronic gastritis.

120. The Court notes the findings of the Commission that until May 1998 death row inmates were not allowed to have daily outdoor walks and windows in their cells were fully shuttered. When inspected by the Commission's Delegates, the applicant's cell was found to have been freshly painted, with an open toilet and a washbasin with cold water, two beds, a table and a little bench, both fixed to the floor, central heating and a window with bars. There were some books, a chess set, garlic, oil, a stock of soap and toilet paper. The applicant's cell was overheated, particularly in comparison with other rooms in the prison.

121. Concerning the visits by the applicant's mother, the Court relies on the Commission's finding that two warders were present when his mother visited him, who were authorised to interrupt their conversation when they considered that the mother or the applicant had said anything "untrue". Except for her visit of 27 August 1998, all the requests of the applicant's mother to visit him were granted. However, her requests of 24 September 1997 and 26 March 1998, were granted about three months after the requests had been submitted. Moreover, such visits were generally limited to a maximum of twelve in a year.

122. The Court notes that it was not possible for the Commission to establish with sufficient clarity whether the applicant or his mother had asked for permission for a priest to come to see him already in middle of 1997. It could be said, however, that when the applicant met the priest on 26 December 1998 following his request of 21 December 1998, there were no regular visits to inmates by chaplains as the Instruction did not allow such visits.

123. Concerning the applicant's correspondence, the Court observes that although the applicant was allowed to send more than twelve letters a year as provided for in the Instruction, until October 1997, he was not entitled to do so.

124. On the basis of the large amount of documentary evidence submitted by the parties and the facts established by the Commission during its fact-finding visit to Ivano-Frankivsk Prison relatively shortly after the applicant's death sentence had become final and after the Convention had entered into force in respect of Ukraine, the Court has established a detailed picture of the conditions of detention in which the applicant was detained from 1996 onwards, and particularly between 11 September 1997, the date on which the Convention entered into force in respect of Ukraine, and May 1998, when the Instruction started to be applied in Ivano-Frankivsk Prison.

125. The Court views with particular concern the fact that, until at earliest May 1998, the applicant, in common with other prisoners detained in prison under a death sentence, was locked up for 24 hours a day in cells which offered 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. In the case of the present applicant, the situation was aggravated by the fact that he was placed in solitary confinement following his suicide attempt. In this regard, the Court agrees with the Commission that, although it is quite normal for prisons that inmates are obliged to follow disciplinary rules, the disciplinary punishment inflicted on the applicant in the present case because of his suicide attempt seems to be particularly severe and disproportionate to the aim which it was to attain. The applicant's situation was further aggravated by the fact that he was throughout the period in question subject to a death sentence although, as noted in paragraphs 11 and 115 above, a moratorium had been in effect since March 1997.

126. 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*, 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.

127. The Court acknowledges that following May 1998 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 nearly 30 months, including a period of 8 months after the Convention had come into force in respect of Ukraine.

128. 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 125 to be unacceptable in the present case.

129. There has accordingly been a violation of Article 3 of the Convention in this respect.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

130. In his original application, the applicant complained that his right to see his mother was restricted, that he was prevented from sending and receiving any correspondence, that he was not allowed to watch television or to have any communication with the outside world.

131. 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."

132. The Commission found it established that the applicant's right to receive visits from his mother was limited to one per month and that during the visits, two warders were present listening to the conversations who were authorised to intervene when they considered that the inmate or his relatives had said anything "untrue". The Commission further found that a visit could be withdrawn as a disciplinary punishment inflicted upon the applicant for a violation of the prison rules. As to correspondence, the Commission noted that while, according to the Instruction, the applicant could send his relatives one letter per month and receive letters without any limits as to their number, his correspondence was censored.

133. The Court, agreeing with the Commission, considers that the above-mentioned restrictions constituted an interference by a public authority with the exercise of the applicant's right to respect for his private and family life and his correspondence guaranteed by Article 8 § 1 of the Convention.

134. Such interference can only be justified if the conditions in the second paragraph of this provision are met. In particular, if it is not to contravene Article 8, the 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).

135. 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).

136. In contending that these requirements were met, the Government referred in their written observations to the Pre-Trial Detention Act ("the Act") and the Correctional Labour Code ("the Code"). In their further observations, they added a reference to the Instruction and the Temporary Provisions. The applicant submitted that only certain internal regulations had been issued to govern the conditions in which persons awaiting the death penalty were detained.

137. The Court observes that the Act governs conditions of detention until a sentence becomes final. It further observes that although the Code provides a general legal basis for conditions of detention the competent national authorities in the present case did not refer to its provisions when informing the applicant or his mother about the rules to be followed by a death row inmate.

138. It appears from the documents presented by the parties and the Commission's findings of fact that after the sentence became final, the detention conditions of persons sentenced to death were governed by the Instruction issued by the Ministry of Justice, the Prosecutor General and the Supreme Court. The Court notes that the Instruction was an internal and unpublished document which was not accessible to the public.

139. The Court notes that the Instruction was replaced by the Temporary Provisions approved by the State Department for the Execution of Sentences on 25 June 1999 as Order no. 72 and registered by the Ministry of Justice on 1 July 1999 as no. 426/3719, which entered into force on 11 July 1999 and which are accessible to the public. The Temporary Provisions extended the rights of persons sentenced to capital punishment. In particular, prisoners were allowed to receive six parcels and three small packets per year, to send and receive letters without any limits and to have monthly visits of up to two hours from their relatives. However, as noted by

the Commission, the Temporary Provisions have no application to the facts complained of by the applicant, which occurred before 11 July 1999.

140. The Court finds that in these circumstances it cannot be said that the interference with the applicant's right to respect for his private and family life and his correspondence was "in accordance with the law" as required by Article 8 § 2 of the Convention.

141. In view of the above finding, the Court, like the Commission, considers it unnecessary to examine whether the interference in the present case was necessary in a democratic society for one of the legitimate aims within the meaning of Article 8 § 2 of the Convention.

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

IV. ALLEGED VIOLATION OF ARTICLE 9 OF THE CONVENTION

143. In his original application the applicant claimed that he had been denied any visit from a priest.

144. The Court considers that the applicant's complaint has to be examined under Article 9 of the Convention which reads as follows:

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals or for the protection of the rights and freedoms of others."

145. The Government submitted that the applicant had never asked to have a visit from a priest. This was disputed, according to the Commission's findings, by the applicant's mother, but corroborated by certain witnesses heard by it.

146. The Commission was unable to establish with sufficient clarity whether the applicant or his mother requested permission from the national authorities for the applicant to be visited by a priest before 21 December 1998. However, the Commission found it to be established by the oral evidence and documents produced to it that the applicant was not able to participate in the weekly religious services which were available to other prisoners and was not in fact visited by a priest until 26 December 1998.

147. The Court accepts the findings of the Commission and, like the Commission, considers that this situation amounted to an interference with the exercise of the applicant's "freedom to manifest his religion or belief". Such an interference is contrary to Article 9 of the Convention unless it is

"prescribed by law", serves one or more of the legitimate aims in paragraph 2 and "necessary in a democratic society" to achieve those aims.

148. The Court, when examining the applicant's complaints under Article 8 of the Convention, has already observed that the conditions of detention of persons sentenced to death were governed by the Instruction which, according to the extract submitted by the Government, did not confer on persons sentenced to death the right to be visited by a priest. In addition, the Court has already concluded that the Instruction did not satisfy the requirements for a "law" within the meaning of Article 8 § 2 of the Convention.

149. It true that the Instruction was replaced by the Temporary Provisions which entered into force on 11 July 1999. However, although they guarantee the right of death row inmates to pray, read religious literature and to receive visits from a priest, the Temporary Provisions have no application to the facts complained of by the applicant which occurred before 11 July 1999.

150. In these circumstances, the Court finds that the interference with the applicant's right to manifest his religion or belief was not "in accordance with the law" as required by Article 9 § 2 of the Convention. It considers it unnecessary to examine whether the interference in the present case was "necessary in a democratic society" for one of the "legitimate aims" within the meaning of Article 9 § 2 of the Convention.

151. Accordingly, there has been a violation of Article 9 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

152. Article 41 of the Convention provides:

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

A. Damage

153. The applicant claimed 3,130,000 Ukrainian hryvnas (UAH) for non-pecuniary damage.

154. The Government submitted that the applicant's claims for non-pecuniary damages for an alleged violation of Article 3 of the Convention in connection with his detention conditions on death row and the alleged lack of effective investigation into the ill-treatment were exorbitant. They asked the Court to determine the just satisfaction on an equitable basis taking into consideration its case-law on similar issues and the economic situation in

Ukraine. In addition, they found the applicant's claims for non-pecuniary damages for alleged ill-treatment unsubstantiated.

The Government further stated that the applicant's claims for non-pecuniary damages in connection with the alleged violation of Article 8 of the Convention were partly unsubstantiated. They finally considered that the finding of violations of Articles 8 and 9 would constitute an adequate compensation for non-pecuniary damages.

155. The Court, bearing in mind its findings above regarding the applicant's complains, considers that he suffered some non-pecuniary damage as a result of the conditions to which he was subjected on death row, which cannot be compensated for solely by the finding of a violation. Making its assessment on an equitable basis, the Court awards the applicant 2,000 euros (EUR).

B. Costs and expenses

156. The applicant claimed a total of UAH 12,600 for fees and costs incurred in the proceedings before the national authorities and before the Convention institution.

157. The Government disputed the above claim. They argued that the applicant had failed to support his claims with vouchers and bills and that the costs and expenses in question were exorbitant and unjustified.

158. The Court reiterates that in order for costs and expenses to be included in an award under Article 41, it must be established that that they were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum (see *Nielsen and Johnson v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII). The Court observes that the applicant's claim included expenses for the services rendered by his lawyers during the criminal proceedings before the national courts. However, these expenses do not concern the violations of Articles 3, 8 and 9 of the Convention.

159. Making its assessment, the Court considers it reasonable to award the applicant the sum of EUR 1,000.

C. Default interest

160. The Court considers that the default interest should be fixed at an annual rate equal to the marginal lending rate of the European Central Bank plus three percentage points (see *Christine Goodwin v. the United Kingdom*, no. 28957, 3 July 2002, § 124, to be published in ECHR 2002).

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been no violation of Article 3 of the Convention as regards the alleged assaults of the applicant in Ivano-Frankivsk Prison;

2. *Holds* by six votes to one that there has been a violation of Article 3 of the Convention as regards the failure to carry out an effective official investigation into the applicant's allegations of assaults in Ivano-Frankivsk Prison;

3. *Holds* unanimously 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;

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

5. *Holds* unanimously that there has been a violation of Article 9 of the Convention;

6. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months, the following amounts:
      (i) 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;
      (ii) EUR 1,000 (one thousand euros) in respect of costs and expenses, to be converted into Ukrainian hryvnas at the rate applicable at the date of settlement;
      (iii) any tax that may be chargeable on the above amounts;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7. *Dismisses* unanimously 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

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

N.B.
M.O'B.

PARTLY DISSENTING OPINION OF JUDGE SIR NICOLAS BRATZA

I am in full agreement with the conclusion and reasoning of the majority of the Court on all points, save as to their finding that there has been a violation of Article 3 of the Convention as regards the failure to carry out an effective official investigation into the applicant's allegation of assaults in the Ivano-Frankivsk Prison.

I have, in the first place, some hesitations as to whether it is in any event appropriate to examine such a complaint under what is referred to as the "procedural aspects" of Article 3 rather than under Article 13 of the Convention, to which provision I consider that it more naturally belongs. In holding that Article 3 has such a procedural aspect, the Court, like the Commission, draw on well-established case-law under Article 2 of the Convention to the effect that, where allegations are made of an unlawful deprivation of life, the provision requires by implication that there should be an effective official investigation, capable of leading to the identification and punishment of those responsible. This view has indeed received express confirmation in the Court's judgment in the case of *Assenov and Others v. Bulgaria* (*Reports* 1998-VIII, p. 3290, §§ 102-103) in which the Court found a procedural breach of Article 3 due to the inadequate investigation made by the national authorities into the first applicant's complaint that he had been severely ill-treated by the police. The Court there observed that, if it were not the case that Article 3 embodied such a procedural aspect, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and that it would be possible for agents of the State to abuse the rights of those within their control with virtual impunity.

However, the Assenov and Others case was decided before the judgment of the Grand Chamber of the Court in *Ilhan v. Turkey* [GC], no. 22277/93, p. 267, ECHR 2000-VII, in which the Court (reflecting the partly dissenting opinion of Mr. Pellonpää in the Commission) voiced certain doubts as to the analogy drawn in this respect between the provisions of Article 2 and those of Article 3. The Court pointed out that, while the obligation to provide an effective investigation into the deaths caused by, *inter alia*, the security forces had been held to be implied into Article 2 in order to ensure that the rights guaranteed by that Article were not theoretical or illusory but practical and effective, the provisions of Article 2 included the requirement that the right to life be "protected by law". In addition, the Court noted, Article 2 may also concern situations where the initiative must rest on the State for the practical reason that the victim is deceased and the circumstances of the death may be largely confined within the knowledge of State officials (p. 295, § 91). The Court continued:

> "92. Article 3, however, is phrased in substantive terms. Furthermore, although the victim of an alleged breach of this provision may be in a vulnerable position, the practical exigencies of the situation will often differ from cases of use of lethal force or suspicious deaths. The Court considers that the requirement under Article 13 of the Convention that a person with an arguable claim of a violation of Article 3 be provided with an effective remedy will generally provide both redress to the applicant and the necessary procedural safeguards against abuses by State officials. The Court's case-law establishes that the notion of effective remedy in this context includes the duty to carry out a thorough and effective investigation capable of leading to the identification and punishment of those responsible for any ill-treatment and permitting effective access for the complainant to the investigatory procedure see the *Aksoy v. Turkey* judgment [of 18 December 1996, Reports 1996 - III], p. 2287, § 98). Whether it is appropriate or necessary to find a procedural breach of Article 3 will therefore depend on the circumstances of the particular case."

In the Ilhan case itself, the Court found that the applicant had suffered torture at the hands of the security forces and that his complaints concerning the lack of any effective investigation by the authorities into the causes of his injuries fell to be dealt with under Article 13, rather than Article 3, of the Convention. In this respect the present case differs from the Ilhan case, in that no substantive breach of Article 3 has been found by the Court to have been established. Nevertheless, my preference would have been to examine the complaint concerning the lack of effective official investigation into the applicant's allegations of ill-treatment under Article 13 of the Convention instead of Article 3.

As to the substance of the complaint, the majority of the Court, like the majority of the Commission, have found that the complaints made by the applicant's mother gave rise to an arguable claim that he had been ill-treated in prison and that, following the complaints, the State authorities seem to have carried out some investigation into the allegations. However, the majority conclude that the investigation was not effective and did not reflect any serious effort to discover what had really occurred in the prison in September 1998. This conclusion appears to be in large part based on the fact that the decisions of the national authorities which had been produced to the Commission referred only to the fact of the dismissal of the complaints, as well as on the lack of any contemporaneous record to demonstrate, step by step, the nature of the investigations carried out by those authorities.

While I accept that the complaint of the applicant's mother gave rise to an arguable claim that the applicant had been ill-treated, I note that the complaint was made only on 23 October 1998, several weeks after the alleged incident, which made the carrying out of any form of effective investigation considerably more difficult. Moreover, as pointed out by Mr Alkema in his partly dissenting opinion in the Commission, the medical examination of the applicant which was carried out on 28 October 1998 following his mother's complaint is some indication of a genuine attempt on

the part of the authorities to investigate the incident. As further emphasised by Mr Alkema, the medical staff who had examined the applicant on 3 September 1998 (the day after the alleged beating), when he was almost fully undressed, saw no visible traces of ill-treatment on his body and this matter was not further pursued by the Delegates of the Commission when questioning the medical staff.

In these circumstances, I do not find it to be established that the national authorities failed to carry out an effective investigation into the applicant's allegations of assault on 2 September 1998.