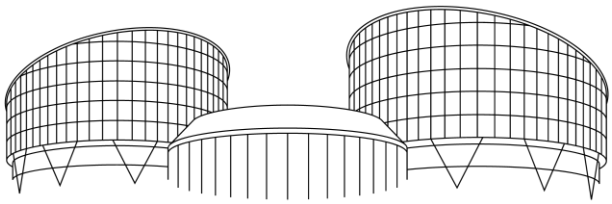

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF VASILIY IVASHCHENKO v. UKRAINE

(Application no. 760/03)

JUDGMENT

STRASBOURG

26 July 2012

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

In the case of Vasiliy Ivashchenko v. Ukraine,

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

Dean Spielmann, *President,*
Mark Villiger,
Karel Jungwiert,
Boštjan M. Zupančič,
Ganna Yudkivska,
Angelika Nußberger,
André Potocki, *judges,*
and Stephen Phillips, *Deputy Section Registrar,*

Having deliberated in private on 3 July 2012,

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

PROCEDURE

1. The case originated in an application (no. 760/03) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Mr Vasiliy Nikolayevich Ivashchenko ("the applicant"), on 23 November 2002.

2. The Ukrainian Government ("the Government") were represented by their Agent, Mr Nazar Kulchytskyy, of the Ministry of Justice.

3. On 10 January 2007 the President of the Section decided to give notice of the application to the Government. On 12 December 2007 the President of the Section also decided to communicate to the Government the applicant's complaint under Article 34 of the Convention that his letters to the Court were blocked.

4. Having examined the applicant's request for a hearing, the Chamber decided, under Rule 54 § 3 of the Rules of Court, that no hearing was required in the case.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1961. He is currently serving a prison sentence in Izyaslav, the Khmelnytsk Region.

A. The applicant's arrest

6. On 12 April 1998 a police officer was killed and another police officer was severely wounded by a group of people using fire arms. On the same day the police stopped a car, whose driver stated that he had dropped off three people, who had allegedly committed the above crime, in a field several hundred metres away. Thereupon four police officers went to search for the suspects. They saw three people, including the applicant, crossing the field. The police officers fired several shots into the air and ordered the people to lie down on the ground.

7. According to the applicant, they all obeyed the orders of the police. The officers then approached them and started beating the applicant and the two others. The applicant was hit and kicked in the head, chest, kidney and groin area, as a result of which he lost consciousness. The applicant stated that the officers had pierced his cheek with a needle and had used a cigarette lighter to burn his right hand and suggested that they had done so in order to make him regain consciousness.

8. According to the written statements of the police officers submitted by the Government, while the applicant and the other suspects threw aside their guns they refused to obey the orders of the police and "offered physical resistance to the arrest". Because of this, the police officers employed "unarmed combat techniques", forced the suspects to the ground and handcuffed them.

9. Several hours later the applicant was taken to the medical wing of the investigative detention unit (*слідчий ізолятор* – "the SIZO") in Cherkasy where he regained consciousness.

10. He was examined by a doctor who noted a number of lesions and bruises on the applicant's head and body, including a wound and a haematoma on his forehead, and haematomas on his left shoulder, chest and right thigh. The medical report, written by that doctor, also stated that the applicant had several blisters on his fingers which, according to the applicant, were the result of burns. The doctor stitched the wound on the applicant's forehead, prescribed a pain killer and suggested that the applicant see a neurologist. According to the report, an X-ray examination of the applicant's chest did not reveal fractures of his ribs.

11. According to the applicant, the doctor did not note down all of his injuries. For instance, fractures of the applicant's ribs and two fingers on his right hand were not revealed as no X-ray examination was carried out.

12. The next day a medical expert examined the applicant and noted that his injuries were minor.

13. In the course of the criminal investigations against him, the applicant complained of ill-treatment by the police to various public authorities, including the prosecutors.

14. By decisions of 21 August 1998 and 25 January 1999, the prosecutors refused to bring criminal proceedings against the police officers, finding that they had acted lawfully during the arrest. The finding was based on the statements of the police officers and the applicant's medical documents (see paragraphs 8, 10 and 11 above). The applicant did not challenge the prosecutors' decisions before the courts.

15. He again raised complaints of ill-treatment in the course of his trial before the Cherkasy Regional Court of Appeal ("the Cherkasy Court") and the Supreme Court, which rejected them as unsubstantiated (see paragraphs 30 and 39 below).

B. The criminal investigations in respect of the applicant and his trial

16. On 13 April 1998 the investigator came to see the applicant in the SIZO. The investigator wished to question the applicant. He informed the applicant that he was suspected of aggravated robbery and murder committed on 12 April 1998 and explained to the applicant his basic procedural rights and guarantees, including the right to legal assistance and to remain silent. The relevant records were signed by the applicant, the investigator and a lawyer, Mr B., who, according to the Government, was also present during the applicant's questioning. The lawyer was appointed by the investigator to represent the applicant in the proceedings.

17. The records also contain a statement by the applicant expressing the wish to be represented by another lawyer, Mr T., but that if that lawyer refused to take part in the case he would agree to be represented by Mr B. In the records the applicant also noted that the statement was made in the presence of Mr B. Accordingly, the applicant refused to be questioned on that day. During his subsequent questioning, including at the trial stage, the applicant denied his responsibility for the crimes of which he was suspected.

18. In his application to the Court, the applicant stated that Mr B. had taken part in the proceedings at the request of the applicant's wife, who had paid the lawyer's fees. The applicant also contended that the lawyer had not been present at the SIZO on 13 April 1998 and that he had signed the records at a later date. The applicant submitted letters issued by the SIZO administration on 16 June 2004, according to which during the pre-trial investigations lawyers had not visited the applicant in the SIZO and the applicant had left the SIZO only once – to undergo a psychiatric examination on 12 August 1998.

19. On 14 April 1998 the prosecutors invited Mr T. to defend the applicant. As that lawyer refused to take part in the proceedings, Mr B. continued to represent the applicant throughout the proceedings.

20. According to the records submitted by the Government, Mr B. took part in the investigative actions, including the applicant's questioning which took place in the SIZO on 21 April 1998 and 10 January 1999, studied the materials of the case, attended the court hearings, made written and oral pleadings, and prepared an appeal in cassation contesting the applicant's conviction. The court hearings which the lawyer did not attend were adjourned.

21. The applicant argued that during the entire period of the investigations he had not communicated with Mr B. and had not been allowed to correspond with anyone outside the SIZO. The investigators allegedly told him that it was not possible to see the lawyer before the trial. The applicant met the lawyer for the first time when the trial commenced.

22. On 21 April 1998 the applicant was charged with several counts of aggravated robbery, murder and inflicting bodily injuries.

23. In March 1999 the investigations were completed. The applicant and Mr B. were invited to familiarise themselves with the case file. The applicant expressed the wish to study it without the lawyer, allegedly at the request of the investigator, who promised the applicant that he would be allowed to meet with his brother.

24. In January 2000 the applicant finished studying the case file and in March 2000 the Cherkasy Court started examining the case as a court of first instance.

25. In the course of the court proceedings the applicant submitted several requests for the withdrawal of Mr B., stating that he did not need a lawyer at all. While the trial court made several requests to the local bar association inviting it to suggest another lawyer for the applicant, no replacement was found. The court also invited the applicant to hire a new lawyer himself, which the applicant did not do. By a letter dated 13 September 2000, the President of the Cherkasy Court informed the Deputy Minister of Justice that the applicant's and his co-defendants' refusal to be legally represented had resulted in a delay of three months to the court proceedings, which could not be pursued without the participation of a lawyer given the gravity of the charges. It was also noted that the defendants had submitted numerous procedural requests, including requests for their representation by the Minister of Justice and relinquishment of jurisdiction in favour of the Supreme Court, which evidenced that they were in fact trying to protract the proceedings.

26. Before the trial court the applicant contested the charges against him and alleged that the testimony of his co-defendants confirming his and their involvement in the impugned criminal acts had been obtained under physical and psychological pressure from the police. The applicant also lodged a request with the court for a video or audio-recording to be made of the proceedings, but this was rejected by the court.

27. The applicant's co-defendants raised similar complaints before the court and denied their submissions made in the course of the pre-trial investigations.

28. On 28 January 2002 the Cherkasy Court found the applicant guilty of several counts of aggravated robbery, inflicting grievous bodily injuries and murder. It sentenced the applicant to life imprisonment. The court based its judgment on the testimony of about thirty witnesses and victims of the crimes, partly on the statements of the applicant's co-defendants in the course of the investigations, and also on the conclusions of several forensic, ballistic and other expert examinations. The court further took into account the fact that in the course of the searches at the defendants' places of residence the police had found a large number of objects belonging to the victims of the crimes.

29. The court also dealt with the defendants' allegations that they had been tortured by the police in the course of the pre-trial investigations in order to obtain their confessions. It questioned the investigators and the police officers concerned and concluded that those allegations were unsubstantiated. The court also noted that the defendants, excluding the applicant, had made their statements to the investigators in the presence of their lawyers. The applicant's co-defendants had not complained of ill-treatment to the law-enforcement authorities. The court therefore found no ground which could prevent it from relying on these statements in its judgment.

30. As to the applicant, the court observed that he had not admitted his guilt at any stage of the proceedings, and there was no evidence that he had been forced to do so. Having questioned the police officers who had arrested the applicant on 12 April 1998 and one of the officers from the Cherkasy SIZO, the court noted that the applicant had been injured during the arrest but that there was no evidence that he had been ill-treated during his subsequent detention.

31. On 12 and 27 February 2002 respectively the applicant and Mr B. lodged separate cassation appeals, contesting the factual findings of the first-instance court. The applicant also complained that the trial court had failed to give due consideration to the defendants' arguments that "they had been denied the opportunity to have and meet with a lawyer before their first questioning" and that the trial court had not allowed the defendants' lawyers to visit them in detention. The applicant further made reference to his ill-treatment on 12 April 1998 and alleged that the statements of his co-defendants had been obtained under physical and psychological pressure from the police.

32. Meanwhile, on 7 February 2002 the applicant and one of his co-defendants concluded an agreement with Mr Br., pursuant to which Mr Br. undertook to defend them in the proceedings.

33. On 10 February 2002 the applicant asked the Cherkasy Court to allow Mr Br. to participate in the proceedings as his defence counsel.

34. On 20 February 2002 the Cherkasy Court informed the applicant that it had no jurisdiction to decide on the matter.

35. On 11 March 2002 Mr Br. complained to the President of the Supreme Court about the Cherkasy Court's refusal to allow him to act as the applicant's and his co-defendant's counsel. Mr Br. also requested access to the criminal case file so that he could prepare a cassation appeal on behalf of the applicant and his co-defendant and to be granted leave to visit them in the SIZO. No reply was given by the Supreme Court to Mr Br.'s requests.

36. On 21 May 2002 the applicant sent an amended cassation appeal to the Supreme Court in which he complained about the Cherkasy Court's refusal to allow Mr Br. to act as his defence counsel.

37. By a letter of 4 June 2002, the Cherkasy Court informed the applicant, his co-defendant and Mr Br. that Mr Br. could not represent two defendants at the same time, as they had made conflicting submissions concerning the circumstances of the case. In particular, while the applicant stated that he had not been present at the scene of one of the crimes, his co-defendant submitted that the applicant had been there.

38. The court also noted that Mr Br. did not have an advocate's licence and that he had not proved that, under domestic law, he could participate as defence counsel in criminal proceedings. The court further reiterated that Mr Br. should have asked the Supreme Court to grant him leave to participate in the cassation proceedings, since the first-instance court, which had already delivered a judgment in the case, was not competent to decide on that matter.

39. On 9 July 2002 the Supreme Court held a hearing on the cassation appeals. According to the applicant, Mr Br. was allowed to take part in the hearing on the applicant's behalf. The applicant, his co-defendants and their lawyers were also present. The Supreme Court rejected the cassation appeals submitted by the applicant and Mr B. The Supreme Court further upheld the conclusions of the Cherkasy Court concerning the defendants' allegations of their ill-treatment at the pre-trial stage of the investigation.

40. According to the applicant, Mr Br. was not given an opportunity to study the case file or to meet with the applicant prior to the Supreme Court hearing.

C. The application to the Court

41. On 23 November 2002 the applicant lodged his present application with the Court.

42. On 22 April 2004 the applicant asked the Cherkasy Court to provide him with copies of the medical reports drawn up after his examination in the SIZO and of the procedural decision concerning his request for a video or

audio-recording of the proceedings before that court, which he intended to submit to the Court in substantiation of his application.

43. By a letter of 28 May 2004, the Deputy President of the Cherkasy Court informed the applicant that his request had been refused, as it was not the function of that court to copy documents for the applicant. The court also noted that there were no funds in the court's budget allocated for such purposes.

44. On 21 June 2004 the applicant lodged a complaint with the Prydniprovskyy District Court of Cherkasy (the "Prydniprovskyy Court") against the Deputy President of the Cherkasy Court for failure to provide him with copies of the documents from his case file. In his complaint, the applicant stated that he needed copies of these documents in order to submit them to the Court. He also sought compensation for the damage allegedly caused by the refusal to provide him with the documents.

45. On 25 June 2004 the Prydniprovskyy Court declined jurisdiction to consider the applicant's complaint. The court held that under Ukrainian law judges acting in their official capacity enjoyed immunity from court proceedings against them.

46. On 8 July 2004 the applicant appealed against the decision of 25 June 2004.

47. On 15 July 2004 the same court granted the applicant time to rectify certain shortcomings in his appeal. The court held that the applicant's appeal should have been typewritten and should have contained information concerning the parties to the proceedings, in particular, their names and addresses.

48. On 26 July 2004 the applicant submitted a new version of his appeal. The applicant also attached a note, issued by the administration of the SIZO, stating that, in accordance with the law, detainees were not provided with the opportunity to type their documents.

49. On the same day the Prydniprovskyy Court refused to accept the applicant's appeal for failure to comply with the decision of 15 July 2004. According to the applicant, he appealed against the decision of 26 July 2004. There is no information concerning the outcome of his appeal.

50. By a letter of 28 June 2004, the Court asked the applicant to submit copies of his appeal in cassation against the judgment of 28 January 2002 and of his requests for legal assistance.

51. On 19 July 2004 the applicant asked the President of the Cherkasy Court to provide him with a copy of his appeal in cassation as well as with copies of the documents which he had already requested in his letter of 22 April 2004. The applicant referred to the Court's letter, but did not enclose a copy.

52. On 4 August 2004 the acting president of the Cherkasy Court rejected the applicant's request on the same grounds as in the letter of 28 May 2004. The acting president of the court also stated that, if necessary,

the Court could ask the State authorities to provide it with copies of these documents.

53. The applicant's further requests for copies of the documents from his case file were also rejected by the Cherkasy Court.

54. In April 2007 the Government submitted, at the Court's request, copies of various documents from the applicant's criminal case, including his appeal in cassation and documents concerning legal assistance in the course of the domestic proceedings.

55. In July and October 2007 the Court received several letters sent from the applicant's brother's address. In these letters the applicant alleged that the Government had blocked his correspondence with the Court. In particular, the applicant stated that on 10, 14, 17 and 23 May, and on 9 and 15 July 2007 he had submitted his observations on the admissibility and merits of the application, claims for just satisfaction, a friendly settlement proposal, and some additional information to the staff of the Colony, to which the applicant had been transferred from the SIZO in 2005, for them to send to the Court. The applicant provided a copy of the document dated 4 October 2007 in which the authorities confirmed that they had dispatched the applicant's correspondence addressed to the Court on the above dates. However, the Court never received the applicant's submissions.

56. According to the Government, the impugned letters were sent promptly to the Court. The staff of the Colony was not responsible for the fact that they did not reach the Court.

57. In December 2007 the applicant complained to the Prosecutor General and the Izyaslav Court alleging interference with his correspondence. The complaints were dealt with by the prosecutors and the postal service. The prosecutors replied to the applicant that his letters had been duly dispatched by the staff of the Colony. The prosecutors also noted that it was not possible to check whether the postal service had received and dispatched the applicant's letters, which were unregistered mail. That was confirmed by the postal service.

58. By a letter dated 1 July 2009, the Vice-President of the Cherkasy Court rejected another request from the applicant for copies of documents from his case file. In the letter it was also noted that the applicant had the right to hire a lawyer, pursuant to paragraph 2 of Article 8 of the Code on the Execution of Sentences, or to appoint a representative among one of his close relatives. The applicant was informed that such a representative would be given an opportunity to study the case file and to make notes.

II. RELEVANT DOMESTIC LAW AND INTERNATIONAL MATERIAL

59. The relevant provisions of domestic legislation and the relevant provisions of the Recommendation Rec(2006)2 of the Committee of

Ministers to member States on the European Prison Rules were summarised and quoted in the judgment in the case of *Naydyon v. Ukraine* (no. 16474/03, §§ 35-38 and 41-42, 14 October 2010), which mainly concerned the failure of the authorities to provide the applicant with the opportunity to obtain copies of documents needed for his application before the Court.

60. In the context of the execution of the Court's judgment in *Naydyon*, in September 2011 the Ukrainian Government submitted to the Committee of Ministers an action plan on measures to comply with that judgment. An extract from the action plan concerning general measures reads as follows:

> "1. Publication and dissemination of the judgment
>
> The summary of the judgment was published in the Government's Gazette [Uriadovyi Kurier], no. 28 of 15 [February] 2011.
>
> By letters of 22 March 2011, explanatory notes on the conclusions of the Court in the above-mentioned judgment were sent to the Supreme Court of Ukraine, the High Specialised Court of Ukraine for civil and criminal cases, the Donetsk Court of Appeal, the General Prosecutor's Office and the State Prison Service.
>
> Moreover, the Court's conclusions in the above judgment were included in the submission to the Cabinet of Ministers of Ukraine concerning the execution of ECHR judgments (as of March 2011). The Cabinet of Ministers of Ukraine instructed the relevant authorities to take measures to remedy the violation found, to avoid similar violations and bring their practices in accordance with the requirements of the Convention.
>
> 2. Legislative measures
>
> In order to determine whether any legislative amendments are required the authorities are currently holding multilateral discussions. As soon as this issue is determined at the national [level] the Committee of Ministers will be informed thereof."

61. At its 1120th meeting on 13-14 September 2011 the Committee of Ministers took note of the action plan and invited Ukraine to keep it informed of the progress made in its implementation. So far, the Committee of Ministers has not yet concluded the supervision of the execution of the judgment under Article 46 § 2 of the Convention.

THE LAW

I. SCOPE OF THE CASE

62. The Court notes that, after the communication of the case to the respondent Government, the applicant raised several new complaints.

63. In particular, in his submissions dated 12 March 2007 the applicant complained under Article 7 of the Convention that he had been unlawfully

sentenced to life imprisonment, stating that such punishment could not have been applied in his case.

64. In April 2008 the applicant complained under Article 34 of the Convention that in the Colony he was not allowed to keep the original letters sent to him by the Court. When they arrived, he was given a short time (up to ten minutes) to read them in the presence of officers. Subsequently, often after delays of over a month, he could obtain copies of them on request. Where such letters were in English, of which the applicant had no command, no translation or explanation was given to him by the staff of the Colony.

65. In 2011 the applicant further complained that from 12 to 21 August 2011 he had been provisionally placed in a detention facility in Vinnytsya where the material conditions had been degrading. In particular, the applicant was held in a dark, damp and cold cell and was not permitted daily walks.

66. In the Court's view, the applicant's new allegations are not an elaboration of his original complaints to the Court on which the parties have commented. The Court considers, therefore, that it is not appropriate to take these matters up in the context of the present case (see *Piryanik v. Ukraine*, no. 75788/01, § 20, 19 April 2005).

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

67. The applicant complained that he had been tortured by the police during his arrest. He further complained that his co-defendants had been tortured by the police in the course of the pre-trial investigations in the case. The applicant relied on Article 3 of the Convention which reads as follows:

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

A. Admissibility

68. The Court notes that the applicant's complaint of the ill-treatment of his co-defendants must be rejected for lack of victim status in accordance with Article 34 of the Convention.

69. Concerning the applicant's complaint that he was tortured by the police on 12 April 1998, the Court notes that the applicant took steps at the domestic level to bring that complaint to the attention of the national authorities. The applicant pursued this matter in the course of his trial and the fact that the complaint was rejected by the prosecutors on 21 August 1998 and 25 January 1999 did not prevent the domestic courts from examining it on the merits in the course of the applicant's trial (see paragraphs 30 and 39 above). In these circumstances, the applicant reasonably waited for the completion of the trial to raise the complaint

before the Court and accordingly complied with the six-month rule provided for in Article 35 § 1 of the Convention (see *Kaverzin v. Ukraine*, no. 23893/03, § 99, 15 May 2012 (not yet final)).

70. The Court further finds that the applicant's complaint that he was tortured by the police on 12 April 1998 is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

71. The applicant complained that he had been beaten by the police during his arrest. The applicant insisted that he had neither resisted the arrest nor tried to escape. The applicant noted that his ill-treatment had continued after he had lost consciousness (see paragraph 7 above) and had resulted in serious injuries.

72. The Government stated that on 12 April 1998 force had been used against the applicant because he had refused to obey the orders of the police officers. In particular, the officers had used unarmed combat techniques against the applicant and subsequently handcuffed him.

73. According to the Government, the applicant failed to prove that the police officers had used force unlawfully or excessively. They also argued that there was no evidence that the applicant had been tortured or subjected to inhuman treatment.

74. The Government argued that the use of force by the police against the applicant had not attained the minimum level of severity to qualify as inhuman or degrading treatment within the meaning of Article 3 of the Convention.

75. The Government further noted that the applicant's complaints of torture had been duly examined by the prosecutors and the courts, who had not found any violations in the police officers' actions.

2. The Court's assessment

76. The Court reiterates that Article 3 of the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. In order to fall within the scope of Article 3, the ill-treatment must attain a minimum level of severity, the assessment of which depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (see, among others, *Ireland v. the United Kingdom*, 18 January 1978, § 162, Series A no. 25).

77. The Court also reiterates that in assessing evidence in a claim of a violation of Article 3 of the Convention the standard of proof "beyond reasonable doubt" must be applied (see *Ireland v. the United Kingdom*, cited above, § 161, and *Avşar v. Turkey*, no. 25657/94, § 282, ECHR 2001-VII (extracts)). Such proof may, however, follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Labita v. Italy* [GC], no. 26772/95, § 121, ECHR 2000-IV). Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during such detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Ribitsch v. Austria*, 4 December 1995, § 34, Series A no. 336, and *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII).

78. Turning to the circumstances of the present case, the Court notes that, although there is no medical evidence in support of the applicant's allegations that his cheek had been pierced or that his ribs or fingers had been fractured, the applicant sustained a number of other injuries which were noted in the medical report on the day of his arrest (see paragraph 10 above). Those injuries were substantially serious to amount to ill-treatment within the meaning of Article 3 of the Convention (see, for instance, *Spinov v. Ukraine*, no. 34331/03, § 46, 27 November 2008).

79. The Court further notes that it is common ground between the parties that the injuries had been sustained during the applicant's encounter with the police. However, while the Government argued that the applicant had been injured because of the legitimate use of force to arrest him, the applicant contended that he had been deliberately tortured by the police.

80. In this context, the Court observes that the Government's argument is based on the findings of the domestic authorities who dealt with the applicant's complaints of ill-treatment (see paragraphs 14, 15, 30 and 39 above). However, those findings lack important details and relevant substantiation. In particular, they do not contain conclusive explanations of the exact nature and degree of force used against the applicant. The written statements of the police officers, on which the prosecutors and the courts relied, do not provide such explanations either. They are couched in very vague and confusing references to the applicant offering "physical resistance to the arrest" and the officers employing "unarmed combat techniques" (see paragraph 8 above). Accordingly, the Court rejects the Government's argument that recourse to physical force by the police was made necessary by the applicant's own conduct as unsubstantiated.

81. The Court further notes that neither the domestic authorities nor the Government made an attempt to address or to challenge, with substantiated arguments, the applicant's detailed submissions concerning his ill-treatment

by the police. In this regard, the Court attaches particular importance to the fact that the applicant's submissions concerning the origin of several blisters on his fingers were completely disregarded (see paragraphs 7 and 10 above).

82. Having regard to the relevant medical evidence and the parties' submissions in the present case, the Court finds that the applicant was ill-treated by the police on the day of his arrest.

However, the Court does not consider that the ill-treatment at issue amounted to torture. While the police officers used disproportionate force to arrest the applicant, it has not been established or persuasively argued that they intended to inflict punishment or to intimidate the applicant.

83. In the light of the foregoing, the Court holds that that there has been a violation of Article 3 of the Convention in that the applicant was subjected to inhuman and degrading treatment by the police.

III. ALLEGED UNFAIRNESS OF THE CRIMINAL PROCEEDINGS AGAINST THE APPLICANT

84. The applicant claimed that he was innocent and that his conviction had been based on an incorrect assessment of the facts and evidence. In particular, the applicant argued that the courts should not have admitted the statements made by his co-defendants in the course of the pre-trial investigation, alleging that these statements had been obtained under physical and psychological pressure from the police.

85. The applicant also claimed that he had been unaware of the nature and cause of the accusation against him and alleged that the authorities had refused to give him access to legal assistance during the pre-trial investigations. He further complained that they had not allowed Mr Br. to examine the case file or to meet with the applicant in order to prepare an appeal in cassation on his behalf.

86. The applicant relied on Article 6 §§ 1 and 3 (a) – (d), Articles 13 and 17 of the Convention and Article 2 of Protocol No. 7. The Court considers that the applicant's complaints fall to be examined under Article 6 §§ 1 and 3 (a) – (c) of the Convention, which reads, in so far as relevant, as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

...”

87. The Government contested the applicant’s submissions, stating in particular that the applicant’s right to defence had been secured at the domestic level.

88. At the outset, the Court observes that some of the applicant’s complaints under Article 6 of the Convention were not raised, in a clear and substantiated way, before the domestic authorities. In particular, this concerns the alleged failure of the investigators to inform the applicant of the nature and cause of the accusation against him and their alleged refusal to give him access to legal assistance at the pre-trial stage. The applicant’s statement in his cassation appeal that the trial court had failed to examine submissions that “[the defendants] had been denied the opportunity to have and meet with a lawyer before their first questioning” was not supported by any details or arguments and thus did not represent a serious allegation which had to be specifically addressed by the Supreme Court. In these circumstances, the Court may not be called to consider the complaints on the merits, essentially taking on the role of a domestic tribunal.

89. In any event, the Court considers that those complaints are unsubstantiated. In particular, the applicant was duly informed of the charges against him (see paragraph 16 above). Although the applicant alleged that Mr B. had not been present during the applicant’s questioning in the SIZO (see paragraph 18 above), the Court notes that the Government submitted sufficient evidence to refute the applicant’s allegation (see paragraphs 16, 17, and 20 above). The Court further notes that the applicant did not demonstrate that any difficulties he might have experienced in communicating with the lawyer during the investigations should be imputable to the authorities and not to the applicant himself or the lawyer.

90. The Court further notes that the applicant’s allegation that he could not communicate with anyone outside the SIZO is not supported by any evidence whatsoever. There is also no indication that that issue was brought to the attention of the domestic authorities.

91. As regards the applicant’s complaint about the courts’ refusal to allow Mr Br. to examine the case file and to meet with the applicant in order to prepare an appeal in cassation on his behalf, the Court notes that this matter was addressed in detail by the Cherkasy Court. In explaining its position on the matter, it referred to the specific circumstances preventing Mr Br. from taking part in the proceedings, which included the fact that he wished to represent two co-defendants who had made conflicting submissions on the facts. Given that the applicant did not contest the accuracy of that information, the Court does not consider that the limitation on his right to choose a lawyer on that ground was disproportionate or otherwise contrary to the guarantees of Article 6 § 3 (c) of the Convention.

92. The fact that the Supreme Court eventually allowed Mr Br. to take part in the hearing on behalf of the applicant (but not on behalf of his

co-defendant) does not cast doubt on the Cherkasy Court's position on that matter (see paragraph 91 above). The applicant failed to indicate when the decision to grant Mr Br. leave to participate was taken or what were the reasons for such a decision. In any event, the Court notes that the applicant was not precluded from obtaining legal advice prior to the Supreme Court hearing from Mr B., the lawyer who had taken part in the investigations and the trial and had ample access to the case file.

93. On the whole, the Court finds that the applicant was afforded sufficient opportunity to prepare and to raise arguments in his defence during the trial and the cassation proceedings, with the benefit of legal advice from Mr B. The applicant did not demonstrate that his arguments were not adequately dealt with or that any alleged violation of his procedural rights or alleged errors of law or fact by the courts were such as to impair the overall fairness of the proceedings under Article 6 of the Convention. There is nothing in the case file allowing the Court to disagree with the courts' conclusions that the allegations of the applicant's co-defendants of ill-treatment in the course of the pre-trial investigation were unsubstantiated.

94. In the light of the foregoing, the Court concludes that this part of the application should be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

IV. ALLEGED INTERFERENCE WITH THE APPLICANT'S RIGHT OF INDIVIDUAL PETITION

95. The applicant complained that the authorities had failed to provide him with copies of the documents from his case file which he had wished to submit to the Court in substantiation of his application. The applicant further complained that the authorities had blocked his correspondence with the Court. He relied on Article 34 of the Convention, which provides as follows:

> "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

96. The Court notes that the applicant's complaints under Article 34 of the Convention essentially concern two distinct issues. Namely, the alleged refusal to provide the applicant with copies of documents for his application to the Court and the alleged blocking of his letters to the Court. The Court will deal with these issues separately.

A. Refusal to provide the applicant with copies of documents for his application to the Court

1. The parties' submissions

97. The Government argued that the applicant's complaint concerned the authorities' refusal to make photocopies of certain documents for him at their expense and not a refusal of the applicant's access to such documents. In this context, the Government noted that domestic regulations did not require the authorities to provide prisoners with photocopies of documents from their case files for free. In the Government's view, such an obligation would place an unjustified burden on the authorities, especially given that the volume of case material might be very high. They also argued that the limitation at issue constituted an element of unavoidable suffering inherent in lawful detention.

98. The Government further noted that the applicant and the lawyer who had represented him in the domestic proceedings had had full access to the case file in the course of those proceedings and that they could have made copies of the relevant documents at their own expense for the applicant's subsequent application to the Court. After the completion of the domestic proceedings, the applicant could have asked the lawyer or his relatives to obtain copies of documents for the application.

99. The Government also noted that the staff of the Colony in which the applicant was being detained had provided him with copies of certain documents.

100. According to the Government, the fact that the applicant had lodged the application with the Court confirmed that the authorities had not hindered his right of individual petition.

101. The applicant contested the Government's submissions and insisted that he had been denied access to his case file. While the staff of the Colony had given him photocopies of the Court's letters, they had not assisted him in obtaining copies from his domestic case file. The applicant further contended that, in spite of the fact that he had asked the authorities to make copies of documents at his own expense, his requests had been refused. The applicant considered that the refusal was linked to the fact that he had been allowed to keep only copies of his verdict and of the appeal decision in his possession (see paragraph 59 above).

102. The applicant also submitted that when studying the case material during the criminal proceedings, he had not found it necessary to make copies of the documents because he had thought that the courts would not find him guilty.

2. The Court's assessment

103. The Court notes that this part of the case concerns a similar issue of interference with applicants' right of individual petition, concerning which it has delivered judgments in several cases against Ukraine. For instance, in *Naydyon* (cited above, §§ 64-69) the Court found a violation of Article 34 of the Convention on the ground that the authorities had failed to ensure that the applicant, who had been dependent on them (a prisoner without a lawyer), had been provided with the opportunity to obtain copies of documents which he had needed to substantiate his application before the Court.

104. The principle difference between the applicant's situation in the present case and that in *Naydyon* is that the former maintains contact with a relative, his brother, who is at liberty and sometimes helps the applicant in communicating with the Court (see paragraph 55 above and *Naydyon*, cited above). However, the Court is not of the view that this element may form the basis for a different conclusion as to Ukraine's compliance with Article 34 of the Convention.

105. Although the Government argued that the applicant's relatives could have helped him in getting copies of the documents he needed, they did not explain the procedure which the applicant and, for instance, his brother had to follow in order for the latter to gain access to the applicant's case file. In this regard, the Court takes note of the situation in another case against Ukraine, where a prisoner's mother was not permitted to make copies of documents from his case file kept by a local court (see *Tretyakov v. Ukraine*, no. 16698/05, § 84, 29 September 2011).

106. It is true that in *Tretyakov* the Court held that Ukraine had complied with its obligations under Article 34 of the Convention, in particular as regards providing the applicant with the opportunity to obtain copies of the documents he had wished to submit in support of his application. However, in that case after the applicant lodged his application with the Court he had ample access to the case material as the criminal proceedings were pending at that time, he was not precluded from copying it by hand, and was able to submit to the Court all the documents he deemed to be of relevance. His complaint principally concerned the refusal of the trial court to allow him to photocopy them (see *Tretyakov*, cited above, § 85).

107. In the present case, the applicant introduced his application after the proceedings against him had been completed. Like the applicant in *Naydyon*, he was denied access to the case file and was not able to make copies of case documents either by hand or by any other means (see *Naydyon*, cited above, § 65). In these circumstances and given the applicant's submissions, the Court does not agree with the Government that his complaint is directed solely against the authorities' refusal to provide him with photocopies of certain documents for free.

108. As to the Government's argument that the applicant could have made copies of the documents required for his application before the domestic proceedings were completed, the Court notes that it has already rejected a similar argument in *Naydyon* (see *Naydyon*, cited above, §§ 59 and 67) and that there is no ground to depart from that finding in the present case.

109. Contrary to the Government's contention (see paragraph 100 above), the fact that the present application reached the Court does not exclude the possibility that there has been an interference with the applicant's right of individual petition (see *Naydyon*, cited above, § 68).

110. In the light of the foregoing, the Court concludes that Ukraine has failed to comply with its obligation under Article 34 of the Convention to furnish all necessary facilities to the applicant in order to make possible a proper and effective examination of his application by the Court.

B. Alleged interference with the applicant's correspondence with the Court

111. The Government argued that the applicant had failed to raise the complaint of interference with his correspondence with the Court before a prosecutor responsible for supervising the legality of execution of sentences. Thus, the applicant could not be regarded as having exhausted domestic remedies in respect of this part of the application.

112. The Government also denied any interference with his correspondence with the Court.

113. The applicant disagreed.

114. As to the Government's plea of non-exhaustion, the Court reiterates that a complaint under Article 34 of the Convention is of a procedural nature and therefore does not give rise to any issue of admissibility under the Convention (see, *mutatis mutandis*, *Puzan v. Ukraine*, no. 51243/08, § 49, 18 February 2010).

115. Turning to the substance of the applicant's complaint, the Court notes that it may not be excluded that the letters which the applicant sent to the Court in May and July 2007 were lost due to a technical error at some stage of their dispatch or delivery. In any event, the Court finds that there is insufficient factual basis to conclude that Ukrainian authorities deliberately stopped the applicant's letters or failed to ensure that they were duly dispatched (see, *mutatis mutandis*, *Juhas Đurić v. Serbia*, no. 48155/06, §§ 75-76, 7 June 2011 (not yet final), and *Orlov v. Russia*, no. 29652/04, §§ 120-21, 21 June 2011; compare and contrast with, for instance, *Nurmagomedov v. Russia*, no. 30138/02, §§ 57-62, 7 June 2007, and *Buldakov v. Russia*, no. 23294/05, §§ 48-50, 19 July 2011).

116. Accordingly, the Court finds that the respondent State has not failed to comply with its obligations under Article 34 of the Convention as regards the dispatch of the applicant's letters addressed to the Court.

IV. APPLICATION OF ARTICLE 46 OF THE CONVENTION

117. Article 46 of the Convention provides:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

118. The Court reiterates that Article 46 of the Convention, as interpreted in the light of Article 1, imposes on the respondent State a legal obligation to implement, under the supervision of the Committee of Ministers, appropriate general and/or individual measures to secure the right of the applicant which the Court found to be violated. Such measures must also be taken in respect of other persons in the applicant's position, notably by solving the problems that have led to the Court's findings (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII).

119. In order to facilitate the rapid and effective enforcement of its judgments finding a violation of the Convention and to assist the respondent State to fulfil its obligations under Article 46, the Court must indicate, as precisely as possible, what it considers to be the problem that has led to the Court's finding. If the problem appears to be of a systemic character and has given rise or is likely to give rise to numerous applications, the Court may be required to identify the source of that problem (see, *mutatis mutandis*, *Broniowski v. Poland* [GC], no. 31443/96, §§ 189-194, ECHR 2004-V; *Hutten-Czapska v. Poland* [GC] no. 35014/97, § 232, ECHR 2006-VIII; *Greens and M.T. v. the United Kingdom*, nos. 60041/08 and 60054/08, § 107, ECHR 2010 (extracts); and, with respect to Ukraine, *Yuriy Nikolayevich Ivanov v. Ukraine*, no. 40450/04, § 80, 15 October 2009; *Kharchenko v. Ukraine*, no. 40107/02, § 101, 10 February 2011; and *Balitskiy v. Ukraine*, no. 12793/03, § 54, 3 November 2011).

120. The Court notes that a part of the present case concerns a systemic problem which calls for the implementation of measures of a general character.

121. In particular, this is the second case, after *Naydyon* (cited above), in which the Court has found a violation of Article 34 of the Convention because the applicant, a prisoner dependent on the authorities, was not provided with effective access to the documents which he needed to substantiate his application before the Court. Similar complaints of interference with the right of individual petition have been raised in a

number of other cases against Ukraine currently pending before the Court. Of them, some twenty-three cases have been communicated to the Government so far.

122. Therefore, the Court concludes that this issue was neither prompted by an isolated incident nor attributable to the particular turn of events in a particular case (see, *mutatis mutandis*, *Broniowski v. Poland* [GC], no. 31443/96, § 189, ECHR 2004-V).

123. Given its findings under Article 34 of the Convention in the present case, as well as in *Naydyon* (see paragraphs 110 above and *Naydyon*, cited above), the Court considers that the issue resulted from the absence of a clear and specific procedure enabling prisoners to obtain copies of case documents, either by making such copies themselves, by hand or using relevant equipment, or having the authorities make copies for them. While there were domestic regulations providing for public access to documents kept by the authorities, including court case files, the national judicial authorities did not consider themselves under an obligation to assist prisoners, taking into account their specific situation, in obtaining such copies. There is also no information that the prison authorities, who were given such a task under the prison regulations, duly complied with it.

124. The Court also notes that the Committee of Ministers has not yet concluded the supervision of the execution of the judgment in *Naydyon* under Article 46 § 2 of the Convention (see paragraph 61 above). Thus, it finds that the issue has remained unresolved.

125. Mindful of the utmost importance of the right of individual petition enshrined in Article 34 for the effective operation of the supervisory system established by the Convention, the Court considers that adequate legislative and administrative measures should be taken without delay by the respondent State in order to ensure that those who are deprived of their liberty have effective access to documents necessary for substantiating their complaints before the Court.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

126. 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

127. The applicant claimed 2,000,000 euros (EUR) in respect of pecuniary and non-pecuniary damage.

128. The Government did not comment.

129. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects the claim in that respect. On the other hand, it awards the applicant EUR 12,000 in respect of non-pecuniary damage.

B. Costs and expenses

130. The applicant did not submit a claim for costs and expenses. Accordingly, the Court considers that there is no call to award him any sum on that account.

C. Default interest

131. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the applicant's complaint that he was tortured by the police on 12 April 1998 admissible and the applicant's complaint of the ill-treatment of his co-defendants inadmissible;

2. *Declares* by a majority the applicant's complaint that the proceedings against him were unfair inadmissible;

3. *Holds* unanimously that there has been a violation of Article 3 of the Convention in that the applicant was subjected to inhuman and degrading treatment by the police;

4. *Holds* unanimously that Ukraine has failed to comply with its obligations under Article 34 of the Convention with respect to the refusal of the authorities to provide the applicant with copies of documents for his application to the Court;

5. *Holds* unanimously that Ukraine has not failed to comply with its obligations under Article 34 of the Convention as regards the dispatch of the applicant's letters addressed to the Court;

6. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with

Article 44 § 2 of the Convention, EUR 12,000 (twelve thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 26 July 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips	Dean Spielmann
Deputy Registrar	President