

SECOND SECTION

CASE OF GONGADZE v. UKRAINE

(Application no. 34056/02)

JUDGMENT

STRASBOURG

8 November 2005

FINAL

08/02/2006

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 *Gongadze v. Ukraine*,

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

Mr J.-P. Costa, *President*,

Mr A.B. Baka,

Mr I. Cabral Barreto,

Mr K. Jungwiert,

Mr V. Butkevych,

Mrs A. Mularoni,

Ms D. Jočienė, *judges*,

and Mrs S. Dollé, *Section Registrar*,

Having deliberated in private on 22 March and 11 October 2005,

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

PROCEDURE

1. The case originated in an application (no. 34056/02) 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, Mrs Myroslava **Gongadze** (“the applicant”), on 16 September 2002.

2. The applicant was represented by Ms S. Preuss-Laussinotte, a lawyer practising in Paris, France. The Ukrainian Government (“the Government”) were represented by their Agents, Mrs V. Lutkovska and Mrs Z. Bortnovska.

3. The applicant alleged that the State authorities had failed to protect the life of her husband and investigate his disappearance and death, which caused her serious anguish and distress.

4. The application was allocated to the Second 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.

5. By a decision of 22 March 2005, the Court declared the application admissible.

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

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1972 and lives in Arlington, the United States of America.

A. The facts of the case, as submitted by the parties

8. Georgiy **Gongadze**, the applicant’s husband, was a journalist. He disappeared on 16 September 2000 in circumstances that have not yet been fully established by the Ukrainian authorities despite the numerous demands and requests of the applicant. Recently, however, several police officers were charged with the kidnap and murder of Mr **Gongadze**.

(a) Events prior to the disappearance of the applicant’s husband

9. Mr **Gongadze** was a political journalist and the editor-in-chief of *Ukrainska Pravda*, an internet newspaper. He was known for his criticism of those in power and for his active involvement in awareness-raising in Ukraine and abroad as regards the problems of freedom of speech in his country. He reported on such topics as the allegedly undemocratic initiatives of the Ukrainian authorities and corruption amongst high-level State officials.

10. For months before his disappearance Mr **Gongadze** had been telling his relatives and colleagues that he was receiving threats and was under surveillance.

11. On 14 July 2000 Mr **Gongadze** wrote an open letter to the Prosecutor General making the following complaints:

(i) His relatives and friends in the city of Lviv, and his colleagues in Kyiv, had been interviewed by law-enforcement officers about him. The pretext for holding these interviews had been an inquiry into a criminal incident in Odessa in which Mr **Gongadze** had allegedly been involved. (The applicant maintained that Mr **Gongadze** had known nothing about the incident or the people involved in it. He himself had never been interviewed about it.)

(ii) For some time, unknown persons in a car with the number plate 07309 KB had been following Mr **Gongadze** from his home to his office and back.

In his open letter Mr **Gongadze** requested the Prosecutor General to take measures to protect him from what he described as “moral terror”, and to find and punish those involved.

12. In response, the Prosecutor General sent the letter to the Regional Prosecutor’s Office in Lviv, where Mr **Gongadze** was officially registered as a resident (*propiska*). The Lviv Prosecutor replied that the places and streets (of Kyiv) mentioned in Mr **Gongadze**’s letter were unknown in Lviv.

13. Later, the then Minister of the Interior told representatives of the non-governmental organisation Reporters Without Borders (as recounted in the latter’s report of 22 January 2001) that the car registration plate had been stolen from a police vehicle in February 2000.

14. On 1 September 2000 the General Prosecutor’s Office (hereafter the “GPO”) informed Mr **Gongadze** that there were no grounds for the adoption of any decision under Article 52-1 of the Code of Criminal Procedure (protective measures during criminal proceedings) regarding his letter.

15. Mr **Gongadze** disappeared on 16 September 2000.

(b) The investigation into the disappearance and murder of the applicant’s husband

16. On 17 September 2000 the applicant reported her husband’s disappearance to the Moskovskiy District Police Department in Kyiv.

17. On 18 September 2000 (19 September, according to the Government) the Pechersky District Prosecutor’s Office initiated an inquiry into a case of premeditated murder (the **Gongadze** case). The inquiry included a search of the places where Mr **Gongadze** had last been seen and interviews with people who had been there at the time. The applicant maintained that the investigating prosecutor in charge of the case, Mr H., had seemed to be conducting a serious investigation. However, he was replaced at the beginning of November by another prosecutor, Mr V.

18. On 2 November 2000 the decapitated body of an unknown person was discovered in the vicinity of the town of Tarashcha, in the Kyiv Region.

19. On 3 November 2000 the Kyiv Regional Prosecutor’s Office initiated an inquiry into the murder of an unidentified person (the Tarashcha case).

20. The first autopsy of the corpse was made by a local expert and the findings were presented on 8 November 2000. According to these findings, the time of death of the unknown person roughly corresponded to the time of the disappearance of Mr **Gongadze**.

21. On 10 November 2000 relatives learned from a brief article in the newspapers about the discovery of an unidentified body in the vicinity of Kyiv. On 15 November 2000, on examining the body, they identified jewellery belonging to Mr **Gongadze** and the marks of an old injury to the body that corresponded to that of the missing journalist. The contents of the stomach corresponded to the food which Mr **Gongadze** had eaten on the day of his disappearance. The relatives took a fragment of skin from the body to be examined by independent experts.

22. From that date onwards, the prosecution allegedly changed their attitude and impeded the investigation. On 15 November 2000 the body was removed from the local morgue in Tarashcha. Three days later the Kyiv Regional Prosecutor's Office admitted that the body had been transferred to Kyiv. All documents relating to the first forensic examination conducted in Tarashcha were confiscated. The local expert was prohibited from talking about the autopsy of the body and later became the subject of criminal proceedings. On 16 November 2000 the Deputy Minister of the Interior announced that, contrary to the preliminary findings, the body which had been discovered had been buried in soil for about two years.

23. On 21 November 2000 the applicant requested the investigator at the Pechersky District Prosecutor's Office

(i) to recognise her as a civil party to the proceedings in the Tarashcha case;

(ii) to identify the body and jewellery found with it; and

(iii) to organise a forensic medical examination in order to establish whether the body found in Tarashcha was that of her husband.

24. On 23 November 2000 the investigator rejected this request.

25. That day the applicant also requested the prosecutor of the Kyiv region not to cremate the body found in Tarashcha and to let her bury it if the body were to be identified as that of her husband.

26. On 29 November 2000 the Pechersky District Prosecutor's Office recognised the applicant as a civil party in the **Gongadze** case.

27. On 4 December 2000 the head of the investigation department of the Kyiv Regional Prosecutor's Office informed the applicant that a criminal investigation into the murder of the unidentified person had been initiated and that a forensic medical examination had been organised. However, there were no grounds to recognise the applicant as a civil party in the Tarashcha case. They promised to keep the applicant informed as to her possible participation in the identification of the objects found with the body. Accordingly, the applicant was not allowed to participate in the identification of the body at that stage.

28. On 6 December 2000 the applicant asked the GPO to be allowed to participate in the identification of the body and requested that the two sets of proceedings be joined.

29. On 8 December 2000 the Prosecutor General announced that a DNA analysis could not be done for the time being because Mrs Lesya **Gongadze**, the deceased's mother, was ill. This statement was denied by the latter herself. The Prosecutor General then declared that he had been misunderstood.

30. On 10 December 2000, more than a month after the body had been discovered, the applicant was allowed to participate in its identification. Being under stress, she was unable to make a positive identification of the body as being that of her husband.

31. On 11 December 2000 a blood sample was taken from the deceased's mother for the DNA analysis.

32. On 14 December 2000 the applicant requested the Prosecutor General to involve foreign experts in the investigation of the case under the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959.

33. On 15 December 2000 the Prosecutor General announced that the body found in Tarashcha was not that of Mr **Gongadze**.

34. On 18 December 2000 the GPO refused the applicant's request to involve foreign experts in the DNA analysis and informed her that the Ukrainian institutions were empowered to conduct all necessary examinations.

35. Later, several DNA analyses were conducted in the case, including analyses by foreign experts. The forensic medical examinations conducted by the Russian and American specialists confirmed that it was highly probable that the body found in Tarashcha was that of Mr **Gongadze**. However, within the framework of an investigation conducted by an *ad hoc* parliamentary committee, an examination conducted by German specialists did not confirm this finding.

36. The applicant maintained that she had never been informed directly by the investigating authorities about the results of these examinations, but had learned about them from the media.

37. On 10 January 2001 the Prosecutor General informed Parliament of the provisional findings of the forensic medical examination conducted by the Russian experts, which showed that the body found in Tarashcha was that of Mr **Gongadze** (99,64% probability). Nevertheless, the identity of the body could not be confirmed as there were witnesses who claimed to have seen Mr **Gongadze** alive in Lviv after his disappearance in November and December 2000. This information had been checked but was also not confirmed.

38. On 12 January 2001 the applicant and the deceased's mother requested the GPO to recognise them as civil parties in the Tarashcha case and to conduct another examination of the body. The same day the applicant was informed by the Prosecutor General that her status as a civil party, which had been granted by the Pechersky District Prosecutor's Office on 29 November 2000, was annulled. The applicant lodged a complaint with the Pechersky District Court of Kyiv.

39. On 13 January 2001 the GPO rejected the applicant's request to be recognised as a civil party, stating that it had not been established beyond all doubt that Mr **Gongadze** was dead or that the body found in Tarashcha was his.

40. On 15 January 2001 the Pechersky District Court recognised the right of the applicant and the deceased's mother to be civil parties and ordered the GPO to grant them this status. However, despite the order, the GPO again refused this status on 17 January 2001. Exceptionally, the GPO agreed to give them the Tarashcha body for burial, whilst emphasising that the GPO was not competent to issue a death certificate.

41. Also on 15 January 2001 the editor-in-chief of the *Grani* newspaper made public the names of four policemen who had allegedly participated in the surveillance of Mr **Gongadze**.

42. The applicant and the deceased's mother challenged the refusal to grant them aggrieved party status in the Pechersky District Court. On 9 February 2001 that court found that the GPO's decision was illegal. The GPO appealed.

43. On 24 January 2001 the investigators severed a defamation case involving a Mr Melnychenko¹ from the Gongadze-case.

44. Despite its appeal, on 26 January 2001 the GPO recognised the status of the applicant and the deceased's mother as civil parties in the light of further forensic evidence. (The applicant maintained that this was done because of the influence of Resolution No. 1239 (2001) of the Parliamentary Assembly of the Council of Europe, adopted on 25 January 2001, which called for

the conduct of “*an expeditious, full and transparent investigation into the disappearance or death of Mr **Gongadze**, and to make known the results of the investigation as quickly as possible; ... to respect the rights of the victim’s relatives, including their right to be the aggrieved side in the case of Mr **Gongadze**’s death.*”)

45. On 27 February 2001 the GPO informed the applicant that additional evidence had confirmed that the body found in Tarashcha was that of Mr **Gongadze**. An investigation into the murder of Mr **Gongadze** was initiated, with the applicant and the deceased’s mother being granted the status of aggrieved parties.

46. On 16 March 2001 the applicant requested the Prosecutor General to give her access to the case-file materials concerning the forensic medical examination of the body. On 19 March 2001 the investigating officer refused, stating that it was part of the preliminary investigation and the applicant could only have such access when the preliminary investigation was over. The applicant’s lawyer unsuccessfully challenged this refusal in the Pechersky District Court of Kyiv.

47. On 30 March 2001 the applicant lodged a complaint with the Pechersky District Court of Kyiv alleging negligence by the investigators.

48. On 26 April 2001 the investigator carried out an inspection of the Tarashcha body in the presence of the deceased’s mother and her lawyer, and the applicant’s lawyer. An additional forensic examination and a genetic identification test were carried out by US specialists. The joint examination by the US and Ukrainian experts confirmed that the Tarashcha body was that of Mr **Gongadze**.

49. On 8 May 2001 the applicant requested full access to the case file, which was refused on 17 May 2001 pending the pre-trial investigation.

50. On 15 May 2001 the Minister of the Interior announced that the two presumed murderers of Mr **Gongadze**, identified as drug users, had died and that the case was therefore solved. The Minister further stated that the murder had been spontaneous, with no political motive. On 17 May 2001 the GPO contradicted this announcement and recommended that the Minister refrain from disclosing any information about the criminal investigation.

51. On 18 May 2001 the applicant requested the GPO to confirm the Minister’s statement and to inform her as to when she would be allowed access to the case file. The same day the GPO informed the applicant that important additional information had been obtained and needed further examination, and that it would therefore be premature to say that the preliminary investigation was over.

52. On 22 May 2001 the applicant requested the GPO to involve experts from the US Federal Bureau of Investigation (the FBI) in the investigation. Her request was refused on 25 May 2001.

53. By letter of 30 May 2001 the GPO authorised the Kyiv Office for Forensic and Medical Examinations to deliver the remains of Mr **Gongadze** to his relatives for burial. A copy of this letter was handed to the representative of the deceased’s mother and sent by mail to the applicant’s representative. On 6 July 2001 the Forensic Office informed the deceased’s mother that she could take the body away for burial. However, according to the Government, the body was still in the Kyiv Office for Forensic and Medical Examinations, although the burial decision remains exclusively with the deceased’s mother and the applicant.

54. On 6 September 2001 the applicant’s representative requested access to the results of all the forensic examinations in the case file. He also asked when the preliminary investigation would be finished. On 7 September 2001 the GPO replied that it was not yet possible to say.

55. In a further reply of 10 September 2001, the GPO stated that the representative of an aggrieved party had a right of access to the results of forensic examinations but only after the pre-trial investigation had been completed. According to the Government, the GPO noted that the

representative had had access to the results of the forensic examinations and genetic tests within the limits permitted by the confidentiality of the investigation.

56. On 10 October 2001 the Kyiv City Justice Department informed the applicant that her claim against the investigators in negligence, lodged on 30 March 2001 with the Pechersky District Court of Kyiv, had not been registered and could not be found. The Department of Justice advised the applicant to lodge the complaint again with that court.

57. On 30 October 2001 the applicant requested the GPO to provide her with information about the forensic medical examination conducted by the FBI and the reasons for the contradictory findings of the forensic medical examinations conducted by the Russian and German experts. She requested that an additional forensic medical examination be held to answer these questions.

58. On the same date the applicant was informed by the GPO that the case file could not be disclosed before the end of the preliminary investigation and that the preliminary investigation would be finalised when the person guilty of the crime had been found.

59. On 31 October 2001 the GPO stated that the forensic medical examinations had established that the body found in Tarashcha was that of Mr **Gongadze**. It further informed the applicant that the results of the forensic medical examination conducted by the German experts could not be included in the case file, as the tissue samples for that examination had been taken by an unauthorised person in breach of established procedures.

60. On 13 November 2001 the Kyiv City Justice Department again informed the applicant that her claim against the investigators in negligence, lodged with the Pechersky District Court of Kyiv, had not been registered and could not be found. The Department of Justice advised the applicant to lodge the complaint again with the Pechersky District Court.

61. On 3 December 2001 the applicant lodged a complaint with the Pechersky District Court of Kyiv about the GPO's refusal to allow her access to the case-file materials concerning the forensic medical examination of the body.

62. On 11 February 2002 the Pechersky District Court held that the applicant's complaint against the GPO could not be considered prior to the transfer of the case to the court. It decided to attach the complaint to the case file for consideration at a later date. The court stated that the Code of Criminal Procedure did not provide for a separate appeal against the investigators on the ground of their refusal of access to the case-file materials relating to the forensic medical examination.

63. On 20 February 2002 the State Civil Registration Office in Lviv refused to issue a death certificate for Mr **Gongadze** in the absence of any document confirming his death.

64. On 28 March 2002 the applicant requested Mr Robert Ménard, the Secretary General of Reporters Without Borders, to be her representative in the case.

65. On 22 May 2002, while the power of attorney for this purpose was being prepared, Mr Ménard requested the GPO, on behalf of the deceased's mother who was also a civil party to the case, to interview the four police officers named in the press as having followed Mr **Gongadze**. He further requested access to the case-file materials concerning the forensic medical examinations, and asked for another examination by foreign experts. His request was not answered.

66. Another request by Mr Ménard on 10 June 2002 was refused by the GPO on 18 June 2002 on the ground that he could not be recognised as the representative of the civil party. On 19 June 2002 Mr Ménard asked the GPO to annul that decision.

67. On 6 July 2002 a new Prosecutor General was elected, who confirmed on 3 September 2002 that there had been numerous irregularities in the previous investigation.

68. On 10 September 2002 the Prosecutor General announced an investigation into the alleged falsification of procedural documents by the prosecutor and investigator from the town of Tarashcha.

69. On 16 September 2002 Reporters Without Borders requested access to all the forensic results in the case file and their examination by an independent expert. They also requested information about the identity of the four persons who had followed Mr **Gongadze** before his disappearance.

70. In October 2002 a new forensic examination took place in Switzerland. On 11 March 2003 Reporters Without Borders announced that the last DNA test had unequivocally identified the body as that of Mr **Gongadze**.

71. In November 2002 the prosecutor from the Tarashcha District Prosecutor's Office was arrested and charged with negligence in the investigation of the case. On 6 March 2003 that prosecutor was sentenced to two and a half years' imprisonment but absolved from serving the sentence by the Shevchenkivsky Local Court of Kyiv under an amnesty law.

72. On 15 January 2003 the chairman of the parliamentary *ad hoc* committee on the **Gongadze** case announced that the persons responsible for the death of Mr **Gongadze** were members of the police.

73. On 17 February 2003 Parliament requested the GPO to investigate the possible role of Mr Kravchenko, who had been Minister of the Interior at the time of the disappearance of Mr **Gongadze**, in the death of the journalist. This request was supported by 120 Members of Parliament (MPs).

74. On 24 February 2003 the Prosecutor General declared that they were checking the information about the involvement of senior officials of the Ministry of the Interior in the death of Mr **Gongadze**.

75. On 28 February 2003 the Prosecutor General, Mr Piskun, openly criticized his predecessor, Mr Potebenko, for impeding the investigation into the murder of Mr **Gongadze**.

76. In May 2003 a former police officer, Mr G., was arrested and charged with organising a criminal group with the participation of the police. He died in prison on 1 August 2003 in unclear circumstances. His lawyers maintained that he had been beaten and tortured. The body of Mr G. was cremated on 3 August without an autopsy.

77. On 5 August 2003 the letters of the late Mr G. appeared in the media. In these letters he accused the police and senior officials of kidnapping and killing Mr **Gongadze**. These letters, and the documents attached to them, were sent to the GPO.

78. On 9 September 2003 the GPO confirmed that the handwriting of the letters was that of the late Mr G.

79. On 22 October 2003 Lieutenant General Pukach, an official of the Ministry of the Interior, was arrested on suspicion of involvement in the disappearance of Mr **Gongadze**. He was accused of ordering the destruction of important documents in the case.

80. On 29 October 2003 the Prosecutor General, Mr Piskun, was dismissed by the President.

81. On 6 November 2003 the Kyiv City Court released Mr Pukach on his undertaking not to abscond.

82. On 15 August 2005 the applicant was allowed to have access to the criminal case file.

(c) The political context

83. The applicant noted that, since 1991, 18 journalists had been killed in Ukraine.

84. The applicant maintained that the political situation which had developed after the disappearance of her husband illustrated the attitude of the Ukrainian authorities towards freedom of the press.

85. Soon after the disappearance of Mr **Gongadze**, the President of Ukraine had promised to employ every means to find him. After a motion voted by Parliament, the President had assigned three law-enforcement agencies – the GPO, the police and the security services – to work on the case.

86. On 18 September 2000 an anonymous person called the Embassy of Georgia in Kyiv with the information that the responsibility for the disappearance of the journalist lay with Mr K., the notorious leader of a criminal group, and with the Minister of the Interior and an MP, Mr Volkov. The Ambassador of Georgia, who made the contents of the call public, was recalled to Georgia several weeks later. The Ukrainian authorities denied any link between the two events.

87. At the end of September 2000 Parliament created an *ad hoc* committee to investigate the disappearance of Mr **Gongadze**. The Prosecutor General refused to collaborate with the committee as its request to interview experts and officers was considered unconstitutional.

88. On 28 November 2000 the Chairman of the Socialist Party, Mr Moroz, publicly announced the existence of audio tapes, secretly made in the office of the President, implicating President Kuchma and other high-level State officials in the disappearance of Mr **Gongadze**. In one of the recorded conversations, allegedly between the President and the Minister of the Interior, the President had asked for Mr **Gongadze** to be threatened. The Minister had then proposed certain people whom he called “real eagles”, capable of anything, to do the job.

89. The applicant maintained that, due to doubts as to the quality of the tapes, it was not possible to establish their authenticity, though one of the US laboratories (BEK TEK) confirmed that they were genuine. She referred to the report of 22 January 2001 by Reporters Without Borders that testified to the existence of special forces in the police, and groups of retired police officers recruited by the Mafia who would commit acts of violence against political figures or journalists.

90. After the disappearance of Mr **Gongadze**, many organs of the media experienced pressure and censorship over their coverage of the case.

91. On 15 September 2001 several thousand opposition supporters demonstrated in memory of Mr **Gongadze**.

(d) The international context

92. The case of the disappearance of Mr **Gongadze** attracted the attention of many international organisations. It was analysed in the context of the lack of freedom of the media in Ukraine, which had been criticised for several years at the international level.

93. On 25 January 2001 the Parliamentary Assembly of the Council of Europe (“PACE”) adopted Resolution 1239 (2001) expressing its concern about “*the intimidation, repeated aggression and murders of journalists in Ukraine and the frequent abuse of power by the competent Ukrainian authorities in respect of freedom of expression*”. It further stated that the investigation into the disappearance of Mr **Gongadze** “*should be considered as a test for freedom of expression and the functioning of parliamentary democracy in Ukraine.*”

94. A plea for a speedy and transparent investigation into all cases of violence against and the death of journalists, particularly in the **Gongadze** case, was repeated in the PACE Recommendation 1497 (2001) of 27 January 2001, Resolution 1244 (2001),

Recommendation 1513 (2001) of 26 April 2001 and Resolution 1262 (2001) of 27 September 2001.

95. Similar pleas were made by the European Union (EU) in a statement on 5 February 2001, and by the Parliamentary Assembly of the Organization for Security and Co-operation in Europe (the "OSCE") in its resolution of July 2001. The OSCE Assembly also awarded the 2001 OSCE Prize for Journalism and Democracy to Mr **Gongadze** posthumously.

96. The case of the disappearance of Mr **Gongadze** was reported in the documents of certain United Nations bodies: the Working Group on Enforced or Involuntary Disappearances and the Human Rights Committee.

97. Reporters Without Borders conducted its own investigation into the disappearance of Mr **Gongadze**, the results of which were published in the special report of 22 January 2001 mentioned above. It concluded that the investigating authorities had been mainly preoccupied with proving the innocence of high-level State officials.

98. On 2 July 2003 the report of Mr H.C. Krüger, Deputy Secretary General of the Council of Europe, was presented to the PACE. The documents attached to the report confirmed that, prior to the appointment of a new Prosecutor General on 6 July 2002, the investigation had been ineffective, although later developments had raised hopes of more efficacy. According to the applicant, the further developments in the investigation demonstrated that the hopes expressed had been premature.

99. On 16 September 2003 the EU made a declaration in which concern was expressed at the lack of progress of the investigation.

100. The issue of the effectiveness of the investigation in the case was similarly raised by the US Congress and by NATO.

101. On 13 September 2005 several international non-governmental organisations published a report about the progress of the investigation in the **Gongadze** case. They maintained that the GPO, supported by the President, had tried to limit the investigation and had not made enough efforts to find and prosecute the instigators of the kidnap and murder of Mr **Gongadze**. They further criticised the Ukrainian authorities for serious setbacks in the investigation, in particular:

“- The disappearance of Lieutenant General Pukach; the leaking of information that disrupted the work of Ukrainian and Israeli agencies who were preparing to detain him; the lack of any public scrutiny of that potentially criminal action; and the absence of any investigation into the process by which Lieutenant General Pukach was previously released and the Pukach case closed in December 2003;

- The death of former Internal Affairs Minister Mr Kravchenko, who could have provided important information about the link between the conversations recorded by Melnichenko and the murder; and the lack of any public scrutiny of the possible negligence of the GPO in its handling of the Kravchenko case and in protecting him as a witness;

- The failure to interview numerous witnesses in the Internal Affairs Ministry with a knowledge of the system of surveillance operated there; and the failure to investigate thoroughly the links between the “werewolves” and Honcharov cases with the **Gongadze** case;

- The failure to resolve the problems surrounding the Melnichenko tapes, with a view to using them as primary evidence in court, caused mainly by the mistakes and sluggishness of the GPO;...”

B. Supplementary facts as submitted by the Government

(a) The investigation into the disappearance and murder of the applicant’s husband

102. On 19 September 2000 the Pechersky District Prosecutor’s Office of Kyiv instituted a criminal investigation, pursuant to Article 94 of the Criminal Code of Ukraine, into a case of

premeditated murder. In order to determine the circumstances of the disappearance, an investigative group was formed. The group included officers of the Department of Criminal Investigations and the GPO. The following three lines of inquiry were pursued:

- (i) did the disappearance involve family problems?;
- (ii) was Mr **Gongadze** the victim of a criminal offence unrelated to his profession?;
- (iii) was the disappearance connected to his critical publications in the *Ukrayinska Pravda* internet newspaper?

103. From 19 September 2000 until 10 October 2000, a number of investigative measures were taken to identify witnesses, check Mr **Gongadze**'s contacts, search localities, etc.

104. On 2 November 2000 the unidentified corpse of a man was found in a forest in the Tarashcha district. The law-enforcement authorities were informed about this and immediately went to the site. On 3 November 2000 the investigative group examined the site and prepared the necessary procedural documents. The corpse was transferred to the morgue of the Tarashcha district for a forensic examination. The investigative officer of the Tarashcha District Prosecutor's Office instituted a criminal investigation into the premeditated murder of an unidentified person, pursuant to Article 94 of the Criminal Code. The forensic expert found jewellery on the corpse that day and near the corpse in the nearby soil the following day.

105. The Pechersky District Prosecutor's Office inquired whether the corpse could be that of Mr **Gongadze**. For this purpose the applicant was summoned before the prosecutor and requested to describe the jewellery which Mr **Gongadze** could have been wearing when he disappeared.

106. On 15 November 2000 a group of journalists - close friends of Mr **Gongadze** - went to Tarashcha, having learned about the unidentified body from a newspaper article. They met with the forensic expert, who informed them about the jewellery and showed them the corpse. Upon the journalists' request, he made an X-ray of one of the arms of the corpse. The X-ray showed pieces of metal in the arm that could have corresponded to an old wound of Mr **Gongadze**. On this ground the journalists concluded that the corpse was that of Mr **Gongadze**. The same day the Tarashcha prosecutor ordered and effected the transfer of the corpse to the Kyiv city morgue for further forensic examination.

107. On 7 December 2000 the GPO joined the investigations in the **Gongadze** and Tarashcha cases, and a case of defamation against senior State officials (the Melnychenko case), in order to ensure their comprehensive and speedy examination.

108. On 13 December 2000 the applicant was questioned as an aggrieved party. She agreed to provide samples of her own blood and of that of her children for forensic examination. The applicant insisted on participating in the identification of the Tarashcha body, and said that she was certain that she could recognise her husband's jewellery.

109. On 14 December 2000 the applicant refused to give blood samples because of a family conflict. That day the applicant requested the GPO to conduct the forensic examinations in a Western country. This request was rejected on 18 December 2000.

110. On 15 December 2000 the investigator reported to the Deputy Prosecutor General that the deceased's mother had refused to participate in the identification of the Tarashcha body, scheduled for 18 December 2000, as she did not feel well and wished to postpone her participation until the completion of the genetic identification tests.

111. On 18 December 2000 the applicant was summoned to the GPO to participate in the identification of the Tarashcha body and the jewellery. She stated that there was a high probability that the corpse was that of her husband. She recognised the jewellery with absolute certainty. The same day the applicant requested to see the documents relating to the examination of the scene of the events and the body. Her request was allowed and a note made to that effect.

112. On 20 December 2000 the GPO received a letter from the deceased's mother, stating that she was under stress and could not come to Kyiv for the identification. She also stated that she would only participate in the identification once an independent forensic examination of the corpse had been made.

113. On 12 January 2001 the applicant and the deceased's mother requested the GPO to conduct an additional forensic examination with the assistance of US experts. They also requested that efforts be made to find the head of the Tarashcha body. The request for the forensic examination was allowed and, with the assistance of the FBI and the US Department of Defence, an additional forensic examination and a genetic identification test were conducted on 22 February 2001. The head could not be found however.

114. On 27 February 2001 the GPO sent a request for legal assistance to the competent German authorities asking for the official results of a genetic identification test made in that State following a request from Mr Holovaty, a Ukrainian MP. According to Mr Holovaty, the German experts had concluded that the Tarashcha body was not Mr **Gongadze**. However, according to the Government, this test had no legal effect, as neither the test nor the procedure for taking tissue samples had complied with Ukrainian legislation.

115. On 6 September 2001 the applicant's representative applied to the GPO, stating that, according to the media, journalists had visited Tarashcha on 15 October 2000. The journalists had examined the body in the Tarashcha morgue and made photographs of it. She asked the GPO to interview those journalists and to join the photographs to the criminal case file. On 7 September 2001 the applicant's representative was informed that the journalists had been identified and interviewed as witnesses in the course of the investigation. They had been requested to submit their photographs for inclusion in the case file.

116. On 30 October 2001 the applicant's representative requested the GPO to fix a time-limit for the completion of the pre-trial investigation into the murder of Mr **Gongadze**. The GPO replied that it could not do so until the murderer had been identified.

117. On the same day the applicant's representative requested an additional forensic examination of, *inter alia*, the following:

(i) whether the X-ray of the corpse's hand done in Tarashcha and given to the journalists corresponded to the X-rays taken when Mr **Gongadze** was alive, and to those taken by the FBI on 27 April 2001;

(ii) whether the FBI analyses proved the presence of traces from bullets that corresponded to the wounds known to have been suffered earlier by the late journalist; and

(iii) whether the hair identification and DNA analysis confirmed the corpse's identity.

118. On 31 October 2001 the GPO refused to authorise an additional examination, as the Tarashcha body was undoubtedly that of Mr **Gongadze** and, during their examinations, the Ukrainian and American experts had already answered the applicant's questions.

119. On 11 June 2002 the applicant's representative requested access to the decision ordering a new forensic examination, allegedly to be carried out by German experts. She further requested to be allowed to put questions to these experts. She referred in her application to the alleged statements of investigators, disseminated by the media, about this new examination.

120. On 21 June 2002 the GPO rejected the application. The applicant's representative was informed that she could study the case file after the pre-trial investigation was completed and that no statement about a new examination by German experts had been made by the Deputy Prosecutor General to the media.

121. On 17 July 2002 the newly appointed Prosecutor General ordered the creation of a new investigative group in the **Gongadze** case.

122. On 26 and 30 July 2002 the new group conducted two additional examinations of the site where the body was found, together with forensic experts. They took soil samples, made a thorough search and took a number of objects for analysis.

123. On 9 August 2002 an additional examination of the Tarashcha body was conducted and samples for further forensic tests were taken. The additional forensic examinations were to establish more accurately the approximate time of Mr **Gongadze**'s death.

124. On 3 September 2002 the deceased's mother was provided with the documents necessary for the burial of Mr **Gongadze**'s remains.

125. On 24 September 2002 the GPO sent a letter to the director of the US FBI inviting them to assist Ukrainian specialists in investigating the case.

126. In September and October 2002 Mr Robert Ménard, Secretary General of Reporters Without Borders, visited Kyiv twice as the representative of the deceased's mother in the criminal case. He met the Prosecutor General and had access to the results of the forensic examinations in the case. Moreover, samples were taken for an additional forensic examination, which was held in Lausanne (Switzerland) from 20 to 25 January 2003.

127. On 14 January 2005 the GPO instituted proceedings against Lieutenant General Pukach for abuse of power. His case was joined to that of Mr **Gongadze**.

128. On 24 January 2005 the Pechersky District Court of Kyiv ordered the arrest and detention of Mr Pukach. The Security Service and the Ministry of the Interior were ordered to find him, without success.

129. During the investigation it was established that Mr **Gongadze** had been the subject of illegal surveillance operations by certain officers of the Department of Criminal Investigation, previously headed by Mr Pukach, from July 2000 until the day he disappeared in September 2000. It was also established that, in 2003, all the materials relating to this illegal surveillance had been destroyed.

130. On 28 February 2005 the GPO instituted proceedings against police officers K. and Pr., as well as Mr Pukach, charging them with the premeditated murder of Mr **Gongadze**. On the same day Mr K. and Mr Pr. were arrested.

131. On 3 March 2005 the Pechersky District Court remanded Mr K. and Mr Pr. in custody.

132. On 5 March 2005 Mr K. and Mr Pr. were officially charged with premeditated murder. They confessed their involvement. On the same day Mr K. was dismissed from his position as head of unit in the Intelligence Department of the Ministry of the Interior.

133. On 5 March 2005 it was also decided to charge Mr Pukach, but he could not be found.

134. On 17 March 2005 the investigation established that a fourth person, Mr P., had been involved in the disappearance and murder of Mr **Gongadze**. Mr P. was interrogated and admitted his role in this crime. On the same day Mr P. was dismissed from his position as a senior officer of the Intelligence Department of the Ministry of the Interior.

135. All three accused participated in an on-site reconstruction of the events of the crime. Other police officers who had followed Mr **Gongadze** before his disappearance were questioned.

136. Some objects belonging to the journalist were found and presented to his relatives for identification.

137. The investigation pursued further forensic examinations of the corpse and the audiotapes of Mr Melnychenko and a number of other matters.

(b) The political context

138. On 11 December 2000 the GPO received a videotape with statements by Mr Melnychenko made in the presence of several Ukrainian MPs. These statements concerned the involvement of the President of Ukraine and many other high-ranking officials in giving illegal orders. Mr Melnychenko claimed to have made audio recordings of incriminating conversations, using a digital recorder placed under the sofa in the office of the President of Ukraine.

139. On 13 December 2000 Mr Moroz, a Ukrainian MP, lodged an application with the GPO, enclosing a copy of a complaint by Mr Melnychenko dated 16 November 2000 and video-recorded statements containing accusations about the involvement of senior State officials in the disappearance of Mr **Gongadze**. A forensic examination of the audio tapes was ordered but could not determine their authenticity. (The applicant contended that a US laboratory had confirmed the authenticity of the tapes.)

140. On 15 December 2000 the GPO requested Interpol to establish the whereabouts of Mr Melnychenko.

141. On 16 September 2002 the GPO requested the assistance of the US Department of Justice in interviewing Mr Melnychenko as a witness in the **Gongadze** case.

142. Mr Melnychenko refused to provide the GPO with his tapes and recording equipment, but agreed to provide written answers to the GPO's questions, which he had not done by the time the Government submitted their observations to the Court. The applicant stated that the reason for Mr Melnychenko's implied lack of cooperation was his well-founded fear of prosecution by the Ukrainian authorities.

C. Recent events

143. After Viktor Yushchenko was elected President of Ukraine on 26 December 2004, he pledged to reopen the investigation into the **Gongadze** case. It was reported in the press on 2 March 2005 that the Prosecutor General had announced the arrest of three security officers in connection with the present case: a general and two colonels. On 4 March 2005, the death by purported suicide of Yuriy Kravchenko, the above-mentioned Minister of the Interior at the time, was announced. He had been due to be interviewed by the GPO that morning.

144. Recently, the GPO announced that the criminal investigation was complete and would be sent to the court. The aggrieved parties were given access to the case file. They stated that the latest forensic examination in September 2005 by German experts had confirmed that the Tarashcha body was that of Mr **Gongadze**.

145. On 15 September 2005 Mr Turchinov, who had been dismissed from his post as Head of the Security Service, informed journalists that the Service had been preparing for the arrest and extradition of Lieutenant General Pukach from Israel, but the operation had failed due to a leak of information from the GPO. He stated that the interim results of the laboratory examination of the Melnychenko tapes had not established any sign of tampering, and had identified persons whose voices were recorded on the tapes.

146. On 20 September 2005 the Parliament of Ukraine heard the report of the chairman of its *ad hoc* committee investigating the murder of Mr **Gongadze**. This report concluded that the kidnap and murder of Mr **Gongadze** had been organised by former President Kuchma and the late Minister of the Interior, Mr Kravchenko. The report found that the then Head of the Presidential Administration and the current speaker of Parliament, Mr V. Lytvyn, and the then Head of the Security Service and a current Member of Parliament, Mr L. Derkach, had been involved in the crimes. The report noted finally that, having been informed about the crimes and

the names of suspects, the GPO had failed to take any action or to react to the conclusions of the *ad hoc* committee.

II. RELEVANT DOMESTIC LAW

147. The relevant provisions of the Constitution of Ukraine provide:

Article 3

“The human being, his or her life and health, honour and dignity, inviolability and security are recognised in Ukraine as having the highest social value. ...”

Article 27

“Every person has the inalienable right to life.

No one shall be arbitrarily deprived of life. The duty of the State is to protect human life. ...”

Article 28

“Everyone has the right to respect for his or her dignity.

No one shall be subjected to torture, cruel, inhuman or degrading treatment or punishment that violates his or her dignity. ...”

148. The relevant provisions of the Code of Criminal Procedure provide:

Article 28. A civil claim in a criminal case

“Anyone who has suffered material damage as a result of a crime shall be entitled to lodge an application to join the criminal proceedings as a civil party claiming damages ..., which shall be considered by the court at the same time as the criminal case...”

Article 49. An aggrieved party

“Anyone who has suffered ... damage as a result of a crime may be recognised as an aggrieved party. ...

A citizen who has been recognised as an aggrieved party in respect of the crime shall be entitled to give evidence in the case. An aggrieved party, or his or her representative, shall be entitled to ... make requests; study all the materials of the case file when the pre-trial investigation is completed; ... [and] lodge complaints against the actions of the inquirer, investigator, prosecutor and court, ...

In cases where the crime has caused the death of the victim, the rights provided for in this Article shall be conferred upon the deceased’s next of kin.”

Article 94. Grounds for instituting a criminal action

“A criminal action shall be instituted on the following grounds:

- 1) applications or communications from ... individuals; ...
- 5) direct detection of signs of a crime by a body of inquiry or investigation, a prosecutor or a court.

An action can be instituted only when there is sufficient evidence that a crime has been committed.”

149. The relevant provisions of the Prosecution Service Act, in the version of 1995, provided:

Article 5. Main functions of the Prosecution Service

The main functions of the Prosecution Service are:

...

2) supervision of compliance with the law by the bodies that combat crimes and other offences and investigate circumstances indicating that a crime has been committed;

3) investigation of circumstances indicating that a crime has been committed; ...

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

150. The Government submitted that the applicant's complaints under Article 2 and Article 3 of the Convention about the alleged failure of the State to protect the life of her husband, and about her state of distress and uncertainty, had been lodged with the Court outside the period of six months prescribed by Article 35 § 1 of the Convention.

151. The Government stated that the refusal of the GPO to entertain the complaint of the applicant's late husband about threats to his life had been sent to Mr **Gongadze** on 1 September 2000, more than six months before this application was lodged with the Court.

152. The Government maintained that the criminal proceedings relating to the murder of the applicant's husband had been initiated on 27 February 2001, and the applicant recognised as an aggrieved party within those proceedings. The Government argued that the applicant should have raised her complaint under Article 2 of the Convention within six months of that date, but had failed to do so.

153. The Government contended that the applicant's complaint under Article 3 of the Convention about the alleged atmosphere of fear and uncertainty should equally be rejected for being out of time. From the time when she was recognised as an aggrieved party in the criminal proceedings, she could no longer claim that the atmosphere had been uncertain because the body found in Tarashcha had been identified with a high degree of certainty as being that of her husband, and criminal proceedings for murder initiated.

154. The applicant claimed to have tried using the available domestic remedies, but to no avail. She maintained that the six-month rule had been improperly relied upon in the circumstances of the present case.

155. The Court reiterates that where no domestic remedy is available in respect of an act alleged to be in violation of the Convention, the six-month time-limit laid down in Article 35 § 1 of the Convention in principle starts to run from the date on which the act complained of took place or the date on which the applicant was directly affected by, became aware or could have become aware of such an act. However, special considerations may apply in exceptional cases where applicants first avail themselves of a domestic remedy and only at a later stage become aware, or should have become aware, that the remedy is ineffective. In that situation, the six-month period may be calculated from the time when the applicant becomes aware, or should have become aware, of these circumstances (see *Aydın v. Turkey* (dec.), nos. 28293/95, 29494/95 and 30219/96, ECHR 2000-III (extracts)).

156. The Court notes that the Government relied on the availability and effectiveness of the remedy of criminal proceedings, in the case of disappearance or murder in respect of the applicant's complaint under Article 13 of the Convention. The applicant pursued this remedy but, after delays and deficiencies in the criminal proceedings, she lodged her application with the Court two years after her husband's disappearance, while the criminal proceedings were still pending.

157. The Court observes that the applicant could arguably claim to have lacked confidence in the information provided by the investigation, given the contradictory statements made throughout the proceedings, which allegedly contributed to the state of uncertainty of which she complained. This uncertainty is also supported by the fact that the latest identification of the body was conducted in September 2005.

158. Accordingly, the Court concludes that the application was lodged in due time, in the exceptional circumstances of the case, and therefore dismisses the Government's preliminary objection.

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

A. Alleged failure to protect the right to life

1. *The parties' submissions*

159. The applicant complained under Article 2 of the Convention that the death of her husband was the result of a forced disappearance and that the State authorities had failed to protect his life. Article 2, in so far as relevant, provides:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

160. The Government originally maintained that the only element linking the murder of Mr **Gongadze** to State authorities was the audio tapes made by Mr Melnychenko. They contended that there was no evidence "beyond reasonable doubt" that the State was responsible for a violation of the right to life of the applicant's husband. Later, however, they informed the Court about the arrest of several police officers who had confessed to having participated in the surveillance, kidnap and murder of Mr **Gongadze**.

161. The applicant maintained that, at the time of lodging her application with the Court, she had not been certain of her husband's fate or the identity of the body found in Tarashcha. Therefore, she had based her complaint on his disappearance. Whilst she no longer claimed that her husband had disappeared, she alleged that he had been killed in violation of Article 2 of the Convention.

162. The applicant submitted that the tapes made by Mr Melnychenko, the authenticity of which had been confirmed by FBI experts, were not the only element linking State authorities to the murder of Mr **Gongadze**. The culpable negligence of the law-enforcement officers in conducting the investigation, in the applicant's view, could also be considered a contributory element.

163. The applicant originally concluded that the facts of the case clearly demonstrated that the State had been involved in the murder of her husband or, at least, that there was a reasonable suspicion of involvement. She recently submitted that the latest information provided by the Government confirmed the direct involvement of State agents in the murder of her husband, but that the investigation had seemed to limit the case to the prosecution of direct offenders, and not of those who had ordered and organised the crime.

2. *The Court's assessment*

164. The Court reiterates that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. This involves a primary duty on the State to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends, in appropriate circumstances, to a positive obligation on the authorities to take preventive

operational measures to protect an individual or individuals whose life is at risk from the criminal acts of another individual.

165. Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (see *Kiliç v. Turkey* judgment, no. 22492/93, §§ 62-63, ECHR 2000-III).

166. The recent developments in the present case demonstrate with a high degree of probability that police officers were involved in the disappearance and murder of Mr. **Gongadze**. The question to be determined is whether the authorities failed to comply with their positive obligation to protect Mr **Gongadze** from a known risk to his life.

167. The Court first notes that, in the instant case, the applicant's husband, in his open letter of 14 July 2000 to the Prosecutor General, reported several facts concerning the questioning of his relatives and colleagues by police officers about him and his surveillance by unknown persons. He requested an investigation of these facts and the implementation of measures for his protection.

168. Secondly, the authorities, primarily prosecutors, ought to have been aware of the vulnerable position in which a journalist who covered politically sensitive topics placed himself/herself *vis-à-vis* those in power at the material time (as evidenced by the death of eighteen journalists in Ukraine since 1991 – see paragraph 83 above).

169. Thirdly, the Court notes that, by virtue of powers conferred upon it under domestic law, the General Prosecutor's Office (the "GPO") is entitled and obliged to supervise the activities of the police and investigate the lawfulness of any actions taken by them. Despite clear indications in Mr **Gongadze**'s letter about the inexplicable interest in him shown by law-enforcement officers, the response of the GPO was not only formalistic, but also blatantly negligent (see paragraph 12 above). A fortnight later the applicant's husband disappeared.

170. The Court finds that these complaints, made by the late Mr **Gongadze**, and subsequent events revealing the possible involvement of State officials in his disappearance and death, were neglected or simply denied for a considerable period of time without proper investigation. There was no reaction to the alleged involvement of the police in the disappearance when information about such a possibility was disseminated publicly (see paragraph 41 above). The fact that the alleged offenders, two of them active police officers, were identified and charged with the kidnap and murder of the journalist just a few days after the change in the country's leadership raises serious doubts as to the genuine wish of the authorities under the previous Government to investigate the case thoroughly.

171. In view of these considerations, the Court finds that there has been a substantive violation of Article 2 of the Convention.

B. Failure to investigate the case

1. The parties' submissions

172. The applicant next complained that the State had failed to investigate the case in a coherent and effective manner, in violation of the procedural requirements of Article 2 of the Convention.

173. The Government maintained that there had been objective reasons for the delays in the investigation. Given that the GPO had performed many investigative measures in the case, the Government considered that the investigation had been sufficiently effective.

174. The applicant disagreed. She contended that the mere number of investigative measures could not be the decisive factor. The conviction of two law-enforcement officers for negligence in the investigation clearly demonstrated its ineffectiveness. Moreover, after some progress in the investigation in 2003, the proceedings had again been impeded after the dismissal of Mr Piskun from the position of Prosecutor General. These facts, according to the applicant, showed that the State had failed to satisfy its obligation to conduct an effective investigation into her husband's murder.

2. The Court's assessment

175. The Court reiterates that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, *Kaya v. Turkey*, judgment of 19 February 1998, *Reports* 1998-I, § 105). The essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigatory procedure (see, for example, *mutatis mutandis*, *İlhan v. Turkey* [GC], no. 22277/93, § 63, ECHR 2000-VII).

176. For an investigation into an alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events (see *Güleç v. Turkey*, judgment of 27 July 1998, *Reports of Judgments and Decisions* 1998-IV, §§ 81-82, and *Oğur v. Turkey* [GC], no. 21594/93, §§ 91-92, ECHR 1999-III). The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances (see, for example, *Kaya v. Turkey*, cited above, § 87) and to the identification and punishment of those responsible (see *Oğur v. Turkey*, cited above, § 88). This is not an obligation of result, but of means. The authorities must have taken all reasonable steps to secure the evidence concerning the incident. Any deficiency in the investigation which undermines its ability to establish the cause of death or the persons responsible, whether the direct offenders or those who ordered or organised the crime, will risk falling foul of this standard.

177. There is also a requirement of promptness and reasonable expedition implicit in this context (see *Yaşa v. Turkey*, judgment of 2 September 1998, *Reports* 1998-VI, §§ 102-104, and *Çakıcı v. Turkey* [GC], no. 23657/94, §§ 80, 87, 106, ECHR 1999-IV). It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular

situation. However, a prompt response by the authorities in investigating the use of lethal force or disappearance may generally be regarded as essential in ensuring public confidence in their maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see, in general, *McKerr v. the United Kingdom*, no. 28883/95, §§ 108-115, ECHR 2001-III, and *Avşar v. Turkey*, no. 25657/94, §§ 390-395, ECHR 2001-VII (extracts)).

178. The Court observes that the applicant maintained that the investigation into the disappearance of her husband had suffered a series of delays and deficiencies. Some of these deficiencies were acknowledged by the domestic authorities on several occasions.

179. The Court considers that the facts of the present case show that during the investigation, until December 2004, the State authorities were more preoccupied with proving the lack of involvement of high-level State officials in the case than by discovering the truth about the circumstances of the disappearance and death of the applicant's husband.

180. In the light of these considerations, the Court concludes that there has been a procedural violation of Article 2.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

1. The parties' submissions

181. The applicant maintained that the atmosphere of fear and uncertainty, and the incomplete and contradictory information provided during the investigation, had forced her to leave the country and caused her suffering, in breach of Article 3 of the Convention, which provides:

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

182. The applicant submitted that the contradictory statements about the identity of the Tarashcha body, and the attitude of the investigative authorities towards her and the deceased's mother, had created an atmosphere of fear and uncertainty. The applicant maintained that she had only been convinced that the body found in Tarashcha belonged to her husband in March 2003 (see paragraph 70 above). She alleged that the further developments in the investigation, namely the death of a Mr G., a former police officer and possible witness in the **Gongadze** case, and the release of Lieutenant General Pukach, who had been suspected of organising the surveillance of her husband, had made her despair of any effective outcome of the investigation.

183. The Government accepted that the applicant had suffered as a result of her husband's murder, but disagreed that a breach of Article 3 of the Convention had been caused by the conduct of any State authority.

2. The Court's assessment

184. The Court recalls that Article 3 has previously been relied on in a number of similar cases against Turkey in which the applicants complained that they had suffered inhuman and degrading treatment in the context of the death or disappearance of their next of kin. Whether a family member of a “disappeared person” is a victim of treatment contrary to Article 3 will depend on the existence of special factors which give the suffering of the relative a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of serious violations of human rights. Relevant elements will include the proximity of the family tie, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family members in the attempts to obtain information about the disappeared person and the way in which the

authorities responded to those enquiries (see *Orhan v. Turkey*, no. 25656/94, § 358, 18 June 2002).

185. In the instant case the Court notes that the applicant's husband disappeared in September 2000 and that, according to the applicant, it was only in March 2003 that she received convincing information that the decapitated body, which had been found in Tarashcha in November 2000, was that of her husband. In the meantime, the applicant had received numerous contradictory statements from the authorities about his fate. In particular, in December 2000 the Prosecutor General announced that the Tarashcha corpse was not Mr Gongadze; on 10 January 2001 the Prosecutor General publicly announced that it was highly probable that the corpse was Mr Gongadze and, at the same time, announced that there were witnesses who had seen Mr Gongadze alive after his disappearance; three days later the GPO informed the applicant that there was no evidence that the corpse was Mr Gongadze, and a fortnight later the applicant was recognised as an aggrieved party because there was enough evidence to believe that the Tarashcha corpse was her late husband. This uncertain situation continued, with the result that, having raised doubts as to the identity of the Tarashcha corpse, and therefore the fate of the applicant's husband, the State authorities, at the same time, constantly refused to grant the applicant full access to the relevant materials in the case file. Only in August 2005 was the applicant allowed access to the file. In September 2005 the GPO announced that the latest DNA test conducted in Germany proved that the body found in Tarashcha was that of the applicant's husband.

186. The Court finds that the attitude of the investigating authorities towards the applicant and her family clearly caused her serious suffering which amounted to degrading treatment contrary to Article 3. It concludes, therefore, that there has been a violation of this provision.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

187. The applicant complained of a lack of effective remedies and invoked Article 13 of the Convention, which provides:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

1. The parties' submissions

188. The Government stated that the Code of Criminal Procedure provided an aggrieved party with the possibility of lodging a civil claim for compensation in respect of pecuniary and non-pecuniary damage incurred as a result of a crime, but the applicant had not pursued this channel. Moreover, the Government stressed that the investigation into the death of Mr Gongadze had been sufficiently effective. They maintained that the Code of Criminal Procedure provided rights for an aggrieved party to join the criminal proceedings, which the applicant had enjoyed. In so far as the complaint was based on the refusal of full access to the criminal case file, such a restriction had been justified in the interests of the confidentiality and effectiveness of the investigation.

189. The applicant disagreed, maintaining her claim that there was no effective remedy for her complaints under Articles 2 and 3 of the Convention.

2. The Court's assessment

190. The Court reiterates that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an arguable complaint under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law. In particular, its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State.

191. Given the fundamental importance of the right to the protection of life, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life, including effective access for the complainant to the investigation procedure (see *Kiliç v. Turkey*, cited above, § 91).

192. In the present case, it is not in dispute that the authorities had an obligation to carry out an effective investigation into the circumstances of the killing of the applicant's husband. For the reasons set out above (see paragraphs 166-70, 178-79 and 185), for more than four years no effective criminal investigation can be considered to have been conducted in accordance with Article 13, the requirements of which are broader than the obligation to investigate imposed by Article 2. The Court therefore finds that the applicant was denied an effective remedy in respect of the death of her husband.

193. Furthermore, with regard to the compensatory remedy relied on by the Government, the Court observes that a claim for compensation for criminal injury can be lodged under the Code of Criminal Procedure. However, such a claim must be lodged against a particular person or persons. The remedy becomes futile if the offender is not identified or prosecuted. Therefore the absence of any outcome in the main criminal proceedings also prevented the applicant from effective recourse to this remedy, since in practice a civil claim for compensation would not have been examined prior to a final determination of the facts in the pending criminal proceedings.

194. Accordingly, there has been a violation of Article 13 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

195. 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

196. The applicant claimed a global sum of EUR 100,000 in respect of pecuniary and non-pecuniary damage and costs and expenses.

197. The Government observed that this claim was not supported by any documents, but left the decision on the amount of just satisfaction to the Court's discretion.

198. The Court has found that the failure of the authorities to protect the life of the applicant's husband and the ineffective investigation into his death give rise to violations of Articles 2, 3, and

13. It considers that an award of compensation should be made in her favour, having regard to the gravity of the breaches in question. Accordingly, it awards the amount claimed in full.

B. Default interest

199. The Court considers it appropriate that the default interest 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 UNANIMOUSLY

1. *Dismisses* the Government's preliminary objection;
2. *Holds* that there has been a violation of Article 2 of the Convention, both in its substantive and procedural aspects;
3. *Holds* that there has been a violation of Article 3 of the Convention;
4. *Holds* that there has been a violation of Article 13 of the Convention;
5. *Holds*
 - (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 100,000 (one hundred thousand euros) in respect of pecuniary and non-pecuniary damage, as well as costs and expenses, to be converted into US dollars at the rate applicable at the date of settlement, plus any tax that may be chargeable;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

Done in English, and notified in writing on 8 November 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. Dollé J.-P. Costa
Registrar President

¹ cf. *Melnychenko v. Ukraine*, no. 17707/02, § 15, judgment of 19 October 2004

GONGADZE v. UKRAINE JUDGMENT

GONGADZE v. UKRAINE JUDGMENT