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

SECOND SECTION

# CASE OF LAKATOŠ AND OTHERS v. SERBIA

*(Application no. 3363/08)*

JUDGMENT

STRASBOURG

7 January 2014

*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 Lakatoš and Others v. Serbia,**

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

Guido Raimondi, *President,*
Işıl Karakaş,
Dragoljub Popović,
András Sajó,
Nebojša Vučinić,
Helen Keller,
Egidijus Kūris, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 3 December 2013,

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

# PROCEDURE

1. The case originated in an application (no. 3363/08) against Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by five Serbian nationals, Mr Slavko Lakatoš ("the first applicant"), Mr Lajči Dimović ("the second applicant"), Mr Ivica Dimović ("the third applicant"), Mr Maćaš Dimović ("the fourth applicant"), Ms Ramajana Ametov ("the fifth applicant"), on 7 January 2008.

2. The applicants were represented by Mr V. Juhas Đurić, a lawyer practising in Subotica ("VJĐ"). The Serbian Government ("the Government") were initially represented by their former Agent, Mr S. Carić, and subsequently by their Acting Agent, Ms Vanja Rodić.

3. The applicants alleged that they had suffered numerous violations of Articles 3, 5, 6 § 2 and 8 of the Convention, all in the criminal justice context.

4. On 22 September 2010 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

5. The first, second, third, fourth and fifth applicants were born in 1974, 1980, 1980, 1957 and 1979 respectively. The third applicant lived in Hajdukovo, whilst all other applicants lived in Subotica.

### A. The underlying events and the subsequent criminal proceedings

6. In the course of 2006 and 2007 numerous robberies took place in the municipalities of Bačka Palanka, Bačka Topola, Bački Petrovac, Bečej, Kula, Novi Sad, Odžaci, Senta, Sombor and Vrbas (in northern Serbia). The main targets were older persons and some of them suffered grievous bodily harm. One such robbery took place in Kucura, a village in the vicinity of Vrbas, on 5 November 2007 at about 8 p.m. Shortly thereafter a police patrol noticed what it deemed to be a suspicious vehicle near that village. Whilst they managed to arrest another person, PN, according to the Government, the first, second and third applicants escaped. The next morning the fourth and fifth applicants allegedly went to give them a lift back to Subotica. A police patrol, however, stopped them before they entered the town. All five applicants were then arrested and taken to the Novi Sad Police Station.

7. On 6 November 2007 the investigating judge ordered that DNA samples be taken from the applicants. Later on, the fifth applicant was released.

8. On 7 November 2007, in their separate reports to their superiors, the police officers involved in the above-described operation stated that the applicants had resisted arrest and/or tried to escape, which is why force had had to be used and the applicants had sustained some injuries. In particular, the first and third applicants had excoriations on their foreheads, the second applicant had "redness on his forehead (above his eyebrows) as well as around his right eye", and the fourth applicant had an "excoriation on the left side of his head (temporal bone)". Concerning the first and the third applicants, the reports noted that they were not provided with medical assistance since they never asked for any. Officer VD is also referred to as having been injured by the second applicant in the course of arrest.

9. On 8 November 2007 the first, second, third and fourth applicants were taken to the investigating judge. They complained, in the presence of the public prosecutor, of being beaten by the police during arrest and whilst in the Novi Sad Police Station. The investigating judge also noted the injuries sustained by the second and fourth applicants respectively. In particular, the second applicant's injuries included two excoriations and one laceration on the left rear side of his neck, while the fourth applicant's

injuries included bruises on his left shoulder and his face. With the authorisation of the investigating judge, the applicants' lawyer took photographs of their injuries. The fourth applicant was then released, whereas the first, second and third applicants were remanded in custody on suspicion of having committed numerous robberies and in view of the severity of the potential sentence and the nature of the crimes alleged (under Article 142 § 2 (5) of the Code of Criminal Procedure; see paragraph 38 below). The investigating judge stated that the crimes in question had all been committed in a similar manner, specifically that: (i) the assaults had occurred during the night; (ii) the victims were elderly people who had been living alone; (iii) overwhelming physical force had been used against them, resulting in some cases in serious bodily harm; and (iv) the victims had been left behind tied with ropes in their own homes.

10. On the same day the police held a press conference about this case. Reportedly, some of the highest-ranking officers at the Novi Sad Police Station referred to the applicants as members of a criminal group which had committed the said robberies. Also, the police apparently informed the journalists that the local population had been so alarmed that they had already started setting up "village guard units" (*seoske straže*) for their own protection (see *Građanski list*, a daily newspaper published in Novi Sad, 9 November 2007, p. 13). The photographs of the first, second, third and fourth applicants were released to the press.

11. Pursuant to an order of the investigating judge of 13 November 2007, the first, second and third applicants were medically examined on the same day. According to the medical report: (i) the first applicant had bruises and/or haematoma on the back of his head, left auricle, arms and legs; (ii) the second applicant on his forehead, left auricle, neck and legs; and (iii) the third applicant on his forehead, right shoulder, back and left foot. The fourth applicant did not attend the medical examination because he had apparently returned to Subotica. His injuries, however, were documented by the photos taken on 8 November 2007 and consisted of bruises and excoriations on his left shoulder, his back and his abdomen.

12. On 29 November 2007 the fifth applicant gave a statement to the investigating judge to the effect that she had been slapped in the face by the police upon arrest on 8 November 2007.

13. On 13 December 2007 the fourth and fifth applicants asked the investigating judge to inform them whether their DNA samples were still kept and, if so, to order their destruction.

14. On 29 February 2008 the public prosecutor issued an indictment. The first, second and third applicants, as well as PN, were charged with 14 robberies and 3 attempted robberies. The second applicant was also accused of causing grievous bodily harm with intent to resist arrest. On the same day the public prosecutor decided not to prosecute the fourth and fifth applicants.

15. On 11 June 2008, at the oral hearing held before the Novi Sad District Court, the third applicant stated, *inter alia*, that on 8 November 2007 he had shown his lawyer "the injuries sustained whilst in police custody in Novi Sad". He further recounted that in the course of arrest "no force had been used against him".

16. On 22 September 2008, pursuant to an order of the presiding judge, an additional medical report on the injuries sustained by the first, second and third applicants was produced. It stated that the injuries recorded on 13 November 2007 had been inflicted by "the repeated use of mechanical force". The possibility that they had been caused by a fall was ruled out. Concerning the time-line, the first, second, and third applicants' injuries would appear to have been sustained some three, seven and three days, respectively, prior to 13 November 2007. The report, however, stated in its introduction that there were no clear-cut stages in the temporal evolution of a haematoma. Lastly, the report considered the photographs taken of the first and second applicants' injuries and concluded, *inter alia*, that there were some additional injuries recorded on 13 November 2007 compared to those shown on the photographs. Regarding the third applicant, there were discrepancies between the two. Most injuries, however, were registered on both occasions and some additional injuries were recorded on 13 November 2007.

17. On 10 July 2009 the Novi Sad District Court found the first and the third applicants guilty of 13 robberies and 4 attempted robberies and sentenced them to 14 years and 6 months' imprisonment respectively. It found the second applicant guilty of 13 robberies, 4 attempted robberies and causing grievous bodily harm to a police officer with intent to resist arrest and sentenced him to 15 years' imprisonment.

18. On 1 March 2011 the Novi Sad Appeals Court quashed the first, second and third applicants' convictions and ordered a retrial. In its reasoning, the court noted various procedural deficiencies and described the impugned judgement's reasoning as "incomprehensible". The first, second and third applicants' detention, however, was extended based on the same grounds as before.

19. On 11 November 2011 the, now renamed, Novi Sad High Court again found the first, second and third applicants guilty and imposed the same sentences as earlier. In its reasoning, it referred to, *inter alia*, the medical expert's findings of 13 November 2007 and 22 September 2008, as well as the statements given by the police officers involved, and concluded that the injuries sustained by the first, second and third applicants had been caused due to their attempts to resist arrest and/or escape from the police. The High Court lastly noted that following their admission to the District Prison on 9 November 2007, as regards the first and third applicants, and 12 November 2007, as regards the second applicant, the prison doctor had: (i) found no injuries concerning the first applicant; (ii) stated that the second

applicant had been suffering from anxiety; and (iii) confirmed that the third applicant had had haematomas on his back.

20. On 4 June 2012 this judgment was upheld by the Appeals Court.

21. On 9 August 2012 the first, second and third applicants filed an appeal with the Constitutional Court, alleging numerous substantive and procedural violations. These proceedings are still pending.

22. On 28 December 2012 the first, second and third applicants were released from further serving their sentences in view of the general amnesty granted by the Serbian Parliament.

### B. Additional facts concerning the pre-trial detention

23. On 5 December 2007, 4 February, 4 March, 1 April, 30 May, 30 July, 1 October and 1 December 2008, 30 January, 1 April and 1 June 2009 the Novi Sad District Court extended the pre-trial detention of the first, second and third applicants in view of the severity of the potential sentence and the nature of the crime alleged. The legal basis and the reasoning in all these decisions, in so far as relevant, corresponded to the reasoning and legal basis of the detention order issued by the investigating judge on 8 November 2007 (see paragraphs 9 above and 38 below).

24. After their appeals had been rejected by the Supreme Court on the same basis, on 18 June 2008 and 6 July 2009 the third applicant lodged two separate constitutional appeals. In its decisions of 25 December 2008 and 8 October 2009, respectively, the Constitutional Court considered, among other things, whether the grounds and reasons for his pre-trial detention satisfied the requirements of a constitutional right equivalent to Article 5 of the Convention and decided that they did. In its decision of 25 December 2008, in the context of the constitutional appeal's timeliness, the Constitutional Court examined the detention orders issued between 8 November 2007 and 30 May 2008 and concluded that they should be considered jointly (given the "existence of temporal continuity" and the fact that the third applicant had still been detained). The Constitutional Court's decision of 8 October 2009 concerned the detention order of 1 June 2009.

25. On 9 June 2011 the Constitutional Court rejected the first, second and third applicants' appeal regarding the length of their detention following the adoption of the District Court's decision of 10 July 2009.

### C. Other relevant facts

26. On 31 July 2009 PN filed a criminal complaint alleging police abuse. On 6 December 2010 the public prosecutor rejected this complaint for lack of evidence that a crime had been committed.

27. On 31 December 2010 the Novi Sad High Court informed the Government that the fourth and fifth applicants' DNA samples remained

stored in the Novi Sad Forensic Medicine Institute. It further noted that there was no specific legislation on the storage, usage and destruction of DNA material. No such material could therefore be destroyed in the absence of a court decision to this effect.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. The Constitution of the Republic of Serbia (*Ustav Republike Srbije*; published in the Official Gazette of the Republic of Serbia – OG RS – no. 98/06)

28. Article 16 § 2 of the Constitution read as follows:

"... [R]atified international treaties are an integral part of the [Serbian] legal system ... and shall be directly applicable ..."

29. Article 18 of the Constitution read as follows:

"Human and minority rights guaranteed by the Constitution shall be implemented directly.

The Constitution shall guarantee ... the direct implementation of human and minority rights secured by the generally accepted rules of international law ... [and] ... ratified international treaties ... Legislation may prescribe the manner of exercising these rights only if so explicitly stated in the Constitution or if necessary for the enjoyment of a specific right owing to its nature, it being understood that such legislation may not under any circumstances influence the substance of the guaranteed right in question.

Provisions on human and minority rights shall be interpreted ... pursuant to valid international standards on human and minority rights, as well as the practice of international institutions which supervise their implementation."

### B. The Constitutional Court Act (*Zakon o Ustavnom sudu*, published in OG RS no. 109/07, amendments published in OG RS no. 99/11)

30. Article 87 provides that should the Constitutional Court rule in favour of a group of people on a given issue, that decision will also be applicable to other people in the same legal situation, even if they have personally never filed a constitutional appeal on the issue concerned.

### C. The Criminal Code (*Krivični zakonik*, published in OG RS no. 85/05, amendments published in OG RS nos. 88/05, 107/05, 72/09 and 111/09)

31. Article 137 of the Code reads as follows:

"1. Whoever ill-treats another or treats another in a humiliating and degrading manner shall be punished with imprisonment of up to one year.

2. Whoever causes severe pain or suffering to another for such purposes as obtaining from him or a third person a confession, a statement or information, or intimidating or unlawfully punishing him or a third person ... shall be punished with imprisonment from six months to five years.

3. If the offence specified in paragraphs 1 and 2 above is committed by an official acting in an official capacity, the official concerned shall be punished for the offence specified in paragraph 1 with imprisonment from three months to three years, and for the offence specified in paragraph 2 with imprisonment from one to eight years."

### D. The Code of Criminal Procedure (*Zakonik o krivičnom postupku*, published in the Official Gazette of the Federal Republic of Yugoslavia – OG FRY – no. 70/01, amendments published in OG FRY no. 68/02 and in OG RS nos. 58/04, 85/05, 115/05, 49/07, 122/08, 20/09, 72/09 and 76/10)

32. Article 3 provides, *inter alia*, that all State bodies and agencies shall respect the right of all persons to be presumed innocent unless and until their guilt has been established by a final court decision.

33. Article 5 provided, *inter alia*, that a detained person had to be informed of his or her right to be examined by a medical doctor "without delay". This duty applied to the police as well as the investigating judge (see *Komentar Zakonika o krivičnom postupku*, Prof. dr Tihomir Vasiljević and Prof. dr Momčilo Grubač, Justinijan, Belgrade, 2005, p. 35). Article 5 was somewhat changed with the entry into force of the amendments to the Code of Criminal Procedure published in OG RS 72/09.

34. Article 12 prohibits, *inter alia*, any and all violence aimed at extorting a confession or a statement from the suspect and/or the accused, or indeed any other person involved in the proceedings.

35. Articles 19, 20, 46 and 235, read in conjunction, provide, *inter alia*, that formal criminal proceedings (*krivični postupak*) may be instituted at the request of an authorised prosecutor. In respect of crimes subject to prosecution *ex officio*, including ill-treatment and torture, the authorised prosecutor is the public prosecutor personally. The latter's authority to decide whether to press charges, however, is bound by the principle of legality which requires that he must act whenever there is a reasonable suspicion that a crime subject to prosecution *ex officio* has been committed. It makes no difference whether the public prosecutor has learnt of the incident from a criminal complaint filed by the victim or another person, or indeed even if he has only heard rumours to that effect.

36. Article 133 provides, *inter alia*, that the defendant's participation in the criminal proceedings may be secured by means of sending "summonses, his forcible production in court, the issuance of a prohibition of his leaving his place of residence, [as well as] through the imposition of bail or detention". The competent court shall not apply a more severe measure, in order to secure the defendant presence, if a less severe measure may achieve

the same purpose. Also, the measures shall be vacated *ex officio* when the reasons for their application have ceased to exist, or shall be replaced with other less severe measures once the conditions are met.

37. Article 137 provides, *inter alia*, that the defendant who is to be or has already been detained based only on circumstances indicating that he will abscond may remain at large or may be released providing that he personally, or another person on his behalf, gives bail guaranteeing that he shall not abscond until the conclusion of the criminal proceedings and the defendant himself promises that he will not hide or change his place of residence without permission.

38. Article 142 § 1 (5) provides that a person may be remanded in custody on reasonable suspicion of having committed a crime if the potential sentence is imprisonment of more than ten years and if this is justified due to particularly serious circumstances regarding the crime in question (*ako je to opravdano zbog posebno teških okolnosti krivičnog dela*). Up until September 2009, which is when the amendments to the Code of Criminal Procedure published in OG RS 72/09 entered into force, Article 142 § 2 (5) provided that a person may be remanded in custody on reasonable suspicion of having committed a crime if the potential sentence is imprisonment of more than ten years and if this is justified due to the way in which the crime in question had been perpetrated or due to other particularly serious circumstances regarding the crime (*ako je to opravdano zbog načina izvršenja ili drugih posebno teških okolnosti krivičnog dela)*.

39. Article 224 provides, *inter alia*, that a criminal complaint may be filed in writing or orally with the competent public prosecutor, as well as that a court of law, should it receive a complaint of this sort, shall immediately forward it to the competent public prosecutor.

40. Article 61 provides that should the public prosecutor decide that there are no bases to press charges, he must inform the victim of this decision, who shall then have the right to take over the prosecution of the case on his own behalf, in the capacity of a "subsidiary prosecutor".

41. Article 228 § 7 provides, *inter alia*, that the suspect shall be entitled to request that his medical examination be ordered by the investigating judge. The investigating judge's decision to this effect, as well as the medical doctor's subsequent opinion, shall be included in the case file.

### E. The Police Act (*Zakon o policiji*, published in OG RS no. 101/05)

42. Article 86 provides that, whenever force has been used, the police officer concerned shall submit a written report to his superior within 24 hours. The latter shall then establish whether the force used was justified and lawful.

### F. The Obligations Act (*Zakon o obligacionim odnosima*, published in Official Gazette of the Socialist Federal Republic of Yugoslavia – OG SFRY – no. 29/78, amendments published in OG SFRY nos. 39/85, 45/89 and 57/89, and in OG FRY no. 31/93)

43. Articles 157, 199 and 200 of the Obligations Act, taken together, provide, *inter alia*, that anyone who has suffered fear, physical pain or mental anguish as a consequence of a breach of his reputation, personal integrity, liberty or of his other personal rights (*prava ličnosti*) shall be entitled to seek injunctive relief, sue for financial compensation and request other forms of redress "which might be capable" of affording adequate non-pecuniary satisfaction (see, for instance, judgment Pbr. 3879/03 adopted by the First Municipal Court in Belgrade on 29 April 2004, which has, in its relevant part, been upheld by the Supreme Court on 25 May 2006, awarding compensation for, *inter alia*, a breach of the presumption of innocence under Article 200; see also judgment P.br 2939/01 rendered by the Municipal Court in Šabac on 20 February 2002, which was ultimately confirmed by the Supreme Court on 21 April 2004, ordering the cessation of discriminatory treatment and the publication of an apology under Articles 157 and 199).

44. Article 172 § 1 provides that a legal entity (*pravno lice*), which includes the State, shall be liable for any damage caused by one of "its bodies" to a "third person". This provision includes State liability for any judicial or police misconduct and/or malfeasance (see, for example, the judgments of the Supreme Court of 10 November 2002, Rev. 6203/02, and 10 April 2003, Rev. no. 1118/03).

### G. The Public Information Act (*Zakon o javnom informisanju*, published in OG RS no. 43/03, amendments published in OG RS nos. 61/05, 71/09, 89/10 and 41/11)

45. Article 3 provides, *inter alia*, that journalists and editors shall check the origin and veracity of any information before making it public.

46. Article 37 provides, *inter alia*, that no one may be described as a perpetrator of a crime prior to the adoption of a final court judgment to this effect.

47. Article 84 provides that the State shall be liable for any and all damage caused by the publication of untrue or incomplete information provided by a Government body.

48. Articles 85 and 86 provide that a civil claim based on Article 84 must be filed within a period of six months following the publication of the information in question, and that proceedings instituted thereby shall be conducted with urgency.

### H. The Personal Data Protection Act (*Zakon o zaštiti podataka o ličnosti*, published in OG RS no. 97/08, amendments published in OG RS nos. 104/08, 68/12 and 107/12)

49. This Act regulates various personal data protection issues, including the administrative and judicial review mechanism at the disposal of persons who believe that their rights have been violated.

50. Article 13 provides, in particular, that personal data may, *inter alia*, be collected and processed by the State without the consent of the person concerned if this is necessary for the purposes of a criminal investigation or prosecution and if it is done in accordance with the relevant legislation.

### I. Other domestic case-law

51. On 21 February 2006 the Novi Sad Municipal Court, *inter alia*, recognised alleged breaches of Articles 5 and 8 of the Convention, and ordered the respondent State to pay the plaintiff a specified amount of compensation (Pbr. 1848/05). On 8 November 2006 the Novi Sad District Court upheld this judgment and increased the compensation awarded (Gž.br. 3293/06).

52. There is also domestic case-law indicating that a plaintiff complaining about the lawfulness of his detention, as well as the related issues concerning his private life, including the unlawful taking of photographs, had been able to obtain redress before the domestic courts. Specifically, on 21 February 2006 the Novi Sad Municipal Court, *inter alia*, recognised the alleged breaches of Articles 5 and 8 of the Convention, and ordered the respondent State to pay the plaintiff a specified amount of compensation (Pbr. 1848/05). On 8 November 2006 the Novi Sad District Court upheld this judgment and increased the compensation awarded (Gž.br. 3293/06).

## III. RELEVANT INTERNATIONAL REPORTS

### A. Report to the Government of Serbia and Montenegro on the visit to Serbia and Montenegro carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT") from 16 to 28 September 2004, made public on 18 May 2006

53. The relevant sections of this report read as follows:

> "203. The CPT's delegation heard numerous allegations of deliberate physical ill-treatment of persons deprived of their liberty by *the police* throughout Serbia. Some of the allegations concerned ill-treatment at the time of or immediately following apprehension, whereas others related to ill-treatment during police questioning and,

more particularly, during interrogation by officers of the criminal police. Many detainees interviewed by the delegation alleged that they had been slapped, punched, kicked or beaten with batons during police custody. A number of allegations received included recent accounts of beatings on the palms of the hands or soles of the feet, the placing of a plastic bag over the detainee's head to cause temporary asphyxiation, or the infliction of electric shocks on different parts of the body. The ill-treatment alleged was in several cases of such a severity that it could well be considered to amount to torture.

... Further, in almost all of the police stations visited in Belgrade, the delegation found baseball bats and similar non-standard and unlabelled objects in offices used for interrogation purposes.

204. The information at the CPT's disposal suggests that persons suspected of a criminal offence run a significant risk of being ill-treated by the police in Serbia at the time of their apprehension and during the first hours in police custody. The number and severity of allegations of police ill-treatment received calls for urgent action by the national authorities ...

206. As regards fundamental safeguards against ill-treatment of persons deprived of their liberty by the police (e.g. the right to have the fact of one's detention notified to a close relative or third party; the rights of access to a lawyer and a doctor), at present their practical implementation leaves a lot to be desired; the CPT has made detailed recommendations in this area ..."

## B. Report to the Government of Serbia on the visit to Serbia carried out by the CPT from 19 to 29 November 2007, made public on 14 January 2009

54. The relevant sections of this report read as follows:

"13. The number of allegations of ill-treatment by the police heard by the CPT's delegation in the course of the 2007 visit was lower, and the ill-treatment alleged less severe, than during the Committee's first periodic visit in 2004.

That said, the delegation did receive a number of allegations of physical ill-treatment (consisting of punches, kicks, truncheon blows, blows with a thick book or with a wet rolled newspaper, and handcuffing to fixed objects in a hyper-extended position) during questioning by criminal police officers, in order to obtain confessions or other information. It would appear that juveniles suspected of serious criminal offences are particularly exposed to physical violence. Further, the delegation received some accounts of verbal abuse and threats during questioning ...

14. Most of the allegations of ill-treatment related to periods some time before the delegation's visit; consequently, any injuries which might have been caused by the ill-treatment alleged would almost certainly have healed in the meantime ...

15. It should also be noted that, in several police stations visited (e.g. in Bor, Inđija, Kovin, Petrovac na Mlavi, Negotin and Ruma), the delegation again found – in offices used for police interviews – various non-standard issue items (such as baseball bats, iron rods, wooden sticks, thick metal cables, etc). **The CPT reiterates its recommendation that any non-standard issue objects be immediately removed from all police premises where persons may be held or questioned. Any such items seized during criminal investigations should be entered in a separate**

**register, properly labelled (identifying the case to which they refer) and kept in a dedicated store.**

...

19. As stressed by the CPT in the report on its first visit to Serbia, it is axiomatic that judges must take appropriate action when there are indications that ill-treatment by the police may have occurred. In this connection, it should be noted that some persons interviewed during the 2007 visit alleged that the investigating judges before whom they had been brought with a view to being remanded in custody ignored their complaints of police misconduct ..."

# THE LAW

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

55. All applicants complained under Article 3 that they had been ill-treated by the police and that there had been no effective official investigation into their ill-treatment.

56. Article 3 of the Convention reads as follows:

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

### A. Admissibility

#### *1. As regards the first, second and third applicants*

57. The Government maintained that the first, second and third applicants had failed to exhaust the available criminal remedies. The Court considers that this objection goes to the very heart of the question whether the said applicants had suffered a procedural violation of Article 3 and would more appropriately be examined at the merits stage. It therefore decides to join the objection to the merits of the applicants' complaints. The first, second and third applicants' complaints are further not manifestly ill-founded, within the meaning of Article 35 § 3 (a) of the Convention, and are not inadmissible on any other ground. They must therefore be declared admissible.

#### *2. As regards the fourth applicant*

58. On 9 December 2009 the fourth applicant died.

59. On 11 January 2011 his representative informed the Court of this fact, and indicated that Ms Silvana Dimović, the fourth applicant's daughter, wished to maintain the proceedings brought by her father.

60. The Government made no comment in this regard.

61. The Court recalls that in a number of cases in which an applicant died in the course of the proceedings it has taken into account the statements of the applicant's heirs or of close family members expressing the wish to pursue the proceedings before the Court (see *Karner v. Austria*, no. 40016/98, § 22, ECHR 2003-IX, with further references).

62. In the circumstances of the present case, the Court finds that Ms Silvana Dimović has standing to proceed in her father's stead (see, *mutatis mutandis*, among many other authorities and specifically in the context of Article 3, *Sulejmanov v. the former Yugoslav Republic of Macedonia* (dec.), no. 69875/01, 18 September 2006). The Court shall, however, continue referring to the latter as "the fourth applicant" for reasons of convenience (see *Raimondo v. Italy*, judgment of 22 February 1994, § 2. Series A no. 281-A).

63. The Government lastly maintained that the fourth applicant had failed to exhaust the available criminal remedies. The Court considers that, just like in respect of the first, second and third applicants, this objection goes to the very heart of the question whether the fourth applicant had suffered a procedural violation of Article 3 and would more appropriately be examined at the merits stage. It therefore decides to join the objection to the merits of the fourth applicant's complaint. The fourth applicant's complaint is also not manifestly ill-founded, within the meaning of Article 35 § 3 (a) of the Convention, and is not inadmissible on any other ground. It must therefore be declared admissible.

*3. As regards the fifth applicant*

64. The Court notes that there is nothing in the case file, except for the fifth applicant's own statement to the investigating judge of 29 November 2007 to support her allegation that she had been slapped in the face by the police upon arrest. It follows that the fifth applicant's complaints under Article 3, substantive and procedural, are unsubstantiated and must, as such, be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

## B. Merits

*1. The parties' submissions*

**(a) The Government's submissions**

*(i) The substantive aspect*

65. The Government maintained that the police had had no choice but to use force since the first, second, third and fourth applicants had resisted arrest and/or tried to escape. In any event, any injuries suffered by them had not reached the threshold of torture, inhuman and/or degrading treatment within the meaning of Article 3. Also, the said applicants' statements as to

when exactly the alleged abuse had occurred, upon arrest or subsequently, had been inconsistent and the third applicant had even stated that he had not been abused during arrest. There were likewise inconsistencies in their statements concerning the duration of the alleged abuse. Only the first applicant admitted before the police to having committed the crimes in question, whilst the second and third applicants did not do so. It is therefore difficult to maintain that the police had used force in order to elicit their confessions. The medical report of 22 September 2008 also concluded that the injuries sustained by the first, second and third applicants were inflicted between 3 and 7 days prior to 13 November 2007. Finally, the Government recalled that the fourth applicant had failed to attend the medical examination on 13 November 2007.

*(ii) The procedural aspect*

66. The Government noted that the first, second, third and fourth applicants had never lodged written criminal complaints against the officers in question. Had they done so, they could have, if rejected, taken over the prosecution of their cases in the capacity of subsidiary prosecutors. In addition or in the alternative, the first, second, third and fourth applicants should have filed written requests with the investigating judge, seeking that the minutes of the hearing held on 8 November 2007, referring to their alleged injuries, be forwarded to the competent public prosecutor.

67. The Government also argued that although PN's criminal complaint concerning the same incident had been rejected, this did not mean that the public prosecutor would necessarily have come to the same conclusion concerning the other applicants. In any event, PN had never tried to take over the prosecution of his case in the capacity of a subsidiary prosecutor and had thus deprived himself of the opportunity to have his claims examined by the courts.

68. Finally, the Government maintained that it could not be said that the national authorities had remained passive in the face of allegations of ill-treatment. Specifically, on 13 November 2007 the first, second and third applicants were medically examined based on an order issued by the investigating judge. Also, in the subsequent criminal proceedings brought against the said three applicants the court heard additional expert testimony regarding the injuries in question and obtained supplementary medical reports. Ultimately, the courts, having found the three applicants guilty, opined that their injuries had been sustained as a consequence of their attempts to resist arrest and/or escape from the police.

**(b) The applicants' submissions**

69. The first, second, third and fourth applicants maintained that by informing the investigating judge, as well as the public prosecutor, of their abuse on 8 November 2007 they had effectively lodged a criminal

complaint within the meaning of the Code of Criminal Procedure. This complaint, however, was never processed by the competent authorities.

70. As for the investigating judges' order to medically examine the first, second and third applicants, this was issued too late and hindered rather than facilitated the proper establishment of the relevant facts. According to Article 5 of the Code of Criminal Procedure the said applicants should have been examined on 8 November 2007, at the latest. In any event, it was obvious that the first, second, third and fourth applicants had been ill-treated during arrest and/or while in the Novi Sad Police Station. The applicants' statements given to the investigating judge, the relevant police and medical reports, as well as the photographs taken on 8 November 2007, all provided substantiation to this effect.

71. Lastly, the first applicant contested the authenticity of the minutes documenting his alleged confessions.

*2. The Court's assessment*

**(a) The substantive aspect**

72. The Court reiterates that Article 3 of the Convention must be regarded as one of the most fundamental provisions of the Convention and as enshrining core values of the democratic societies making up the Council of Europe (see *Pretty v. the United Kingdom,* no. 2346/02, § 49, ECHR 2002-III). In contrast to the other provisions in the Convention, it is cast in absolute terms, without exception or proviso, or the possibility of derogation under Article 15 of the Convention (see, *inter alia*, *Chahal v. the United Kingdom*, judgment of 15 November 1996, § 79, *Reports of Judgments and Decisions* 1996-V).

73. According to the Court's settled case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, among other authorities, *Gäfgen v. Germany* [GC], no. 22978/05, § 88, ECHR 2010; *Price v. the United Kingdom,* no. 33394/96, § 24, ECHR 2001-VII; *Mouisel v. France*, no. 67263/01, § 37, ECHR 2002-IX; and *Jalloh v. Germany* [GC], no. 54810/00, § 67, 11 July 2006).

74. Treatment has been held by the Court to be "inhuman" because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering (see *Labita v. Italy* [GC], no. 26772/95, § 120, ECHR 2000-IV). Treatment has been considered "degrading" when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance

(see *Hurtado v. Switzerland*, 28 January 1994, opinion of the Commission, § 67, Series A no. 280, and *Wieser v. Austria*, no. 2293/03, § 36, 22 February 2007). Constant mental anxiety caused by the threat of physical violence and the anticipation of such, has likewise been deemed to go beyond the threshold of Article 3 (see *Rodić and Others v. Bosnia and Herzegovina*, no. 22893/05, § 73, 27 May 2008).

75. The Court emphasises that, in respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention. The requirements of an investigation and the undeniable difficulties inherent in the fight against crime cannot justify placing limits on the protection to be afforded in respect of the physical integrity of individuals (*Ribitsch v. Austria*, 4 December 1995, § 38, Series A no. 336; *Tomasi v. France*, 27 August 1992, § 115, Series A no. 241-A).

76. Persons in custody are in a vulnerable position and the authorities are under an obligation to account for their treatment. Where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 of the Convention (see, among many other authorities, *Selmouni v. France* [GC], no. 25803/94, § 87, ECHR 1999-V). While it is not, in principle, the Court's task to substitute its own assessment of the facts for that of the domestic courts, the Court is nevertheless not bound by the domestic courts' findings in this regard (see, for example, *Ribitsch, cited above,* § 32). In assessing evidence, the Court has generally applied the standard of proof "beyond reasonable doubt" (see *Ireland v. the United Kingdom*, 18 January 1978, § 161, Series A no. 25). However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see, for example, *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII).

77. Turning to the present case, the Court notes that the injuries sustained by the first, second and third applicants' have been documented by the minutes prepared and the photographs taken with the consent of the investigating judge on 8 November 2007, the results of the medical examination of 13 December 2007, and the findings of the medical report of 22 September 2008 (see paragraphs 9, 11 and 16 above). The issue that hence remains to be resolved is the time of their infliction. In this regard, even assuming that the applicants had indeed resisted arrest or tried to escape as argued by the Government and thus sustained injuries, the Court is of the opinion that this alone cannot refute the allegation that the first, second and third applicants had indeed been subjected to abuse whilst in police custody. Specifically, there were conspicuously fewer injuries referred to in the police officers' reports to their superiors of 7 November

2007 compared to those established in the report based on the first, second and third applicants' medical examination carried out on 13 December 2007 (see paragraphs 8, 11 and 16 above). The medical report of 22 September 2008 also essentially confirmed the findings of this examination, as well as the existence of the injuries photographed on 8 November 2007 (see paragraph 16 above). Similarly, regarding the fourth applicant, although he was not medically examined on 13 November 2007, or thereafter, the minutes prepared by the investigating judge and the photographs taken on 8 November 2007, whose authenticity was never called into question, had likewise documented additional injuries compared to the ones listed in the relevant police report of 7 November 2007 (see paragraphs 8 and 9 above).

78. Since the Government have offered no explanation whatsoever for the discrepancy between the injuries acknowledged by the police on 7 November 2007 and those established subsequently, and there being no credible suggestion that any of these injuries, which had clearly reached the Article 3 threshold, might have been sustained prior to the events of 6 November 2007, the Court cannot but find that there has been a violation of Article 3 of the Convention on account of the inhuman and degrading treatment suffered by the first, second, third and fourth applicants, respectively.

**(b) The procedural aspect**

79. The Court reiterates that where a person makes a credible assertion that he has suffered treatment contrary to Article 3 at the hands of State agents, that provision, read in conjunction with the general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation (see, among many authorities, *Labita*, cited above, § 131). Whatever the method of investigation, the authorities must act as soon as an official complaint has been lodged.

80. Even when, strictly speaking, no complaint has been made, an investigation must be started if there are sufficiently clear indications that ill-treatment has been used (see *Stanimirović v. Serbia*, no. 26088/06, § 39, 18 October 2011). Victims of alleged violations are not required to pursue the prosecution of officers suspected of ill-treatment on their own. This is a duty of the public prosecutor who is better equipped in that respect (*Stojnšek v. Slovenia*, no. 1926/03, § 79, 23 June 2009; and *Otašević v. Serbia*, no. 32198/07, § 25, 5 February 2013). If an applicant nonetheless takes over the prosecution and obtains a trial against officers accused of ill-treatment, those proceedings become an inherent part of the case and must be taken into account (see *V.D. v. Croatia*, no. 15526/10, § 53, 8 November 2011; *Butolen v. Slovenia*, no. 41356/08, § 70, 26 April 2012; and *Otašević*, cited above).

81. The Court has also held that the investigation should be capable of leading to the identification and punishment of those responsible. If not, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for State agents to abuse the rights of those within their control with virtual impunity (see *Labita*, cited above, § 131). The investigation must also be thorough: the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions. Furthermore, the investigation must be prompt and independent. Lastly, the investigation must afford a sufficient element of public scrutiny to secure accountability. While the degree of public scrutiny required may vary, the complainant must be afforded effective access to the investigatory procedure in all cases (see *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, § 137, ECHR 2004-IV).

82. In the present case, having already found a substantive violation of Article 3, the Court further notes that the first, second, third and fourth applicants had indeed complained of having been abused by the police. They did so before the investigating judge and in the presence of a public prosecutor, as well as the trial and appellate chambers (see paragraphs 9, 20 and 21 above). Yet, despite the Convention and the domestic law requiring that an allegation of this sort be examined *ex officio* (see paragraphs 80 and 35 above, in that order), no separate abuse-related investigation, aimed at the identification *and punishment* of those responsible, was ever instituted by the competent authorities (see *Hajnal v. Serbia*, no. 36937/06, § 99, 19 June 2012). The criminal case against the first, second and third applicants, wherein they raised their abuse complaints in order to have some of the impugned evidence excluded, was certainly not capable of the latter. It is thus clear that the aforementioned standards have not been satisfied. Accordingly, the Court dismisses the Government's preliminary objection and finds that there has been a violation of Article 3 of the Convention in respect of the first, second, third and fourth applicants.

## II. ALLEGED VIOLATIONS OF ARTICLE 5 OF THE CONVENTION

83. The first, second and third applicants complained under Article 5 that the severity of the potential sentence and the nature of the crime alleged could not, by themselves, justify their pre-trial detention up until their initial conviction on 10 July 2009.

84. The Court considers that these complaints fall to be examined under Article 5 § 3 of the Convention, which reads as follows:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by

law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

*1. Admissibility*

85. The Government noted that only the third applicant had made use of the constitutional appeal avenue. The first and second applicants had not therefore exhausted an available and effective domestic remedy. In support of their objection, the Government recalled that the Constitutional Court had found violations of the Constitution even in situations where the appeals had been lodged prior to 7 August 2008.

86. The first, second and third applicants maintained that the constitutional appeal could not be deemed as an effective domestic remedy. In any event, the third applicant had made use of this avenue which could potentially have benefited the first and second applicants had the Constitutional Court ruled in his favour (see paragraph 30 above).

87. The Court recalls that it has repeatedly held that a constitutional appeal should, in principle, be considered as an effective domestic remedy, within the meaning of Article 35 § 1 of the Convention, in respect of applications introduced against Serbia as of 7 August 2008 (see, for example, *Vinčić and Others v. Serbia*, nos. 44698/06 et seq., § 51, 1 December 2009; *Šorgić v. Serbia*, no. 34973/06, § 76, 3 November 2011; and *Hajnal*, cited above, § 122). It sees no reason to hold otherwise in the present case, and notes that the first, second and third applicants had introduced their application before the Court on 7 January 2008. The Government's objection in this regard must therefore be rejected, it being understood that it would also be inappropriate to divide the situation complained of regarding the extensions of the pre-trial detention prior to and after the said date (see, *mutatis mutandis*, *Belevitskiy v. Russia*, no. 72967/01, § 99, 1 March 2007; *Sizov v. Russia*, no. 33123/08, § 44, 15 March 2011; *Smirnova v. Russia*, nos. 46133/99 and 48183/99, § 66, ECHR 2003-IX (extracts); and *Idalov v. Russia* [GC], no. 5826/03, § 130, 22 May 2012; see also paragraph 24 above as regards the Constitutional Court's approach to this issue).

88. The Court further notes that the applicants' complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It also notes that they are not inadmissible on any other ground. They must therefore be declared admissible.

*2. Merits*

**(a) The parties' submissions**

89. The Government noted the duration of the first, second and third applicants' pre-trial detention and maintained that throughout this time there had been reasonable suspicion that they had committed the crimes in

question. These crimes were very serious and their perpetrators posed a great danger to society, as was confirmed by their ultimate conviction. Indeed, at their press conference, the police had stated that due to the series of robberies in question the local population had already started forming their own village guard units in order to provide protection. Finally, the Government argued that the detention orders impugned by the applicants contained specific and fully adequate reasoning.

90. The first, second and third applicants reaffirmed their complaints, adding that it is only the reasoning of the detentions orders that should be relevant for the Court's consideration, not other circumstances which had not been taken into account by the domestic courts or those referred to by the Government in their submissions. Also, alternatives to detention had never been considered domestically (see paragraph 36 above).

**(b) The Court's assessment**

91. As established in Neumeister v. Austria (judgment of 27 June 1968, § 4, Series A no. 8, p. 37), the second limb of Article 5 § 3 does not give judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him provisional release pending trial. Until conviction, he or she must be presumed innocent, and the purpose of the provision under consideration is essentially to require the individual's provisional release once continued detention ceases to be reasonable.

92. This form of detention can only be justified in a given case if there are specific indications of a genuine requirement of public interest which outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention (see, among other authorities, Kudła v. Poland [GC], no. 30210/96, § 110 et seq, ECHR 2000-XI).

93. The responsibility falls in the first place on the national judicial authorities to ensure that the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must examine all the facts arguing for or against the existence of an important public interest justifying a departure from the rule in Article 5 and must set them out in their decisions on the applications for release (see, for example, Weinsztal v. Poland, no. 43748/98, judgment of 30 May 2006, § 50). It is essentially on the basis of the reasons given in these decisions and of the facts mentioned by the applicant in his appeals, that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 (see Labita, cited above, § 152).

94. The persistence of reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the lawfulness of the continued detention, but with the lapse of time this no longer suffices and the Court must then establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were "relevant" and "sufficient", the Court must also be

satisfied that the national authorities displayed "special diligence" in the conduct of the proceedings at issue (see, amongst other authorities, Letellier v. France, judgment of 26 June 1991, Series A no. 207, § 35; Yağcı and Sargın v. Turkey, judgment of 8 June 1995, § 50, Series A no. 319-A).

95. Unlike the first limb of Article 5 § 3, there is no express requirement of "promptness" in its second limb. However, the required scrutiny, whether on application by the applicant or by the judge of his or her own motion, must take place with due expedition, in order to keep any unjustified deprivation of liberty to an acceptable minimum (see McKay v. the United Kingdom, cited above, § 46).

96. Whenever the danger of absconding can be avoided by bail or other guarantees, the accused must be released, it being incumbent on the national authorities to always duly consider such alternatives (see, mutatis mutandis, G.K. v. Poland, no. 38816/97, § 85, 20 January 2004), notwithstanding the fact that it cannot be required of them that the examination of bail takes place with any more speed than is demanded of the first automatic review of the applicant's detention (see McKay cited above, §47).

97. In the present case the first, second and third applicants remained in pre-trial detention for more than one year and eight months – from 6 November 2007 until 10 July 2009. The national courts extended their detention on eleven occasions, relying on the severity of the potential sentence and the nature of the crime alleged (see paragraphs 6, 9 and 24 above). While it is true that by reason of their particular gravity and public reaction to them certain offences may give rise to a social disturbance capable of justifying pre-trial detention, this ground can be regarded as relevant and sufficient only provided that it is based on facts capable of showing that the release of the accused would actually disturb public order (see Letellier, cited above, § 51). In the present case these conditions were not satisfied. The national courts assessed the need to continue the pre-trial detention from a rather abstract and formalistic point of view, taking into consideration only the severity of the potential sentence and the nature of the crime alleged. In their repetitive reasoning they never discussed the possible public reaction to the first, second and third applicants' release or even referred to the issue. This was only mentioned by the police at the press conference, but as such could not have been appealed within the criminal proceedings, as well as the Government in their observations before the Court, but even then merely in the context of the local population setting up village guard units before the said applicants' arrest.

98. In view of the foregoing, there has been a violation of Article 5 § 3 of the Convention in respect of the first, second and third applicants.

## III. ALLEGED VIOLATIONS OF ARTICLES 6 § 2 AND 8 OF THE CONVENTION

99. The first, second, third and fourth applicants further complained that by referring to them, at a press conference, as members of a criminal group and by making their photographs available to the press the police violated Articles 6 § 2 and 8 of the Convention.

100. Lastly, the fourth and fifth applicants complained under Article 8 of the Convention that they have not been able to obtain any information about the DNA samples taken from them on 6 November 2007 and, if still kept, to have them destroyed.

101. The provisions of the Convention referred to by the applicants, in so far as pertinent, read as follows:

**Articles 6 § 2**

"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

**Article 8**

"Everyone has the right to respect for his private ... life ...

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

### A. The parties' submissions

102. The Government maintained that the first, second, third, fourth and fifth applicants had failed to exhaust the available civil remedies based on the relevant provisions of the Obligations Acts and/or the Public Information Act. They further recalled that the Convention was directly applicable in the Serbian legal system.

103. Regarding the complaints concerning the taking of DNA samples from the fourth and fifth applicants, the Government further noted that their request to have them destroyed had been submitted prior to the termination of the criminal case against them. Finally, although there had been no specific domestic legislation on the storage and automatic destruction of DNA samples obtained in the above context, the applicants should have made use of the said civil remedies which would have been capable of affording compensation and/or injunctive relief as appropriate. In any event, the general provisions of the Code of Criminal Procedure and the Personal Data Protection Act remained applicable.

104. The first, second and third applicants maintained that the filing of a civil claim would have involved considerable logistical difficulties,

particularly bearing in mind their detention/incarceration, and that in any event the civil case would have lasted for years.

## B. The Court's assessment

### *1. The relevant principles*

105. The obligation to exhaust domestic remedies requires an applicant to make normal use of remedies which are effective, sufficient and accessible in respect of his or her Convention grievances. It is not necessary for the Convention right to be explicitly raised in domestic proceedings provided that the complaint is raised at least in substance (see *Castells v. Spain*, 23 April 1992, § 32, Series A no. 236; and *Akdivar and Others v. Turkey*, 16 September 1996, § 66, *Reports* 1996-IV).

106. To be effective, a remedy must be capable of redressing directly the impugned state of affairs and must offer reasonable prospects of success (see *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004; and *Sejdovic v. Italy* [GC], no. 56581/00, § 46, ECHR 2006-II). In so far as there exists at the national level a remedy enabling the domestic courts to address, at least in substance, the argument of a violation of a given Convention right, it is that remedy which should be exhausted (see *Azinas*, cited above, § 38). In States where the Convention is part of the law of the land, a complainant has to invoke its provisions if so doing is the only means open to him or her of obtaining the redress sought (see *Van Oosterwijck v. Belgium*, judgment of 6 November 1980, § 33, Series A no. 40). The Court has, however, also frequently underlined the need to apply the exhaustion rule with some degree of flexibility and without excessive formalism (see *Ringeisen v. Austria*, 16 July 1971, § 89, Series A no. 13; and *Akdivar*, cited above, § 69).

107. In terms of the burden of proof, it is up to the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time (see, *inter alia*, *Vernillo v. France*, judgment of 20 February 1991, § 27, Series A no. 198, and *Dalia v. France*, judgment of 19 February 1998, § 38, Reports 1998-I). Once this burden has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from this requirement (see *Dankevich v. Ukraine*, no. 40679/98, § 107, 29 April 2003; and *Akdivar*, cited above, § 68).

### *2. The application of these principles to the present case*

108. Being mindful of the above and turning to the present case, the Court notes that Articles 157, 199 and 200 of the Obligations Act, taken

together, provide, *inter alia*, that anyone who has suffered fear, physical pain or mental anguish due to a breach of his reputation, personal integrity, liberty or of his other "personal rights" shall be entitled to seek injunctive relief, bring a civil claim for damages and request other forms of redress "which might be capable" of affording adequate non-pecuniary satisfaction. The domestic civil courts have applied those provisions in favour of plaintiffs in the context of, for example, the defendant's right to be presumed innocent as well as in the discrimination context, where in addition to compensation adequate injunctive relief including the cessation of discriminatory treatment and the publication of an apology had been granted (see paragraph 43 above). Moreover, Article 172 § 1 of the Obligations Act provides for State liability in cases of police misconduct or malfeasance, as exemplified by a number of civil court judgments adopted on this basis (see paragraph 44 above).

109. The Court further notes that Article 84 of the Public Information Act specifically provides that the State shall be liable for any and all damage caused by the publication of untrue or incomplete information provided by a Government body. According to Articles 85 and 86 of the same legislation such proceedings shall be conducted with urgency (see paragraphs 47 and 48 above).

110. Finally, the Court recalls that Article 18 of the Constitution provides for the "the direct implementation" of human rights secured by ratified international treaties, and sets forth that provisions relating to human rights shall be interpreted pursuant to, *inter alia*, "the practice of international institutions" entrusted with their implementation (see paragraph 29 above). There is also domestic case-law to this effect, in particular civil court judgments recognising, *inter alia*, alleged breaches of Article 8 of the Convention in the context of "private life", including but not limited to the unlawful taking of photographs, and awarding compensation to the plaintiffs where appropriate (see paragraphs 51 and 52 above).

111. In view of the above, the Court is of the opinion that the first, second, third, fourth and fifth applicants should have brought a civil case, based on the Obligations Act (see, *mutatis mutandis*, *Hajnal*, cited above, § 142; *Kostić v. Serbia* (dec.), no. 40410/07, § 60, 17 September 2013; and *Gorgievski v. the former Yugoslav Republic of Macedonia* (dec.), no. 18002/02, 10 April 2006), the Public Information Act, the Constitution and/or the Convention, particularly since the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust that avenue of redress (see *Akdivar*, cited above, § 71). In their civil suit they could thus have sought compensation and/or any other form of redress "capable" of providing adequate non-pecuniary satisfaction, including, where appropriate, a request for the destruction of DNA samples stored in the Novi Sad Forensic Medicine Institute (see, in this connection, paragraph 27 above and note that

the said medical institution had itself implied that the fourth and fifth applicants' DNA material could have been destroyed on the basis of a court decision so ordering). All this is, of course, quite apart from any possibilities for redress stemming from the Personal Data Protection Act, referred to but not specifically relied on by the Government as regards the fourth and fifth applicants (see paragraphs 49 and 50 above).

112. It is further noted that although the first, second and third applicants had been deprived of their liberty until 22 December 2012 this, in and of itself, could not have absolved them of their duty to comply with the exhaustion requirement within the meaning of Article 35 § 1 of the Convention (see, *mutatis mutandis*, *X. v. the United Kingdom* no. 6840/74, Commission decision of 12 May 1977, Decisions and Reports (DR) 10, p. 5). The said applicants also offered no other convincing reasons in this respect.

113. Finally, the present case must be distinguished from the *Matijašević* and *Hajnal* cases, respectively, when it comes to the issue of exhaustion in the context of complaints made under Article 6 § 2 of the Convention (see *Matijašević v. Serbia*, no. 23037/04, §§ 32 and 33, ECHR 2006-X; and *Hajnal*, cited above, § 121). Notably, in those cases the applicants complained that the presumption of innocence had been breached due to the language adopted by the criminal courts themselves, which was why the Court held that the applicants, having complained about this in the criminal context, could not in addition have reasonably been expected to make use of the civil avenue. In the present case, however, the first, second, third and fourth applicants maintain that their right to be presumed innocent had been violated by the police at a press conference. In this respect they clearly had no remedies available within the criminal proceedings brought against them and should therefore have attempted to obtain civil redress. Indeed, there is nothing in the case file or in the said applicants' pleadings that would suggest otherwise.

114. In view of the foregoing, the first, second, third, fourth and fifth applicants' complaints must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies. It further follows that it is therefore not necessary to examine whether the fourth applicant's daughter is entitled to continue with the proceedings before the Court after her father's death (see paragraphs 58 and 59 above).

## IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

115. 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

116. The first, second, third and fourth applicants each claimed 10,000 euros (EUR) in respect of the non-pecuniary damage suffered due to the violation of their rights guaranteed under Article 3 of the Convention.

117. The first, second and third applicants each further claimed EUR 62,500 in respect of the non-pecuniary damage suffered as a consequence of the violations of their rights guaranteed under Article 5 of the Convention. In this regard, they also requested from the Court to exclude from the evidence before the domestic courts "their statements given to the police under duress".

118. The said applicants submitted a just satisfaction agreement, as part of their signed authorisation forms, and requested that any damages awarded to them be paid directly to their counsel.

119. The Government contested these claims.

120. It is clear that the first, second, third and fourth applicants sustained some non-pecuniary damage arising from the breaches of their rights under Articles 3 and/or 5 § 3 of the Convention, for which they should be compensated. Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court therefore awards to the first, second and third applicants, as well as to the fourth applicant's daughter, Ms Silvana Dimović, EUR 5,000 each. The Court has also taken account of the Government's objection (see paragraph 119 above) and decides that these amounts should be paid to the applicants and Ms Dimović personally.

121. Concerning the first, second and third applicants' request for the exclusion from the evidence before the domestic courts of their statements given to the police, the Court notes that this is essentially a procedural fairness issue which is currently pending before the Constitutional Court (see paragraph 22 above). The request must therefore be rejected.

### B. Costs and expenses

122. The third applicant claimed a total of EUR 4,715 for the costs and expenses incurred domestically, as well as those incurred before the Court.

123. The first, second and fourth applicants each claimed EUR 1,200 for the costs and expenses incurred before the Court.

124. The said applicants submitted a fees agreement, as part of their signed authorisation forms, and requested that the costs and expenses awarded to them be paid directly to their lawyer.

125. The Government contested these claims.

126. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were also reasonable as to their quantum. That is, the applicant must have paid them, or be bound to pay them, pursuant to a legal or contractual obligation, and they must have been unavoidable in order to prevent the violation found or to obtain redress.

127. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award to the third applicant alone the sum of EUR 2,750 for the costs and expenses incurred domestically, as well as to the first, second and third applicants and to the fourth applicant's daughter, Ms Silvana Dimović a total of EUR 1,800 jointly for the costs and expenses incurred before the Court, all to be paid directly to their legal representative, VJĐ (see *Hajnal*, cited above, §§ 153 and 154).

### C. Default interest

128. 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, UNANIMOUSLY,

1. *Decides* to join to the merits the Government's objection as to the non-exhaustion of domestic remedies with respect to the first, second, third and fourth applicants' complaints under Article 3 of the Convention and dismisses it;

2. *Declares* the fifth applicant's complaint under Article 3 of the Convention inadmissible;

3. *Declares* the first, second, third and fourth applicants' complaints under Articles 6 § 2 and 8 of the Convention, regarding the press conference organised by the police and the distribution of their photographs on that occasion, inadmissible;

4. *Declares* the fourth and fifth applicant's complaints under Article 8, concerning the DNA samples, inadmissible;

5. *Declares* the remainder of the application admissible;

6. *Holds* that there has been a violation of the substantive aspect of Article 3 of the Convention in respect of the first, second, third and fourth applicants;

7. *Holds* that there has been a violation of the procedural aspect of Article 3 of the Convention in respect of the first, second, third and fourth applicants;

8. *Holds* that there has been a violation of Article 5 § 3 of the Convention in respect of the first, second and third applicants;

9. *Holds*

(a) that the respondent State is to pay to the first, second and third applicants, as well as the fourth applicant's daughter, Ms Silvana Dimović, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Serbian dinars at the rate applicable at the date of settlement:

(i) to the first, second and third applicants, as well as the fourth applicant's daughter Ms Silvana Dimović, personally EUR 5,000 (five thousand euros) each, plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) to the third applicant, through his legal representative, Mr V. Juhas Đurić, EUR 2,750 (two thousand seven hundred and fifty euros), plus any tax that may be chargeable to the third applicant, in respect of costs and expenses incurred domestically;

(iii) to the first, second and third applicants, as well as to the fourth applicant's daughter, Ms Silvana Dimović, through their legal representative, Mr V. Juhas Đurić, a total of EUR 1,800 (one thousand and eight hundred euros) jointly, plus any tax that may be chargeable to them, in respect of costs and expenses incurred before the Court;

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

10. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 7 January 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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|---|---|
| Stanley Naismith | Guido Raimondi |
| Registrar | President |

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Sajó is annexed to this judgment.

G.R.A.
S.H.N.

# CONCURRING OPINION OF JUDGE SAJÓ

While I agree with my colleagues, I find it necessary to specify the reasons why I find the Article 3 complaints admissible. The Government maintained that the first, second and third applicants had failed to exhaust the available criminal remedies. The Court considered that this objection went to the very heart of the question whether the said applicants had suffered a procedural violation of Article 3, and examined it at the merits stage. In its analysis of the merits of the allegation of police brutality, the Court stated that there should be an effective official investigation. The Court continued as follows: "Even when, strictly speaking, no complaint has been made, an investigation must be started if there are sufficiently clear indications that ill-treatment has been used (see *Stanimirović v. Serbia*, no. 26088/06, § 39, 18 October 2011). Victims of alleged violations are not required to pursue the prosecution of officers suspected of ill-treatment on their own. This is a duty of the public prosecutor who is better equipped in that respect (*Stojnšek v. Slovenia*, no. 1926/03, § 79, 23 June 2009; and *Otašević v. Serbia*, no. 32198/07, § 25, 5 February 2013)."

This argument is related to the absence of an initial complaint by the applicants. The Court is of the view that in similar situations an *ex officio* investigation is required. The admissibility issue is, however, slightly different. It concerns the use of available remedies in cases where the investigation fails to occur. Where there is an effective remedy to correct the lack of, or shortcomings in, an investigation, the subsidiarity principle requires that such effective remedy be used. In the present case the possibility of bringing a "subsidiary" prosecution was available, in principle, to the applicants. This possibility exists irrespective of the fact that the prosecution of officers suspected of ill-treatment is the duty of the prosecutor (when he or she becomes aware of it, even in the absence of a formal complaint). There can be no doubt that this Court requires the exhaustion of a domestic remedy where the national system offers the possibility of appeal to a court against a decision by the prosecutor not to prosecute in Article 3 cases. The same logic applies where the national system offers the option of bringing a subsidiary prosecution, as long as that remedy is effective.

Turning to the present case, it can be argued that in Serbia Article 61 of the Serbian Code of Criminal provides that, should the public prosecutor decide that there is no basis for pressing charges, he must inform the victim of this decision; the latter then has the right to take over the prosecution of the case on his own behalf, as a "subsidiary prosecutor" (see paragraph 40

of the judgment). In other words, only after being informed of the prosecutor's negative decision can an applicant act as a "subsidiary prosecutor." In the present case, notwithstanding the order of the judge for medical evidence to be obtained, the public prosecutor took no investigative action (see paragraphs 11 and 16). It is not clear how the applicants could have made use of their right to bring a subsidiary prosecution, which is in any case governed by extremely short deadlines. The burden of proving the effectiveness of a remedy falls on the Government. The Government do not specify how, in the specific circumstances, a subsidiary prosecution could have been effective. Therefore, the Article 3 complaints are admissible.