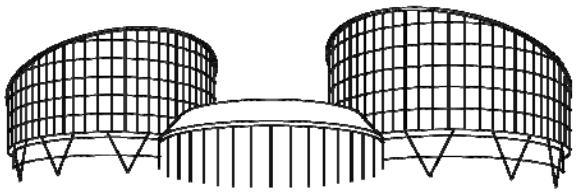

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

**CASE OF HAJNAL v. SERBIA**

*(Application no. 36937/06)*

JUDGMENT

STRASBOURG

19 June 2012

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

**In the case of Hajnal v. Serbia,**

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

Françoise Tulkens, *President,*
Dragoljub Popović,
Isabelle Berro-Lefèvre,
András Sajó,
Guido Raimondi,
Paulo Pinto de Albuquerque,
Helen Keller, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 29 May 2012,

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

# PROCEDURE

1. The case originated in an application (no. 36937/06) against Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Serbian national, Mr Tihomir Hajnal ("the applicant"), on 27 July 2006.

2. The applicant was represented by Mr V. Juhas Đurić ("V.J.Đ"), a lawyer practising in Subotica. The Serbian Government ("the Government") were represented by their Agent, Mr S. Carić.

3. The applicant alleged that he had suffered numerous violations of Articles 3, 5, 6 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 applicant was born in 1985 and lives in Subotica, Serbia.

### A. The events of 8 August 2005

6. On 8 August 2005 the applicant was arrested by the Subotica police and brought to their station concerning an alleged burglary. In their report

the police stated that the applicant, together with a number of others, had been caught after the act and that several objects used for the commission of the alleged crime had been seized. The applicant gave a statement to the officers. According to the minutes of his interrogation, the applicant confessed to one count of attempted burglary, and then signed the document using his nickname, notwithstanding a prior reference in the same minutes noting that he was "illiterate". The minutes further stated that, pursuant to Article 177 of the Code of Criminal Procedure (see paragraph 60 below), the applicant had read them, at his own request, and had had no objections.

### B. The events of 17 August 2005

7. On 17 August 2005, at around 4.00 a.m. according to his own estimate, the Subotica police again brought the applicant, together with several others, to their premises in order to question him about a criminal offence. There was no prior attempt to serve him with the summons. The Government maintained that the reason for this had been the danger that the applicant might otherwise have absconded or tampered with the evidence.

8. The applicant maintained that his lawyer, V.J.Đ., had been informed of this arrest by his relatives and had hence managed to arrive in time to briefly talk to him before the interrogation. The applicant apparently told V.J.Đ. that he had already been physically abused by the police, who had attempted to obtain his confession. V.J.Đ. himself stated that the applicant had seemed "mentally broken" and had been walking with a limp.

9. The subsequent police interrogation began at 1.35 p.m. and ended by 1.40 p.m., at which point the applicant was released. The Municipal Public Prosecutor (*Opštinski javni tužilac*) had been informed of the hearing at 8.30 a.m., but did not attend it. In the course of the interrogation the applicant was asked to give a statement concerning "a burglary of a store in Veliki Radanovac". The applicant, however, declined to do so and noted that he had retained V.J.Đ. as his legal counsel. The minutes of the interrogation further stated that the applicant was "illiterate", and bore his fingerprint instead of a signature. With reference to Article 177 of the Code of Criminal Procedure, the minutes, lastly, noted that the applicant had read them, at his own request, and had had no objections. The minutes were also signed by V.J.Đ.

10. The applicant maintained that he had been provided with no food whilst in police custody.

### C. The events of 18 August 2005

11. On 18 August 2005, at around 4.00 a.m. according to the applicant's own estimate, he was brought, yet again, by the Subotica police to their premises, without having been previously summoned. The Government

maintained that, just like before, the reason for this had been the danger that the applicant might otherwise have absconded or tampered with the evidence.

12. The applicant claimed that he had once again been beaten by the officers who had attempted to obtain his confession. The applicant apparently asked that V.J.Đ. be informed of his arrest, but the police ignored this demand. Instead, the applicant was provided with a legal aid lawyer, N.D., who, it is claimed, appeared only briefly to sign the minutes of the interrogation and left shortly thereafter.

13. The minutes in question contained: (i) an indication that the applicant was being charged with numerous counts of burglary; (ii) his detailed confession of how he had committed those offences; (iii) his statement to the effect that he did not want to retain V.J.Đ. as his legal counsel; and (iv) his declaration that he had given his statement in the absence of "any physical or mental coercion".

14. The minutes further noted the questions posed by N.D., including whether the applicant was trying to protect anyone with his confession. The Municipal Public Prosecutor had been informed of the hearing on 17 August 2005 at 12.20 p.m., but did not attend it. Finally, the minutes stated that the applicant was "illiterate", but then went on to note, with reference to Article 177 of the Code of Criminal Procedure, that he had read them, at his own request, and had had no objections. The applicant did not sign the minutes, having instead left his fingerprint. The interrogation lasted between 2.40 p.m. and 3.40 p.m., following which the applicant was released.

15. The applicant maintained that he had been provided with no food whilst in the police station.

### D. The events of 24 August 2005

16. On 24 August 2005, at around 5.15 a.m. according to his own estimate or at 9.00 a.m. according to official records, the police arrested the applicant once more, but, this time, ordered his detention for a period of 48 hours. The applicant received no prior summons. He was, however, provided with a detention order, which stated that he had been deprived of his liberty on suspicion of having committed numerous burglaries. The order relied on a number of provisions of the Code of Criminal Procedure (see paragraph 57 below), but did not contain any substantiation as to the factual circumstances warranting the applicant's detention or his prosecution.

17. On the same day the police issued a report supplementing the criminal charges against the applicant, as well as another three defendants, concerning thirteen separate counts of burglary. The report included, *inter alia*, a description of the crimes and referred to the evidence obtained.

18. On the same day V.J.Đ. lodged an appeal on behalf of the applicant. Therein, *inter alia*, he maintained that the impugned detention order had been merely a template devoid of any meaningful reasoning. V.J.Đ. further informed the investigating judge that, following her son's detention, the applicant's mother had been contacted by a lawyer who had offered his services. In particular, the lawyer had said that he knew that the applicant had already retained V.J.Đ. but explained that it would be better for him to change legal counsel as this would facilitate his release from police custody.

19. On the same day the investigating judge of the Municipal Court (*Opštinski sud*) in Subotica rejected the above appeal. She recalled, *inter alia*, that on 18 August 2005 the applicant had been heard in the presence of his legal aid lawyer, that the prosecuting authorities had obtained several witness statements incriminating the applicant, and that the applicant had both been convicted of crimes in the past and had "continued committing crimes" thereafter. The judge lastly specified that there were six separate criminal cases pending concurrently against the applicant before the Municipal Court in Subotica, indicating that he had "committed" several property-related crimes in a short period of time. This, in turn, meant that, if released, the applicant was likely to re-offend and/or abscond.

20. Lastly, on the same day the applicant was examined by the on-duty doctor of the District Prison (*Okružni zatvor*) in Subotica, but "no disease was established, i.e. he was [deemed] healthy". The Government provided a certificate to this effect issued by the prison doctor on 12 January 2011, as well as copies of the relevant medical protocol dated 24 August 2005. The said protocol, however, was mostly illegible.

### E. The preliminary judicial investigation

21. On 25 August 2005 the Municipal Public Prosecutor's Office in Subotica requested that a preliminary judicial investigation (*istraga*) be instituted against the applicant in respect of numerous counts of burglary, and proposed that his detention be extended.

22. On the same day the investigating judge instituted the proceedings sought and extended the applicant's detention for an additional month. Before so doing, she invited the applicant to give a statement in the presence of V.J.Đ. and the Deputy Public Prosecutor and informed him about the evidence put forth by the prosecution. The applicant, however, refused to respond to the charges in question. He referred, instead, to the abuse suffered at the hands of the police, as well as the alleged breach of his procedural rights up to that point. In the reasoning as regards the applicant's continued detention, *inter alia*, the judge stated that the applicant could, if released, re-offend, abscond or unduly influence the witnesses.

23. On 26 August 2005 the applicant's continued detention was confirmed by the three-judge panel of the Municipal Court, which fully accepted the reasoning of the investigating judge.

24. On 30 August 2005 the Municipal Court's three-judge panel confirmed the investigating judge's decision to institute a preliminary judicial investigation.

25. In the following weeks the investigating judge heard many witnesses, including witnesses Đ.D. and P.D. On 1 September 2005 the former stated that his head had been slammed against the wall by the police in order to elicit his statement, whilst the latter recounted that he too had been threatened by the police with a baseball bat and for the same purpose.

### F. The applicant's indictment and the subsequent criminal proceedings

26. On 16 September 2005 the Municipal Public Prosecutor's Office indicted (*optužilo*) the applicant for the crimes in question.

27. On 4 October 2005 V.J.Đ. filed a formal objection against the indictment (*podneo prigovor protiv optužnice*), but on 6 October 2005 the three-judge panel of the Municipal Court rejected this objection.

28. On 21 November 2005 V.J.Đ. informed the Municipal Court that the applicant had recently been photographed by the police in prison. He requested clarification as to what had been the legal basis for this exercise, and expressed concern that the photograph could be used to unlawfully secure his client's identification in the course of future identity parades. The Government submitted that the applicant had been photographed only once, on 25 August 2005, upon admission to the prison, and, further, that this photograph had been used solely for the purpose of supplementing his prison identity papers (*lični list*).

29. On 7 December 2005 V.J.Đ. wrote again to the Municipal Court, stating that on 26 August 2005, 18 November 2005 and 6 December 2005 he had visited the applicant in prison, and that each time prison staff had been present during their conversations. Indeed, they had been close enough to be able to both hear and see everything. V.J.Đ. requested an explanation as to why the applicant had not been entitled to unsupervised communication with his counsel. As it subsequently transpired, on 26 August 2005 the Municipal Court had issued a standing permit (*stalna dozvola*) to V.J.Đ., authorising him to visit the applicant in prison. The said permit stated that visits could last up to 30 minutes and take place under the supervision, i.e. in the presence, of an official to be designated by the prison governor. The Government maintained that the supervision in question meant visual observation only, not listening to the conversations between the applicant and his lawyer.

30. Between 9 December 2005 and 21 March 2006 four hearings were held or adjourned before the Municipal Court.

31. In the presence of the Deputy Public Prosecutor, the applicant described the abuse which he had suffered whilst in police custody, and gave a physical description of the officer who had engaged in his ill-treatment on 17 August 2005. The applicant added that on this day he had sustained injuries to his legs and back, and had also been temporarily unable to hear on his left ear. Upon release the applicant went to a local hospital but was denied treatment because he had forgotten to bring his medical insurance card. When the applicant returned with this card, however, the hospital staff told him "to come back tomorrow". On 18 August 2005, having been beaten by the officers once again, the applicant asked for V.J.Đ. to be informed of his arrest, but officer D.M. refused to do so. Officer M.V. was also present. The applicant explained that he had, ultimately, been coerced into signing a statement already prepared by the police without his participation. At one point, N.D., his police-appointed lawyer, appeared in the interrogation room merely in order to stamp and sign the same statement. As regards the charges against him, the applicant specifically denied some of them whilst in respect of others he refused to answer questions.

32. Officer D.M. stated that the minutes of 17 and 18 August 2005 were accurate, that he had not personally seen the applicant being abused or even heard anything to that effect. The officer also had no recollection as to whether the applicant had been duly summoned to appear before the police, but recalled that the applicant had constantly moved around, which was why he had been difficult to find.

33. Officer M.V. noted that he had not taken part in the interrogation of 17 August 2005, and had only a vague recollection of the interrogation which had taken place the next day. In particular, he remembered that the applicant had said that he did not want to retain V.J.Đ. as his counsel since the latter had always advised him to give no statements to the police and he had already had enough of the repeated arrests and interrogations. M.V. had no information to offer as to whether the applicant had been duly summoned to appear before the police, but recalled that the applicant's police-appointed lawyer had been present throughout the interrogation. Finally, M.V. affirmed that the applicant's statement was accurately recorded in the minutes of his interrogation, and added that he had personally informed the applicant of their content before he signed them.

34. More than a dozen witnesses were subsequently heard before the Municipal Court, some of whom confirmed that they had "bought merchandise" from the applicant. Witness R.K. further stated, *inter alia*, that in August of 2005 he had seen several persons fleeing a crime scene in a red car.

35. Witness L.K., however, stated that the police had beaten him with a baseball bat in order to force him to confess to a number of crimes, as well as to incriminate the applicant. In support of this allegation he provided the Municipal Court with a copy of a medical certificate documenting his injuries of 18 August 2005.

36. Witness Đ.D. stated that he had accompanied the applicant from the police station to the hospital, on which occasion he had seen that the applicant had been injured and had been "walking with a limp" (see paragraphs 8 and 31 above).

37. Witness N.D. stated that he had been invited by the police to act as the applicant's legal aid lawyer on 18 August 2005. Prior to the interrogation, he had had a conversation with the applicant who had informed him that he had already retained legal counsel. The applicant was nevertheless willing to accept N.D. as his lawyer on that occasion only and in order to be released (*da idem odavde*). The applicant then confessed, in some detail, to the crimes in question. N.D. admitted that he had not inspected the case-file since the applicant had refused to communicate with him as regards the substance of the charges at issue, re-affirming that he had already retained a lawyer for this purpose. N.D. added that the applicant had had no visible injuries at that time, and that he had warned the applicant that the confession given to the police would be used as evidence against him. Officer M.V. interrogated the applicant. He did so by posing questions concerning specific places, burglaries and stores. N.D. lastly noted that he had not seen in his 33 years of practice a confession such as the applicant's, and had therefore asked the applicant whether he was "protecting anyone". The applicant had maintained that he was not.

38. Witness M.D. denied any connection to the applicant, but stated that he too had been physically abused by the police on a number of occasions. M.D. also provided a medical certificate in this regard.

39. On 22 March 2006 the Municipal Court decided to exclude the applicant's statement of 18 August 2005 from the case file. It explained, *inter alia*, that there was indeed evidence to the effect that the applicant had been repeatedly arrested without having first been properly summoned which, in and of itself, indicated a sort of police harassment aimed at obtaining his confession. Further, there was no doubt that the applicant had chosen V.J.Đ. as his legal counsel and had never revoked this authorisation. The police, nevertheless, questioned the applicant in his chosen counsel's absence, and appointed a legal aid lawyer for no apparent reason.

40. On 4 April 2006 the District Court (*Okružni sud*) in Subotica quashed this decision and declared the applicant's statement of 18 August 2005 legally valid. It noted that, as indicated in the minutes of the same date, the applicant had specifically said that he did not want V.J.Đ. to act as his legal counsel. The issue of whether the applicant was duly summoned was irrelevant, and the conditions for the appointment of a legal aid lawyer

were clearly fulfilled. The applicant was also properly advised of his procedural rights.

41. On 10 April 2006 officer Z.T. stated that on 8 August 2005 he had indentified a red car, which had apparently been seen leaving the crime scene, and had arrested the four or five persons whom he and his colleague had found in or around it. These persons were subsequently taken by other officers to the police station.

42. On 13 April 2006 the Municipal Court heard the parties' closing arguments, found the applicant guilty of having, effectively, committed eleven burglaries, i.e. ten between 15 June 2005 and 7 August 2005 and one on 8 August 2005, and sentenced him to one and a half years' imprisonment for a single crime of "extended burglary" (*jedno produženo krivično delo teške krađe*). The Municipal Court further observed that there were six separate criminal cases pending concurrently against the applicant and considered this as an aggravating circumstance in sentencing. The applicant's detention was prolonged until the judgment in his case became final. The Municipal Court also noted that, in the meantime, it had already reviewed and extended the applicant's detention on 16 September 2005, 13 October 2005, 12 September 2005 and 14 February 2006, and that each time its decisions had been confirmed by the District Court on appeal. As regards the applicant's conviction concerning the burglaries committed between 15 June 2005 and 7 August 2005, the Municipal Court took note of the applicant's confession of 18 August 2005, recalled that he had been found in possession of stolen property, and emphasised that several witnesses had confirmed that they had bought such property from the applicant. Concerning the burglary of 8 August 2005 the Municipal Court relied on the applicant's confession of the same date and the statements given by witnesses R.K and Z.T. Testimony indicating that certain witnesses had been ill-treated by the police in order to incriminate the applicant was either dismissed as irrelevant or simply ignored.

43. On 23 May 2006 the Municipal Public Prosecutor's Office lodged an appeal, seeking a harsher sentence.

44. On 29 May 2006 and 7 June 2006 V.J.Đ. filed an appeal on behalf of the applicant, noting, *inter alia*, that: (i) his statement of 18 August 2005 had been obtained as a result of police brutality and in the absence of his chosen counsel, there being no other evidence which could have warranted a conviction; (ii) the police-appointed lawyer had never offered any genuine legal representation to the applicant and had instead been there to assist the police in their interrogation; (iii) the applicant's complaints of ill-treatment had simply been ignored by the Municipal Public Prosecutor's Office; (iv) the prison staff had not allowed the applicant free communication with his chosen counsel; (v) the six separate criminal proceedings which had been *pending* concurrently against the applicant could not lawfully have been taken into account as an aggravating circumstance, but that since they

were this amounted to an implied breach of the applicant's right to be presumed innocent.

45. On 27 June 2006 the District Court rejected the appeals lodged by the parties.

46. On 25 July 2006 V.J.Đ. filed an appeal on points of law (*zahtev za vanredno ispitivanje zakonitosti pravosnažne presude*) on behalf of the applicant, re-stating his submissions made earlier.

47. On 15 November 2006, however, the Supreme Court (*Vrhovni sud*) rejected this appeal.

48. On 23 February 2007, having served his sentence imposed by the Municipal Court, the applicant was released from the District Prison in Novi Sad.

## II. RELEVANT DOMESTIC LAW

### A. The Criminal Code of the Republic of Serbia 1977 (Krivični zakon Republike Srbije; published in the Official Gazette of the Socialist Republic of Serbia nos. 26/77, 28/77, 43/77, 20/79, 24/84, 39/86, 51/87, 6/89 and 42/89, as well as in the Official Gazette of the Republic of Serbia - OG RS - nos. 16/90, 21/90, 26/91, 75/91, 9/92, 49/92, 51/92, 23/93, 67/93, 47/94, 17/95, 44/98, 10/02, 11/02, 80/02, 39/03 and 67/03)

49. Article 65 of this Code reads as follows:

> "(1) Whoever acting in an official capacity uses force or threats or other inadmissible means ... with intent to extort a confession or another statement from an accused, a witness, an expert witness or another person, shall be punished with imprisonment of from three months to five years.
>
> (2) If the extortion of a confession or a statement is aggravated by extreme violence or if the extortion of a statement results in particularly serious consequences for the accused in the criminal proceedings, the offender shall be punished by a minimum of three years' imprisonment."

### B. The Code of Criminal Procedure 2001 (Zakonik o krivičnom postupku, published in the Official Gazette of the Federal Republic of Yugoslavia – OG FRY – nos. 70/01 and 68/02, as well as in OG RS nos. 58/04, 85/05, 115/05 and 46/06)

50. 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.

51. Article 4 § 1 provides, *inter alia*, that a suspect, when first questioned, shall be informed of the charges and evidence against him.

52. 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.

53. Articles 18 § 2 and 178 provide that a court decision may not be based on evidence obtained in breach of domestic legislation, or in violation of ratified international treaties, and that any such evidence must be excluded from the case file.

54. 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*, such as the one at issue in the present case, 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.

55. 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.

56. Article 61 provides that should the Public Prosecutor decide that there is no basis 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".

57. Articles 5 § 2, 142, 144 § 1, 227 and 229, taken together, provide, *inter alia*, that a suspect may be arrested by the police, without an attempt to be summoned first, if: (i) he is in hiding or there is a danger of him absconding; (ii) there are circumstances indicating that he may tamper with evidence or influence witnesses and/or other participants in the criminal proceedings; and (iii) there are grounds to believe that he may re-offend. The suspect must, however, then either be brought before an investigating judge, within, in principle, a maximum of eight hours, or be formally detained by the police, which detention cannot exceed forty-eight hours. In the latter case, the suspect must be served with the provisional detention order within two hours as of his arrest and may lodge an appeal against it with the investigating judge who shall have to decide upon it within another four hours. Should the appeal be rejected and after the forty-eight hours have expired, the suspect shall either be released or brought to the investigating judge for questioning. The investigating judge shall have the power to order the suspect's detention for up to one month.

58. Articles 5 § 1, 71, 72, 226 §§ 8 and 9, 227 § 2 and 228 § 1, read in conjunction, provide, *inter alia*, that a person arrested by the police shall have the right to remain silent, as well as the right to be heard in the presence of his chosen counsel, or, in the absence thereof and depending on the seriousness of the charges, be provided with a legal aid attorney paid for by the State. If the arrested person's interrogation has been carried out in accordance with the law, his statement given on this occasion may be used as evidence in the subsequent criminal proceedings.

59. Articles 228 § 1, 229 § 5 and 226 § 8, taken together, further provide that, *inter alia*, the person arrested by the police shall have the right to contact his lawyer, directly or through family members, including by means of a telephone.

60. Article 177 §§ 1 and 4 provides, *inter alia*, that a person arrested by the police shall be entitled to read the minutes of his interrogation before he signs them, or have those minutes read to him. Should the person in question be illiterate, he shall be allowed to use his right hand index fingerprint instead of a signature.

61. 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.

62. Article 75 §§ 2 and 5 provides that a defendant, whilst in detention, shall have the right to confidential communication with his legal counsel. This communication may be supervised only during the pre-indictment stage of the proceedings, and even then only by means of visual, not audio, monitoring.

63. Article 193 provides that the costs of criminal proceedings shall include, *inter alia*, the defence counsel's fees, whilst Article 196 § 1 states that should the court find the defendant guilty it shall order him to reimburse all costs.

64. Article 225 § 4 provides that general complaints (*pritužbe*) concerning the conduct of police operations may be filed with the competent Public Prosecutor.

65. Article 560 § 1 (3) provides, *inter alia*, that a person who due to an unlawful action undertaken by a State body or an error on its part has been deprived of his liberty in the absence of proper legal basis (*neosnovano*) shall be entitled to recover any damages suffered.

### C. The Amendments to the Code of Criminal Procedure 2001 adopted in 2009 (Zakon o izmenama i dopunama Zakonika o krivičnom postupku, published in OG RS no. 72/09)

66. In accordance with Article 414 of the Code of Criminal Procedure 2001, as amended in September 2009, the re-opening of a criminal trial may

be sought where the Constitutional Court or an international court has found that the convicted person's rights have been breached in the trial.

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

67. 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 no. 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*, an implied breach of the presumption of innocence under Article 200; see also judgment no. 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).

68. 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).

### E. Domestic case-law referred to by the Government

69. The Government provided the Court with 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 Municipal Court in Novi Sad, *inter alia*, applied Article 200 of the Obligations Act, 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 District Court in Novi Sad 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.

70. 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

71. 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 VIOLATION OF ARTICLE 3 OF THE CONVENTION

72. The applicant complained under Article 3 of the Convention about the police ill-treatment of 17 and 18 August 2005, as well as the respondent State's subsequent failure to conduct any investigation into these incidents.

73. 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

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

## B. Merits

### *1. The substantive aspect*

#### (a) The parties' submissions

75. The Government pointed out that there was no medical evidence to the effect that the alleged ill-treatment had occurred. In fact, there was nothing but the applicant's own allegations to this effect. It was further unclear as to why the applicant had not sought a medical examination on 18 August 2005, or indeed attempted to get in touch with V.J.Đ. after his release from police custody. Finally, the Government noted that the applicant had failed to request a medical examination in accordance with Article 228 § 7 of the Code of Criminal Procedure (see paragraph 61 above), and maintained that on 24 and 25 August 2005, which was when he had been admitted to the District Prison in Subotica and heard by the investigating judge, respectively, no injuries were apparent on his person (see paragraphs 20 and 22 above).

76. The applicant acknowledged that he had not managed to obtain medical evidence of the abuse in question, but argued that there was other, direct or indirect, evidence capable of proving his abuse at the hands of the police.

#### (b) The relevant principles

77. 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).

78. 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).

79. 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).

80. 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. It reiterates that 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).

81. 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).

82. 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).

**(c) The application of these principles to the present case**

83. The Court observes that there is no evidence that the applicant had sustained any injuries prior to his arrest on 17 August 2005, and that the Government have not suggested otherwise.

84. It further notes that both V.J.Đ., as the applicant's chosen counsel, and witness Đ.D. stated that they had seen the applicant after the interrogation of 17 August 2005 and had observed his injuries (see paragraphs 8 and 36 above; see also the applicant's statement in court as regards the injuries to his legs and back, as well as his ear, at paragraph 31 above).

85. Also, many other witnesses testified to the effect that they had themselves been ill-treated by the police, some of them in order to incriminate the applicant (see paragraphs 25, 35 and 38 above).

86. The applicant maintained that he had attempted to obtain a medical certificate of the injuries sustained on 17 August 2005, but was unable to do so for technical reasons (see paragraph 31 above). Witness Đ.D. confirmed that he had accompanied the applicant on this occasion (see paragraph 36 above).

87. The Government, for their part, contested that the applicant had been ill-treated at all, and hence offered no explanation for the injuries in question.

88. It is telling that on 17 August 2005 the applicant had declined to give a statement to the police, yet only a day later, on 18 August 2005, he allegedly decided of his own free will to confess to the numerous burglaries at issue (see paragraphs 7-10 and 11-15 above). It this respect the Court recalls the dubious circumstances concerning the appointment of the applicant's legal aid lawyer on 18 August 2005, as well as the issues concerning the applicant's ability to understand the minutes of his interrogations (see paragraphs 12-14, 31 and 37 above). In respect of the former, it is further noted that N.D., the applicant's police-appointed lawyer, had himself stated that, prior to the interrogation of 18 August 2005, he had had a conversation with the applicant who had said that he had already retained legal counsel. The applicant was nevertheless willing to accept him as his lawyer on that occasion only and "in order to be released". The applicant subsequently confessed to the crimes in question, and N.D. admitted that the applicant had refused to communicate with him as regards the substance of the charges at issue, re-affirming that he had already retained a lawyer for this purpose. N.D. lastly noted that he had not seen in his 33 years of practice a confession such as the applicant's, and had therefore asked him as to whether he was "protecting anyone" (see paragraph 37 above).

89. Even assuming that the applicant had indeed had no visible injuries on 24 and 25 August 2005, as argued by the Government (see paragraph 75 above), a week had elapsed since his interrogation in the police station,

meaning that, depending on their severity, the injuries could have healed in the interval. Of course, consequences of any intimidation, or indeed any other form of non-physical abuse, would in any event have left no visible trace.

90. The Court also notes that the CPT has, most pertinently, found that, at the relevant time, "in almost all of the police stations visited in Belgrade, the delegation [had] found baseball bats and similar non-standard and unlabelled objects in offices used for interrogation purposes" (see paragraph 70 above). It further held that the "information at ... [its] ... disposal suggest[ed] that persons suspected of a criminal offence r[an] 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" (ibid.).

91. Finally, it is observed that there are no official records as to when the applicant was brought to the police station on either 17 or 18 August 2005. There are, instead, merely indications concerning the duration of his interrogations on those two days. In such circumstances it cannot be ruled out that the applicant had indeed spent approximately 10 and 12 hours in police custody, respectively (see paragraphs 9, 13 and 14 above; see also, *mutatis mutandis*, *Fedotov v. Russia*, no. 5140/02, § 78, 25 October 2005, albeit in the context of Article 5). The applicant also argued that he had been provided with no food during this time, which allegation was not contested by the Government (see paragraphs 10 and 15 above; see also, *mutatis mutandis*, *Ostrovar v. Moldova*, no. 35207/03, § 85, 13 September 2005).

92. In view of the above, the Court concludes that the applicant was physically abused on 17 August 2005 and was, at the very least, mentally coerced into giving his confession on 18 August 2005, events of those two days being inextricably linked to each other (see, *mutatis mutandis, Milanović v. Serbia*, no. 44614/07, § 78, 14 December 2010). Indeed, on 22 March 2006 the Municipal Court itself concluded that the applicant's repeated arrests amounted to police harassment aimed at obtaining his confession (see paragraph 39 above).

93. Accordingly, the Court considers that there has been a violation of Article 3 of the Convention on account of the inhuman and degrading treatment suffered by the applicant.

*2. The procedural aspect*

**(a) The parties' submissions**

94. The Government conceded that the Public Prosecutor had failed to initiate a separate criminal investigation in respect of the applicant's allegations of ill-treatment. The reason for this, however, was that there had been insufficient evidence indicating that the applicant had been abused. In any event, the applicant never filed a written criminal complaint against the

officers in question, which, as documented by official statistics, would have been considered very seriously, nor did he submit a complaint based on Article 225 § 4 of the Code of Criminal Procedure (see paragraph 64 above).

95. The applicant re-affirmed his complaint, adding that he had properly brought his abuse to the attention of the judges, as well as the competent prosecuting authorities.

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

96. 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 v. Italy*, cited above, § 131). Whatever the method of investigation, the authorities must act as soon as an official complaint has been lodged.

97. 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).

98. 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 v. Italy*, 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).

99. In the present case, having already found a substantive violation of Article 3, the Court further notes that the applicant had indeed complained of having been abused by the police. He did so before the investigating judge and the Deputy Public Prosecutor, as well as the trial and appellate chambers (see paragraphs 22, 31, 44 and 46 above). Yet, despite the Convention and the domestic law requiring that an allegation of this sort be explored *ex officio* (see paragraphs 97 and 54 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. It is thus clear that the aforementioned standards have not been satisfied. Accordingly, there has been a violation of Article 3 of the Convention.

## II. ALLEGED VIOLATION OF ARTICLE 5 § 1 (c) OF THE CONVENTION

100. The applicant complained that his detention of 17 and 18 August 2005 had been unlawful and, as such, in breach of Article 5 § 1 (c) of the Convention, which reads as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> ..."

### A. The parties' submissions

101. The Government maintained that the applicant had failed to exhaust effective domestic remedies. In particular, he did not file a constitutional appeal against the Supreme Court's decision of 15 November 2006, a complaint based on Article 225 § 4 of the Code of Criminal Procedure, or, for that matter, a civil action based on Article 560 § 1 (3) of the same Code taken together with the relevant provisions of the Obligations Act (see paragraphs 64, 65, 67 and 68 above).

102. The Government argued, in the alternative, that the applicant's complaint had been lodged out of time. Specifically, the applicant should have brought it within six months as of 24 August 2005, which was when the investigating judge of Municipal Court had rejected his appeal (see paragraph 19 above).

103. The applicant stated that neither a constitutional appeal nor a complaint under Article 225 § 4 of the Code of Criminal Procedure could be deemed as effective within the meaning of Article 35 § 1 of the Convention. Further, since there was no formal detention order issued by the police on 17 and 18 August 2005 he could not have filed any sort of an appeal against it. The applicant did, however, refer to his unlawful detention on those dates

in his appeal against the first instance judgement, as well as in his appeal on points of law, albeit in the context of unlawfully obtained evidence, having thus complied with both the Convention's exhaustion and its six-month requirements.

### B. The Court's assessment

104. The Court reiterates that Article 35 § 1 of the Convention provides that it may only deal with a complaint which has been introduced within six months from date of the final decision rendered in the process of exhaustion of domestic remedies. Where no effective remedy is available to the applicant, the time-limit expires six months after the date of the acts or measures complained of, or after the date of knowledge of that act or its effect on the applicant (see *Younger v. the United Kingdom* (dec.), no. 57420/00, ECHR 2003-I). In the case of a continuing situation, however, the time-limit expires six months after the end of the situation concerned (see, *mutatis mutandis*, *Ječius v. Lithuania*, no. 34578/97, § 44, ECHR 2000-IX).

105. Turning to the present case, the Court notes that the applicant was released after arrest on both 17 and 18 August 2005, and was not placed in continuing detention until 24 August 2005 (see paragraphs 9, 14 and 16 above). Moreover, the decision of the Municipal Court's investigating judge of 24 August 2005 clearly concerned the detention order issued by the police on the same date, not the events of 17 and 18 August 2005 (see paragraphs 16, 18 and 19), and the post-conviction remedies pursued by the applicant were patently incapable of addressing the issue of his police detention (they were, instead, mostly focused on the validity of the applicant's confession of 18 August 2005). Finally, the Court notes that the applicant himself has acknowledged that, in accordance with the relevant domestic law, there had indeed been no opportunity to file a formal appeal in respect of his detention of 17 and 18 August 2005 (see paragraph 103 above).

106. In such circumstances, since the applicant lodged his complaint with the Court on 27 July 2006, i.e. more than six months following the said two dates, the Court considers that this part of the application must be rejected as out of time pursuant to Article 35 §§ 1 and 4 of the Convention (see, *mutatis mutandis*, *Yüksektepe v. Turkey*, no. 62227/00, § 32, 24 October 2006).

## III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

107. Under Article 6 § 1 of the Convention the applicant complained that his conviction was based on his statement of 18 August 2005, which had itself been obtained as a result of prior police brutality.

108. Article 6 § 1 of the Convention, in so far as relevant, reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law ..."

### A. Admissibility

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

### B. Merits

#### *1. The parties' submissions*

110. The Government re-affirmed their position that there was no evidence that the applicant had suffered any ill-treatment by the police, and, hence, no need to exclude the impugned confession from the case file. In any event, the applicant's conviction was not exclusively based on the confession, and he had also had a prior opportunity to challenge its authenticity before the courts. The Government lastly noted that the applicant's police-appointed lawyer, N.D., had warned him that the confession could be used as evidence against him in the subsequent criminal proceedings.

111. The applicant maintained that the Court's possible conclusion that his Article 3 rights have been breached on 18 August 2005 should automatically lead to a finding that there has also been a violation of Article 6 § 1. The applicant further insisted that his conviction had effectively been based on his confession of 18 August 2005 alone.

#### *2. The Court's assessment*

112. The Court recalls that it is not its function to deal with errors of fact or law allegedly committed by national courts unless and in so far as they may have infringed rights protected by the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation

under national law (*Schenk v. Switzerland*, 12 July 1988, §§ 45-46, Series A no. 140; *Teixeira de Castro v. Portugal*, 9 June 1998, § 34, *Reports of Judgments and Decisions* 1998-IV; and *Heglas v. the Czech Republic*, no. 5935/02, § 84, 1 March 2007). It is, therefore, not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the unlawfulness in question and, where the violation of another Convention right is concerned, the nature of the violation found (see *Khan v. the United Kingdom*, no. 35394/97, § 34, ECHR 2000-V; *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 76, ECHR 2001-IX; and *Allan v. the United Kingdom*, no. 48539/99, § 42, ECHR 2002-IX).

113. However, particular considerations apply in respect of the use in criminal proceedings of evidence obtained in breach of Article 3. The Court has held that the admission of statements obtained as a result of torture or other ill-treatment as evidence to establish the relevant facts in criminal proceedings renders the proceedings as a whole unfair. This finding applies irrespective of the probative value of the statements and irrespective of whether their use has been decisive in securing a conviction (see *Gäfgen v. Germany* [GC], no. 22978/05, § 166, 1 June 2010).

114. In the present case, the Court recalls that it has already found that the applicant was ill-treated, in breach of Article 3 of the Convention, in the course of his interrogations by the police. Specifically, that he was physically abused on 17 August 2005 and, at the very least, mentally coerced into giving his confession on 18 August 2005, the latter, *inter alia*, clearly being connected to the fear which the applicant must have reasonably had of further ill-treatment (see, *mutatis mutandis*, *Stanimirović v. Serbia*, cited above, § 52). It is also noted that the applicant's confession was subsequently used by the Serbian courts to convict him (see paragraphs 42, 45 and 47 above), notwithstanding various issues concerning the effectiveness of his legal representation on that occasion (see paragraph 37 above).

115. In these circumstances, the Court concludes that regardless of the impact of the applicant's confession on the outcome of the criminal trial, its use rendered the trial as a whole unfair. The Court further notes that the applicant's repeated early-morning arrests by the police, the fact that there was no attempt to summon him first, and the conditions in which he awaited his interrogation all lead to the same conclusion. There has accordingly been a breach of Article 6 § 1 of the Convention.

## IV. ALLEGED VIOLATIONS OF ARTICLE 6 § 2 OF THE CONVENTION

116. The applicant complained under Article 6 § 2 of the Convention about the violation of his right to be presumed innocent, stemming from the judicial decisions adopted on 24 August 2005 and 13 April 2006. In particular, these decisions prejudged his guilt in respect of crimes with which he had been charged in another six separate criminal proceedings that were still pending against him.

117. Article 6 § 2 of the Convention reads as follows:

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

### A. Admissibility

#### *1. The parties' submissions*

118. The Government maintained that the applicant had failed to exhaust the effective domestic remedies. Specifically, he did not bring a civil action in accordance with Articles 157, 172, 199 and 200 of the Obligations Act (see paragraphs 67 and 68 above) nor file a constitutional appeal (in which respect the Government cited several decision adopted by the Constitutional Court between 9 October 2008 and 25 December 2008). As regards the complaint concerning the decision of 24 August 2005, the Government further argued that it had been lodged out of time.

119. The applicant made no comment in this respect.

#### *2. The Court's assessment*

##### **(a) As regards the judgment of 13 April 2006**

120. The Court recalls that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention requires applicants first to use the remedies provided by the national legal system, thus dispensing States from answering before the Court for their acts before they have had an opportunity to put matters right through their own legal system. In order to comply with the rule, normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged (see *Assenov and Others v. Bulgaria*, 28 October 1998, § 85, *Reports of Judgments and Decisions* 1998-VIII). Where there are several effective remedies available, it is for the applicant to select which remedy to pursue in order to comply with the requirements of Article 35 § 1 (see *Airey v. Ireland*, 9 October 1979, § 23, Series A no. 32).

121. Turning to the present case, the Court notes that on 13 April 2006 the Municipal Court found the applicant guilty and sentenced him to one and a half years' imprisonment. In so doing, it observed, *inter alia*, that there were six separate, unrelated, criminal cases pending concurrently against the applicant and considered this as an aggravating circumstance in his sentencing (see paragraph 42 above). The Court further notes that in his appeal against this judgment, and subsequently at third instance, the applicant complained about the said pronouncement, as well as the consequent "breach of his right to be presumed innocent" (see paragraphs 44-47 above), albeit to no avail. In these circumstances, the Court considers that, having exhausted the available remedies in the criminal context, the applicant could not in addition have reasonably been expected to make use of a civil claim based on Articles 157, 172 § 1, 199 and/or 200 of the Obligations Act (see, *mutatis mutandis*, *Matijašević v. Serbia*, no. 23037/04, §§ 32 and 33, ECHR 2006-X).

122. The Court further recalls that it has already 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, but only in respect of applications introduced against Serbia as of 7 August 2008 (see *Vinčić and Others v. Serbia*, nos. 44698/06 *et seq*., § 51, 1 December 2009). It sees no reason to hold otherwise in the present case, and notes that the applicant had introduced his complaint before the Court on 27 July 2006.

123. It follows that the Government's two-pronged objection concerning the exhaustion of domestic remedies must be dismissed.

124. Finally, the Court is of the opinion that the applicant's complaint is 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.

**(b) As regards the decision of 24 August 2005**

125. The Court recalls the Convention principles set out in paragraph 104 above.

126. Regarding the present case, it notes that the impugned decision had been adopted by the investigating judge on 24 August 2005, whilst the applicant lodged his complaint with the Court on 27 July 2006, i.e. more than six months later. It follows, therefore, bearing in mind the Court's stated position as regards the constitutional appeal (see paragraph 122 above) and even assuming that a civil claim based on Articles 157, 172 § 1, 199 and/or 200 of the Obligations Act could not have provided the applicant with adequate redress, that the complaint in question has been introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

### B. Merits (as regards the judgment of 13 April 2006)

127. The applicant re-affirmed his complaint.

128. The Government maintained that the Municipal Court had only noted the fact that there had been six separate criminal proceedings which had been pending concurrently against the applicant. This, of itself, could not amount to a breach of the presumption of innocence.

129. The Court reiterates that the presumption of innocence under Article 6 § 2 will be violated if a judicial decision or, indeed, a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before his guilt has been proved according to law. It suffices, in the absence of a formal finding, that there is some reasoning *suggesting* that the court or the official in question regards the accused as guilty, while a premature expression of such an opinion by the tribunal itself will inevitably run foul of the said presumption (see, among other authorities, *Deweer v. Belgium*, 27 February 1980, § 56, Series A no. 35; *Minelli v. Switzerland*, 25 March 1983, §§ 27, 30 and 37, Series A no. 62; *Allenet de Ribemont v. France*, 10 February 1995, §§ 35-36, Series A no. 308; and *Karakaş and Yeşilırmak v. Turkey*, no. 43925/98, § 49, 28 June 2005; and *Matijašević v. Serbia*, cited above § 45). Article 6 § 2 governs criminal proceedings in their entirety, "irrespective of the outcome of the prosecution" (see *Minelli*, cited above, § 30).

130. As already noted above, on 13 April 2006 the Municipal Court found the applicant guilty and sentenced him to one and a half years' imprisonment. It further observed that there were six separate criminal cases pending concurrently against the applicant and considered this as an aggravating circumstance in his sentencing (see paragraph 42 above).

131. The Court considers, in this connection, that only a formal finding of a prior crime, i.e. one's final conviction, may be taken as an aggravating circumstance in future sentencing. Accepting the mere fact that there are other, separate and still pending, criminal proceedings against the person concerned as an aggravating circumstance, would unavoidably imply his or her guilt in those very proceedings. This is exactly what happened in the present case where the Municipal Court implicitly breached the applicant's right to be presumed innocent in the said six separate proceedings pending concurrently.

132. There has accordingly been a violation of Article 6 § 2 of the Convention.

## V. ALLEGED VIOLATIONS OF ARTICLE 6 § 3 OF THE CONVENTION

133. Under Article 6 § 3 (a) of the Convention the applicant complained that he was not informed on 17 and 18 August 2005 of all of the charges and evidence against him.

134. Under Article 6 § 3 (b) and (c) of the Convention the applicant complained that on 26 August 2005, 18 November 2005 and 6 December 2005 his communication with his lawyer had been allowed only in the presence of prison staff, which had breached his right to be provided with adequate facilities for the preparation of his defence.

135. Under Article 6 § 3 (c) of the Convention the applicant complained that on 18 August 2005 he had been denied the legal assistance of his own choosing: specifically that he had been coerced into accepting a police-appointed lawyer who did not act in his best interests.

136. Article 6 § 3 of the Convention, in so far as relevant, reads as follows:

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

137. Having regard to its finding under Article 6 § 1 of the Convention, i.e. that the entire proceedings brought against the applicant had been unfair (see paragraph 115 above), the Court considers that it is not necessary to examine separately the admissibility or the merits of the applicant's additional complaints made under Article 6 § 3 (see, *mutatis mutandis*, *Stanislav Zhukov v. Russia*, no. 54632/00, § 25, 12 October 2006).

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

138. Lastly, under Article 8 of the Convention, the applicant complained that the taking of his photographs in prison had amounted to a breach of the right to respect for his private life.

139. Article 8 of the Convention, in so far as relevant, reads as follows:

> "1. Everyone has the right to respect for his private ... life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the

country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

140. The Government, once again, referred to the Obligations Act, as well as the relevant domestic case-law (see paragraphs 67, 68 and 69 above). Since the applicant had failed to bring a civil case on the basis of this legislation, or indeed directly under Article 8 of the Convention, the Government argued that his complaint should be rejected as inadmissible.

141. The applicant made no comment in this respect.

142. The Court recalls the Convention principles set out in paragraphs 120 and 121 above. It further notes the relevant domestic case-law provided by the Government, based on the Obligations Act and the direct implementation of Article 8 of the Convention, specifically in the context of, *inter alia*, the unlawful taking of one's photographs (see paragraph 69 above and contrast to, for example, *Slavgorodski v. Estonia* (dec.), no. 37043/97, 9 March 1999), and concludes that the applicant's complaint must therefore be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

## VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

143. 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

144. The applicant claimed approximately 3,200 euros (EUR), in Serbian dinars, on account of lost earnings during the time he had spent serving his prison sentence. The applicant explained that even though he had not had a job at the time of his incarceration he had nevertheless been prevented from seeking employment during the said interval. The applicant further claimed EUR 34,615 for the non-pecuniary damage suffered as a result of his incarceration.

145. In the alternative, the applicant noted that the criminal proceedings against him could be re-opened and completed without his coerced confession of 18 August 2005, or, for that matter, the evidence given by witnesses who had themselves been ill-treated by the police in order to incriminate him.

146. The applicant lastly claimed compensation for the non-pecuniary damage suffered as follows: (i) for the substantive violation of Article 3, EUR 8,000; (ii) for the procedural violation of Article 3, EUR 2.000;

(iii) for the violation of Article 5 § 1 (c), EUR 2,000; (iv) for the violation of Article 6 § 1, EUR 4,000; (v) for the violation of Article 6 § 2, EUR 2,000; (vi) for the violations of Article 6 § 3, EUR 6,000; and (vii) for the violation of Article 8, EUR 1,000.

147. The Government contested these claims.

148. The Court notes that the applicant has submitted an agreement whereby any compensation awarded to him should be paid directly to his lawyer, V.J.Đ.

149. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it is clear that the applicant sustained some non-pecuniary loss arising from the breaches of his rights under Articles 3 and 6 §§ 1 and 2 of the Convention, for which he should be compensated. Making its assessment on an equitable basis, as required by Article 41 of the Convention, it therefore awards the applicant EUR 12,000 in this respect, plus any tax that may be chargeable, to be paid directly to the applicant's legal representative, V.J.Đ.

150. It is further observed that the Serbian Code of Criminal Procedure allows applicants to seek the re-opening of their trial where the Court has found that the convicted person's rights have been breached in the trial, as in the present case (see paragraph 66 above).

### B. Costs and expenses

151. The applicant also claimed EUR 21,616.50 for the costs and expenses incurred domestically, and EUR 1,815 for those incurred before the Court (of which approximately EUR 15, in Serbian dinars, for the related postal expenses).

152. The Government contested these claims. Regarding the costs and expenses incurred domestically, in particular, they referred to Articles 193 and 196 § 1 of the Code of Criminal Procedure (see paragraph 63 above).

153. The Court notes that the applicant has submitted a fees agreement and his lawyer's time sheet concerning work done on his case and that he has requested that the costs and expenses incurred should be paid directly to his lawyer, V.J.Đ.

154. 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. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 9,000 covering costs under all heads, to be paid

directly to the applicant's legal representative, V.J.Đ. (see *Belchev v. Bulgaria*, no. 39270/98, § 113, 8 April 2004).

### C. Default interest

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

## FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaints under Articles 3 and 6 § 1, as well as the complaint under Article 6 § 2 as regards the Municipal Court's judgment of 13 April 2006, admissible;

2. *Declares* unanimously the complaints under Articles 5 § 1 (c), 6 § 2 as regards the investigating judge's decision of 24 August 2005, and 8 inadmissible;

3. *Holds* by 6 votes to 1 that there has been a violation of the substantive aspect of Article 3 of the Convention;

4. *Holds* unanimously that there has been a violation of the procedural aspect of Article 3 of the Convention;

5. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention;

6. *Holds* unanimously that there has been a violation of Article 6 § 2 of the Convention as regards the Municipal Court's judgment of 13 April 2006;

7. *Holds* unanimously that it is not necessary to examine separately the complaints under Article 6 § 3 (a), (b) and (c) of the Convention;

8. *Holds* unanimously

   (a) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention and directly to the applicant's legal representative, Mr V. Juhas Đurić, the following amounts, to be converted into Serbian dinars at the rate applicable at the date of settlement:

(i) EUR 12,000 (twelve thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 9,000 (nine thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(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;

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

Done in English, and notified in writing on 19 June 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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| Stanley Naismith | Françoise Tulkens |
| 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.

F.T.
S.H.N.