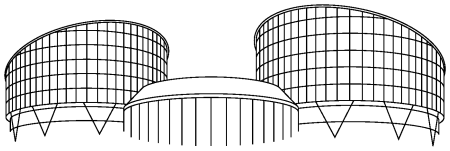

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF HABIMI AND OTHERS v. SERBIA

(Application no. 19072/08)

JUDGMENT

STRASBOURG

3 June 2014

FINAL

03/09/2014

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Habimi and Others v. Serbia,

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

Josep Casadevall, *President,*
Alvina Gyulumyan,
Dragoljub Popović,
Luis López Guerra,
Johannes Silvis,
Valeriu Griţco,
Iulia Antoanella Motoc, *judges,*
and Santiago Quesada, *Section Registrar,*

Having deliberated in private on 13 May 2014,

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

PROCEDURE

1. The case originated in an application (no. 19072/08) against Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). The application was brought on 2 April 2008 by a total of 37 applicants ("the applicants"), of whom 36 were Serbian nationals and one, Mr Qerim Binaj, was a national of Kosovo[1]. The applicants' further personal details are set out in the Annex to this judgment.

2. The applicants were initially represented by Mr D. Vidosavljević, a lawyer practising in Leskovac. As of 23 March 2012, Mr B. Petrović, also a lawyer based in Leskovac, temporarily took over the management of Mr Vidosavljević's law firm. The Serbian Government ("the Government") were initially represented by their former Agent, Mr S. Carić, and subsequently by their current Agent, Ms Vanja Rodić.

3. The applicants alleged that they had been ill-treated during a special police operation of 24 November 2006 and, further, that there was never an effective official investigation into this incident.

4. On 30 August 2010 the application was communicated to the Government. On 1 February 2014 the Court changed the composition of its Sections (Rule 25 § 1). This case was thus assigned to the newly composed Third Section (Rule 52 § 1).

[1] All reference to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The facts of the case, as submitted by the parties, may be summarised as follows.

A. The general context

6. In November 2006 protests broke in a number of prisons throughout the country regarding demands for the Serbian Parliament to enact specific amnesty-related legislation.

7. On 22 November 2006, according to various official reports, violent conflicts between the two main groups of prisoners occurred in the Niš Penitentiary. It would appear that a radical group of prisoners clashed with the moderate leaders over how to proceed with the protests.

8. On 23 November 2006 the prevailing group of prisoners requested that all prison staff, including the guards, vacate the dormitories. They also reportedly threatened the prison staff with kidnappings should they fail to comply with this request. The prison staff therefore left the three buildings in question and the prisoners subsequently, at approximately 4.45 p.m., barricaded the entrances with furniture. Almost 600 prisoners were thus left without any official supervision. The security situation in the Niš Penitentiary continued to deteriorate thereafter. The prison authorities assessed that there was a very real threat to the life and health of the prisoners who had refused to take part in the revolt.

9. On the same day the governor of the Niš Penitentiary formed a crises team which decided that a large scale intervention was necessary. The Ministry of Internal Affairs produced a detailed action plan in this regard. It included, *inter alia*, the assessment of the resistance that could be expected on the part of the prisoners, the force needed to overcome this resistance and the need to secure the presence of medical teams during and in the aftermath of the intervention.

10. On 24 November 2006, at around 7.20 a.m., more than 330 special police officers, members of the Gendarmerie, wearing helmets with visors, assisted by prison guards and other security staff, entered the Niš Penitentiary. The protests were brought under control by 8.45 a.m.

11. According to the information subsequently provided by the Ministry of Justice, a total of 79 prisoners had been injured and medically treated. The same document stated that the injuries sustained, except in one case, were slight in character and had been inflicted by means of blunt force trauma.

12. The police maintained that during their intervention a certain number of prisoners had offered active resistance. Many also had certain pre-

existing injuries stemming from a violent conflict which had apparently occurred between the prisoners themselves prior to the intervention. The police lastly noted that some prisoners had been injured as a result of the general commotion that had ensued in the course of the intervention, including prisoners being trampled over by other prisons and/or pushed against the furniture which had been moved into the corridors.

B. The applicants' situation

13. The applicants claimed that in the course of the intervention and/or shortly thereafter they had been physically abused by the police officers and/or the prisons guards. Concerning the intervention itself, the applicants contended that they had been beaten with baseball bats and truncheons, forced to run between two rows of police officers and/or prison guards who had kicked them as they passed and, lastly, compelled to lie on a cold, concrete floor for hours while being handcuffed. As a result, the applicants allegedly sustained various injuries, such as fractured bones, bruises and wounds all over the body, internal bleeding and brain concussions.

C. The initial proceedings following the intervention

14. On 24 November 2006, at around 9.30 a.m., the investigating judge of the Niš Municipal Court and the Niš Municipal Public Prosecutor took part in an on-site investigation which found a large number of improvised weapons (i.e. knives, blades and metal pipes) on the premises of the Niš Penitentiary.

15. On 28 November 2006, having reviewed the reports of the police officers who had used restraints in the course of the intervention, the commanding officer of the Gendarmerie unit involved decided that the force used had been lawful and proportionate.

16. On 12 January 2007 the Ministry of Internal Affairs forwarded the minutes of the on-site investigation to the Niš Municipal Public Prosecutor's Office ("NMPPO"). These minutes were accompanied by several police reports, photographic documentation, and a statement listing the objects which had been found in prison following the police intervention.

17. On 8 March 2007 the NMPPO requested information from the police concerning the identity of the injured persons and the reasons for the application of coercive measures.

18. Between 29 March and 11 May 2007 the applicants lodged their criminal complaints against unnamed police officers and a number of prison guards. The latter were, for the most part, identified by their respective first names and/or nicknames. The applicants urged the NMPPO to: (i) establish the full identities of all officials who had participated in their abuse;

(ii) obtain the relevant medical records documenting their injuries; (iii) hear a number of other prisoners who had witnessed their ill-treatment; and (iv) ultimately, press criminal charges against all those responsible.

19. On 4 April 2007 the NMPPO ordered the police to submit the reports prepared in accordance with Article 86 of the Police Act (see paragraph 53 below).

20. On 25 April 2007 the police provided the NMPPO with a list of prisoners who had been injured on 24 November 2006 and subsequently treated at the Niš Hospital. The following applicants were among them: Mr Bajram Baždar, Mr Nenad Đokić, Mr Predrag Aleksić, Mr Robert Franc, and Mr Srđan Lomigora. They were all certified as having sustained different kinds of bruises and/or excoriations. On the same occasion the police identified the twelve prison guards to whom the applicants had referred in their criminal complaints.

21. On 7 May and 20 June 2007 the NMPPO requested the police to interrogate the prison guards in question.

22. On 4 August 2007 the police submitted a report, based partly on statements apparently given by a number of prisoners, to the effect that there had been several violent clashes between the various groups of prisoners on 17, 18 and 23 November 2006, resulting in serious injuries and a criminal prosecution. The twelve prison guards were also questioned and all denied ill-treating the applicants.

23. On 10 October 2007 the NMPPO requested the police to hear the applicants and the eyewitnesses specified in the criminal complaints.

24. On 5, 8, 15 and 19 November 2007 police interviewed the following twenty-five applicants on the premises of the Niš Penitentiary: Mr Srđan Lomigora, Mr Siniša Stanković, Mr Vladimir Ivljanin, Mr Miloš Jurišić, Mr Bratislav Rajković, Mr Slađan Matić, Mr Ivan Šekularac, Mr Vladimir Vasiljević, Mr Qerim Binaj, Mr Ivica Jonović, Mr Dejan Stojanović, Mr Branislav Radulović, Mr Zoran Zdravković, Mr Vukašin Kostić, Mr Goran Ristić, Mr Ivan Tanasković, Mr Bajram Baždar, Mr Minuš Belilović, Mr Zoran Vasić, Mr Ognjen Vujović, Mr Aleksandar Simonović, Mr Ivan Gajić, Mr Zoran Marković, Mr Slaviša Strugar and Mr Dane Glušica. All, except for Mr Aleksandar Simonović, confirmed that they had been abused as described at paragraph 13 above. Some also confirmed having witnessed the abuse suffered by other applicants and identified the prison guards in question. Mr Aleksandar Simonović, for his part, refused to give a statement to the police, explaining that he would only testify before a court of law.

25. On 5 December 2007 the NMPPO decided to reject the applicants' criminal complaints. In so doing, it took into account, *inter alia*, the statements given by the prison guards, the available medical documents, the on-sight investigation, and the conclusion of the police officers' commander to the effect that the force used had been lawful and proportionate.

Concerning the injuries sustained by the applicants, the NMPPO opined that they had been caused by fights between the prisoners themselves, their falling down the stairs or against the furniture in the course of the operation and/or the prisoners' resistance to the police who had been trying to restore order to the Niš Penitentiary. Lastly, the NMPPO noted that the proportionality of the entire intervention was best evidenced by the fact that despite the large number of prisoners involved, of which some had been armed and dangerous, and the scale of the intervention only a small number of persons had been injured, sustaining, as they did, mostly slight bodily harm.

D. The proceedings before the courts

26. On 11 December 2007 the applicants requested from the investigating judge of the Niš Municipal Court to establish the identity of all police officers and prison guards concerned, with the intention of starting a "subsidiary prosecution" against them (see paragraphs 46 and 47 below). The applicants stated that they knew the prison guards by their first names or nicknames only, while the identity of the police officers could be established through their commanding officer.

27. On 17 April 2008, despite a prior negative opinion expressed by the investigating judge, the pre-trial Chamber of the Niš Municipal Court ordered that the applicants be heard (see paragraph 47 below).

28. On 19 May and 2 June 2008, on the premises of the Niš Penitentiary, the investigating judge of the Niš Municipal Court heard the following applicants: Mr Zoran Marković, Mr Dejan Stojanović, Mr Nenad Đokić, Mr Ivan Gajić, Mr Bojan Vučković, Mr Branislav Radulović, Mr Vladimir Vasiljević, Mr Minuš Belilović, Mr Ivan Šekularac, Mr Zoran Antić, Mr Nenad Jovanović, Mr Slaviša Strugar, Mr Ivan Tanasković, Mr Aleksandar Simonović, Mr Siniša Stanković, Mr Saša Stevanović, Mr Ivica Jonović, Mr Vukašin Kostić, Mr Bajram Baždar, Mr Zoran Vasić, Mr Ognjen Vujović and Mr Qerim Binaj. All applicants, except for Mr Minuš Belilović, Mr Zoran Antić, Mr Nenad Jovanović, Mr Aleksandar Simonović and Mr Vukašin Kostić recounted the alleged abuse suffered at the hands of the police officers and/or prison guards. Some of them identified, by first name or nickname, the prison guards in question but none could provide any details regarding the identity of the police officers since they had visors covering their faces. Mr Minuš Belilović, however, stated that despite having been ill-treated by the police he did not want anyone to be convicted for the incident and had therefore decided to withdraw his complaint. Mr Zoran Antić and Mr Nenad Jovanović stated, respectively, that they were not the persons of the same name and surname who had complained of police brutality. Mr Aleksandar Simonović described his alleged ill-treatment by the police and prison guards but stated that "out of

fear" he did not want to name the persons concerned. Mr Vukašin Kostić related that he was sorry to have been involved in the incident at all and would like to withdraw his criminal complaint.

29. Though duly informed of the hearing held on 2 June 2008, the applicant's counsel did not attend it. On 3 June 2008 he informed the investigating judge that he had had to attend another hearing, in a different case, scheduled earlier.

30. On 3 June 2008 the investigating judge invited the applicants' counsel to provide the court with information as to the whereabouts of a number of applicants who had in the meantime been released or transferred to another penitentiary.

31. On 16 June 2008 the applicants' counsel responded by stating that he was not obliged to comply with this request. The investigating judge should instead have addressed his request to the Niš Penitentiary.

32. On 30 June and 2 July 2008 the Zabela Penitentiary and the Vranje District Prison informed the investigating judge that four applicants, Mr Miloš Jurišić, Mr Vladimir Ivljanin, Mr Robert Franc and Mr Dane Glušica, were not in their custody.

33. On 4 July 2008 the investigating judge heard another two applicants, Mr Srđan Lomigora and Mr Zoran Zdravković, in his own office. They recounted the abuse allegedly inflicted by the police and/or the prison guards but could not identify the police officers because of their visors. Mr Zoran Zdravković further stated that since he had only recently arrived to the Niš Penitentiary he could not identify the prison guards in question.

34. On the same day the Niš Penitentiary informed the investigating judge that out of the twelve applicants who had yet to be heard some had been moved to other penitentiaries, specifying which, and some released, specifying their home addresses. It subsequently transpired that one of these applicants, Mr Ramadan Ljatifi, had escaped from prison.

35. On 18 July 2008 the investigating judge of the Raška Municipal Court, acting on the request of the Niš Municipal Court, heard another applicant, Mr Darko Savić, who described the alleged abuse suffered in the course of the police intervention. He could not, however, identify the officers because of their visors.

36. Between 5 September and 5 December 2008 the investigating judge of the Niš Municipal Court received minutes of the interrogations of another seven applicants, specifically Mr Vladimir Ivljanin, Mr Adnan Habimi, Mr Miloš Jurišić, Mr Zoran Matović, Mr Robert Franc, Mr Bratislav Rajković and Mr Dane Glušica, carried out before the municipal courts in Prokuplje, Leskovac, Kraljevo, Sremska Mitrovica and Požarevac. All applicants reaffirmed that they had been beaten by the police and/or prison guards during the intervention and all, except for Mr Miloš Jurišić, identified by name the prison guards who had taken part in the alleged abuse. Mr Robert Franc further gave a physical description of one of the

police officers who had allegedly ill-treated him since this officer's face had been visible. Mr Vladimir Ivljanin, in addition, provided a detailed written statement containing a thorough account of his alleged abuse during the intervention and subsequently. In support of these assertions he offered the names of the prison guards in question, the name of the police officer who had allegedly beaten him, a list of eleven prison guards who could allegedly confirm that he had been denied medical assistance, and the names of several dozen prisoners and prison gourds who had witnessed his alleged abuse and/or seen his injuries.

37. On 10 November 2008 applicant Mr Ivica Jonović withdrew his request filed with the investigating judge.

38. On 22 December 2008 the investigating judge informed the applicants' counsel that he had complied with the instructions of the pre-trial Chamber and that it was now up to the applicants to decide whether to take over the prosecution of the case in the capacity of subsidiary prosecutors within a period of eight days (see paragraphs 46-49 below).

39. On 31 December 2008 the applicants' counsel complained to the investigating judge that he was effectively deprived of the possibility to take over the prosecution of the case on behalf of his clients. Specifically, the investigating judge had, in breach of Articles 257 and 259 of the Code of Criminal Procedure, failed to provide him with the case file which could have enabled him to be informed of the available evidence and of the identities of the perpetrators in question (see paragraphs 48 and 49 below). Also, a period of eight days was simply too short.

40. On 8 January 2009 the investigating judge addressed the applicants' counsel. He stated, *inter alia*, that the latter had shown very little interest in the case to date, having never sought access to the case file or attended the hearings. Moreover, some of the applicants had themselves indicated that they had lost all contact with their lawyer. Finally, the investigating judge recalled that counsel acting on behalf of subsidiary prosecutors were not entitled to be provided with the case file but could review it on the court's own premises.

E. Other relevant facts

41. On 31 January 2007 the NMPPO decided that there were no grounds to bring a criminal case against any of the prisoners involved in the revolt and explained that they had never had the intent to use force in order to escape from prison which was a necessary precondition for the existence of the crime provided for in Article 338 of the Criminal Code (see paragraph 44 below).

42. On 21 January 2009 a number of applicants, specifically Mr Adnan Habimi, Mr Ljubomir Simić, Mr Srđan Lomigora, Mr Bojan Vučković, Mr Bajram Baždar, Mr Branislav Radulović, Mr Darko Savić, Mr Qerim

Binaj and Mr Nenad Đokić, requested from the Niš Hospital, through their counsel, to provide them with copies of their respective medical files. On 23 January 2009, however, the Niš Hospital declined to do so since this would be in breach of Article 37 of the Health Care Act (see paragraph 55 below).

43. Based on the copies of the partly inconsistent documents containing medical information, received by the Court after the communication of the present application, the Government maintained that between 24 November and 30 November 2006 the following applicants had not received any medical treatment or, if they had, no physical injuries had been recorded in the course of the examination: Mr Miloš Jurisić, Mr Ramadan Ljatifi, Mr Vladimir Vasiljević, Mr Ivica Jonović, Mr Nenad Jovanović, Mr Vukašin Kostić, Mr Ivan Tanasković, Mr Minuš Belilović, Mr Ivan Gajić, Mr Slaviš Strugar, Mr Zoran Matović and Mr Zoran Antić. The remaining applicants, in view of the available documentation, seemed to have sustained injuries essentially corresponding to those described at paragraph 13 above. Three applicants, Mr Adnan Habimi, Mr Bojan Vučković and Mr Mr Srđan Lomigora, also submitted photographs of their respective injuries.

II. RELEVANT DOMESTIC LAW

A. The Criminal Code (*Krivični zakonik*, published in the Official Gazette of the Republic of Serbia – OG RS – no. 85/05, amendments published in OG RS nos. 88/05, 107/05, 72/09, 111/09 and 121/12)

44. The relevant Articles of this Code read as follows:

Article 137

"1. Whoever ill-treats another or treats another in a 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."

Article 338

"1. Persons who have been deprived of their liberty in accordance with the law, and who have assembled with the intent of obtaining their own forcible release or jointly assaulting persons who have been entrusted with their supervision or for the purpose

of compelling such persons, by means of force or an imminent threat thereof, to undertake certain actions or fail to act in breach of their official duties, shall be punished with imprisonment of up to three years.

2. The perpetrator of the offence specified in paragraph 1 above who has actually resorted to the use of force or made the threat in question shall be punished with imprisonment from six months to five years."

B. 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)

45. 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* 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.

46. 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", within eight days from the notification of that decision.

47. Articles 64 § 1, 239 § 1, and 242, taken together, provide that when the alleged perpetrator of a crime remains unknown a subsidiary prosecutor shall be entitled to petition the investigating judge to undertake specific, additional, measures aimed at the establishment of his identity (*pojedine predistražne radnje*) prior to deciding on whether or not to seek the institution of a formal judicial investigation (*pokretanje istrage*). Should the investigating judge reject this request, it shall, pursuant to Article 243 § 7, be up to the pre-trial Chamber of the same court to rule on the matter.

48. Article 257 § 2 provides that, once a formal judicial investigation has been completed, the investigating judge shall provide the public prosecutor with the case file who shall then have fifteen days to decide on how to proceed, i.e. whether to ask for additional information from the investigating judge, lodge an indictment with the court, or drop the charges in question.

49. Article 259 § 2 provides, *inter alia*, that the provisions of Article 257 § 2 shall also be applied, *mutatis mutandis*, to a subsidiary prosecutor.

C. The Enforcement of Criminal Sanctions Act (*Zakon o izvršenju krivičnih sankcija*; published in OG RS no. 85/05, amendments published in OG RS no. 72/09)

50. Article 128 provides that coercive measures may be used against prisoners when necessary to prevent an escape, a physical attack on or an injury to other persons or the infliction of self-injuries. Coercion may likewise be applied when it is deemed necessary in order to prevent material damage and/or overcome the prisoners' active or passive resistance.

51. Article 129 lists the various types of coercive measures that can be used with respect to prisoners (i.e. physical force, restraints, isolation, rubber truncheons, water hoses, chemical substances and firearms) but requires strict proportionality in their application.

52. Article 130 provides, *inter alia*, that immediately following the application of coercive measures, except when only restraints have been used, the prisoner must be medically examined. The medical examination of the same prisoner shall also be repeated between twelve and twenty-four hours thereafter. A written report on the incident prepared by the security services, as well as a medical report, shall be submitted to the prison governor without delay. The medical report shall include the prisoner's own account of the events at issue, the doctor's assessment of the injuries sustained, if any, and the doctor's opinion on the relationship between the coercive measures applied and any injuries sustained. The prison governor shall inform the Ministry of Justice of the coercive measures used and shall provide it with a written report in this regard within a period of twenty-four hours.

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

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

54. Articles 84, 85 and 88-109 set out the various types of coercive measures, the detailed conditions in which they may be applied while emphasising the importance of proportionality in this context.

E. The Health Care Act (*Zakon o zdravstvenoj zaštiti*, published OG RS no. 107/05)

55. Article 37 provides, *inter alia*, that a patient's personal data, as well as the information contained in his medical documentation, shall be considered as an "official secret" (*službena tajna*) which must, as such, be honoured by all medical staff. The latter, however, may be relieved of this duty based on a decision issued by a court of law or the patient's own consent (in writing or otherwise, providing that it is clear and unequivocal). Lastly, information contained in one's medical documentation may also be provided to certain other State bodies if and when so envisaged in other applicable legislation.

III. RELEVANT HUMAN RIGHTS REPORTS

A. Human Rights in Serbia – A Comprehensive Report for 2006, Belgrade Centre for Human Rights, published in 2007, p. 218

56. The relevant part of this report reads as follows:

> "In early October, around 1,000 prisoners in ... Sremska Mitrovica, Niš and Požarevac launched a protest demanding the adoption of the Amnesty Act ... The same reasons prompted another ... rebellion in November. Around 2,000 prisoners in Sremska Mitrovica and Zabela ... refused to eat because the Amnesty Act ... [had not been adopted] ... The inmates in the Niš prison joined the protest a few days later. Eight days into the protest, some 500 Gendarmerie officers entered the Niš prison and restored order by force, injuring forty inmates ... The Justice Ministry ... claimed that the police had not applied excessive force ..."

B. Commission of the European Communities, Serbia 2008 Progress Report accompanying the communication from the Commission to the European Parliament and the Council, Brussels, 5 November 2008, p. 14

57. The relevant part of this report reads as follows:

> "With regard to prevention of torture and ill-treatment and the fight against impunity, judicial control over respect for human rights in prisons has improved ... However, there has been no progress on investigating alleged serious violations of human rights relating to prison riots in 2006."

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 3 OF THE CONVENTION

58. The applicants complained that they had been ill-treated during the police operation of 24 November 2006 and, further, that there was never an effective official investigation carried out in this connection.

59. The applicants relied on Article 3 of the Convention, which provision reads as follows:

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

A. Admissibility

60. The Government maintained that since there was no medical evidence that they had been injured during the police intervention of 24 November 2006 the applicants whose names have been listed at paragraph 43 above cannot be considered as "victims" within the meaning of the Convention.

61. The Government further submitted that, following the investigating judge's decision of 22 December 2008, all applicants had failed to seek additional information for him or, alternatively, lodge an indictment with the Niš Municipal Court (see paragraph 38 above). One of the applicants, Mr Ivica Jonović, had even specifically withdrawn his charges on 10 November 2008 (see paragraph 37 above). In such circumstances, the application as a whole was likewise inadmissible due to the applicants' failure to exhaust effective domestic remedies.

62. The Court considers that these objections go to the very heart of the question whether the applicants had indeed suffered a substantive and/or a procedural violation of Article 3 and would more appropriately be examined at the merits stage. The application 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.

B. Merits

1. The parties' submissions

(a) The applicants' submissions

63. The applicants reaffirmed their complaints.

64. They further maintained that they had all been abused in the course of the intervention by the police and/or the prison guards, including the twelve applicants specifically referred to by the Government. In any event,

it was up to the official investigation to show that there had been no ill-treatment but it never did so convincingly. The applicants also argued that a lack of supporting medical evidence in some cases did not mean that they had not been abused but merely that no medical assistance had been provided. There was also no proper medical analysis of how, exactly, were each of the applicants' injuries inflicted even though this was necessary in order to rule out any disproportionate use of force on the part of the authorities. The NMPPO likewise decided that there were no grounds to press criminal charges against the applicants for the crime of prison revolt, which indicated that the police had in fact encountered no resistance during the operation.

65. The applicants recalled that the investigating judge of the Niš Municipal Court had initially refused to proceed based on their request lodged in the capacity of subsidiary prosecutors. Ultimately, he was ordered to do so by the pre-trial Chamber, but even then only the applicants themselves were reheard and the hearings took place on the premises of the Niš Penitentiary, where the abuse had occurred, not in a courtroom. The investigating judge further ordered the applicants' counsel to provide the home addresses of those applicants who had been released in the meantime even though he should have obtained this information from the prison authorities directly. Also, the applicants' counsel was not provided with a list of the prison guards' names, surnames and other personal data, despite the fact that this information was known to the investigating judge, while the identity of the police officers involved was never even explored. Finally, the applicants' counsel pointed out that he had not been provided with the court's case file and was, instead, merely informed that he could review it on the court's premises within a very short period of time. All this meant that the applicants had effectively been deprived of their right to take over the prosecution of their case as subsidiary prosecutors.

(b) The Government's submissions

66. The Government maintained that the facts of the case disclosed no breach of the applicants' rights under Article 3 of the Convention, substantive or procedural.

67. They recounted, in some detail, the general context in which the police operation had taken place and concluded that the use of force had been lawful, legitimate, necessary and proportionate. Indeed, although almost 600 prisoners were involved the entire operation lasted for less than an hour and a half and only a small number of prisoners were injured despite the fact that many were armed and dangerous. The operation was thus well-planned and well-executed and was only undertaken as a measure of last resort. Besides, the reasons given by the NMPPO for their decision not to press charges against the prisoners for the crime of prison revolt were

very clear and could not, in any way, be interpreted to mean that the operation had been unnecessary or unjustified (see paragraph 41 above).

68. Additionally, violence started as soon as the prison guards had left the dormitories. The injuries sustained by the prisoners were therefore a consequence of violent clashes among themselves and/or their resistance to the intervention, or were caused due to the panic which ensued in the course thereof. In any event, there was no evidence that the twelve applicants referred to in paragraph 43 above suffered any injuries as a result of the intervention, while the injuries sustained by the remaining applicants were minor in character and as such below the threshold of Article 3 of the Convention.

69. There was also a proper investigation of the incident. An on-sight investigation was carried out in the presence of an investigating judge. The results were then forwarded to the NMPPO which took a reasoned position on the matter. The police officers involved in the operation gave their statements which were subsequently accepted by their commander. The prison guards and the applicants were likewise heard and the former denied using any force during the incident. At the request of the applicants' counsel additional procedural steps were undertaken by the investigating judge and he was informed thereof. However, the applicants counsel failed to adequately represent his clients. Had he made an effort to consult the case-file he could have taken over the prosecution of the case on behalf of the applicants, in their capacity as subsidiary prosecutors, at least in respect of the prison guards who had been identified. Additional measures aimed at the identification of the police officers could also have been requested. Instead, the applicants' counsel, who had also failed to attend any of the scheduled hearings, filed a very general request seeking the identification of all those he deemed responsible.

70. Finally, the Government submitted that the local medical authorities had acted fully in accordance with the relevant domestic legislation when they refused to provide copies of the applicants' medical files to their counsel who could, instead, have petitioned the courts in this respect. In any event, even in the absence of such a request, the courts ultimately obtained the documentation in question.

2. The Court's assessment

(a) The procedural aspect

(i) The general principles

71. 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 other authorities, *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV).

72. Whatever the method of investigation, the authorities must act as soon as an official complaint has been lodged. 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 State agents 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 the State agents 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).

73. The investigation should be capable of leading to a determination of whether the force used by the State was or was not justified in the given circumstances and, in the latter case, to the identification and punishment of those responsible (see *Kaya v. Turkey* judgment of 19 February 1998, *Reports* 1998-I, § 87). The general legal prohibition of torture and inhuman and degrading treatment and punishment would otherwise, 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).

74. The investigation must likewise be thorough. That means that 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 (see *Assenov and Others v. Bulgaria*, 28 October 1998, § 103 et seq., *Reports of Judgments and Decisions* 1998-VIII). They must take all reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony and forensic evidence (see *Tanrıkulu v. Turkey* [GC], no. 23763/94, ECHR 1999-IV, § 104 et seq., and *Gül v. Turkey*, no. 22676/93, § 89, 14 December 2000). Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard (see *Boicenco v. Moldova*, no. 41088/05, § 123, 11 July 2006).

75. Generally speaking, it is necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events (see, for example, *Barbu Anghelescu v. Romania*,

no. 46430/99, § 66, 5 October 2004; and *Kurnaz and Others v. Turkey*, no. 36672/97, § 56, *in fine*, 24 July 2007). This means not only a lack of hierarchical or institutional connection but also independence in practice (see *Boicenco*, cited above, § 121; see also *Ergi v. Turkey*, 28 July 1998, §§ 83 and 84, *Reports of Judgments and Decisions* 1998-IV, where the public prosecutor's investigation showed a lack of independence through his heavy reliance on the information provided by the gendarmes implicated in the incident). Finally, the investigation must afford a sufficient element of public scrutiny to secure accountability. Whilst 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).

(ii) The application of these principles to the present case

76. The Court considers that the applicants' complaints of abuse by police officers and/or prison guards are sufficiently credible to require an effective official investigation. The severity of the alleged ill-treatment is likewise above the threshold required under Article 3.

77. Turning to the investigation, the Court firstly notes that it was initially co-ordinated by the NMPPO. However, in practice, it was carried out almost exclusively by the police which obviously had an institutional connection with the Gendarmerie officers accused of the applicants' abuse, both being parts of the Ministry of Interior (see paragraphs 15-25 above).

78. Secondly, the NMPPO's rejection of the applicants' criminal complaints on 5 December 2007 never considered the statements given by the applicants themselves and consequently failed to address, *inter alia*, the issue of why would the applicants, who were all still in prison at that time, be so determined as to gratuitously accuse the police and/or the prison guards of their abuse. The NMPPO further attached particular importance to the opinion of the police officers' own commander, to the effect that the force used had been lawful and proportionate, which opinion could hardly be described as independent. Finally in discussing the injuries, the NMPPO did so in rather vague terms, mostly referring to "the prisoners" in general rather than the applicants and their injuries in particular (see paragraph 25 above).

79. Thirdly, the investigating judge of Niš Municipal Court ultimately got involved in the investigation. However, the said court's investigating judge only heard the applicants and obtained minutes of the applicants' statements given to other investigating judges. No witnesses, referred to in the applicants' criminal complaints, no police officers and no prison guards were ever heard by a judge (see paragraphs 28-38 above).

80. Fourthly, neither the investigating judge nor the NMPPO made an attempt to identify the police officers who had allegedly abused the applicants, although some of the latter were apparently able to identify the

former (see paragraph 36 above). Also, the applicants were not given an opportunity to confront their alleged or possible abusers even though there was evidence regarding the identities of both the officers who had used restraints during the intervention and of the prison guards involved (see paragraphs 15 and 20-22 above).

81. Fifthly, the Court notes that a number of applicants appear to have been heard, by the police and/or the investigating judge, on the premises of the Niš Penitentiary where several specifically stated that they were afraid to identify their abusers while others decided to withdraw their complaints. It seems quite striking that in these circumstances the investigating judge apparently did nothing to explore these indications of official intimidation (see paragraph 28 above).

82. Lastly, the applicants' counsel was denied access to their medical documentation. Whilst the Government maintain that it was up to the courts to obtain this information, which they ultimately did, and quite apart from whether the said refusal could be considered lawful (see paragraph 55 above), it seems particularly inappropriate that the applicants' efforts to substantiate their claims of ill-treatment would be hindered in such a way at the outset (see paragraph 42 above).

83. In view of the above, the Court dismisses the Government's preliminary objection, regarding the non-exhaustion of domestic remedies (see also paragraph 72 above), and finds that the applicants have suffered a violation of the procedural aspect of Article 3 of the Convention.

(b) The substantive aspect

(i) The general principles

84. 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).

85. 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; and *Jalloh v. Germany* [GC],

no. 54810/00, § 67, 11 July 2006). Treatment has been held 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*, cited above, § 120). It 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). Torture, however, involves deliberate inhuman treatment causing very serious and cruel suffering (see, for example, *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports* 1996-VI, p. 2279, § 64; *Aydın v. Turkey*, judgment of 25 September 1997, *Reports* 1997-VI, pp. 1891-92, §§ 83-84 and 86; and *Selmouni v. France* [GC], no. 25803/94).

86. In the context of detainees, the Court has emphasised that persons in custody are in a vulnerable position and that the authorities are under a duty to protect their physical well-being (see, among other authorities, *Sarban v. Moldova*, no. 3456/05, § 77, 4 October 2005; and *Mouisel v. France*, no. 67263/01, § 40, ECHR 2002-IX). Any recourse to physical force in respect of a person deprived of his liberty which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the rights set forth in Article 3 of the Convention (see *Sheydayev v. Russia*, no. 65859/01, § 59, 7 December 2006; *Ribitsch v. Austria*, judgment of 4 December 1995, Series A no. 336, § 38; and *Krastanov v. Bulgaria*, no. 50222/99, § 53, 30 September 2004). The Court is, of course, mindful of the potential for violence that exists in penal institutions and of the fact that disobedience by detainees may quickly degenerate into a riot (see *Gömi and Others v. Turkey*, no. 35962/97, § 77, 21 December 2006). It accepts therefore that the use of force may be necessary on occasion to ensure prison security, to maintain order or prevent crime. Nevertheless, such force may be used only if indispensable and must not be excessive (see *Vladimir Romanov v. Russia*, no. 41461/02, § 63, 24 July 2008).

87. Allegations of ill-treatment have to be supported by appropriate evidence. In assessing evidence, the Court has generally applied the standard of proof of "beyond reasonable doubt" (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, pp. 64-65, § 161). However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events at issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during such detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory

and convincing explanation (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII). Whilst 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).

(ii) The application of these principles to the present case

88. The Court notes that it is accepted by the parties that on 23 November 2006, as a consequence of the pressure applied by a number of prisoners, all prison staff, including the guards, vacated the dormitories of the Niš Penitentiary. Almost 600 prisoners were thus left without any official supervision until 24 November 2006 when, following a large-scale police intervention, the protests were ultimately brought to an end (see paragraphs 8-10 above). In these circumstances, it is clear that any events during that period, up until the very conclusion of the police operation, did not "lie wholly, or in large part, within the exclusive knowledge of the authorities" and that any allegations of ill-treatment would have to be substantiated "beyond a reasonable doubt".

89. Whilst most applicants had medical evidence of the injuries sustained during the relevant period and practically all had referred to witnesses in support of their allegations of ill-treatment at the hands of the police and/or the prison guards this is not sufficient for the Court to conclude, certainly not beyond a reasonable doubt, that they had indeed been abused in breach of Article 3 of the Convention (see, *mutatis mutandis*, *Gömi and Others*, cited above, § 77). Specifically, there are some indications to the effect that the injuries sustained or allegedly sustained by the applicants might have been caused as a consequence of score-settling between the prisoners themselves or due to the panic which had ensued in the course of the intervention (see paragraphs 8, 12, 22 and 25 above). Furthermore, there are reports to the effect that some prisoners, again possibly including the applicants, had offered resistance during the intervention and it is undisputed that a large number of weapons were seized by the prison authorities on 24 November 2006 (see paragraphs 9, 12, 14, and 25 above).

90. Finally, the Court notes that on 31 January 2007 the NMPPO decided that there were no grounds to bring a criminal case against any of the prisoners involved in the revolt only because they "had never had the intent to use force in order to escape from prison", which was a necessary precondition for the existence of the crime in question (see paragraph 41 above). The Court is of the opinion that this decision cannot therefore be interpreted to mean, as suggested by the applicants, that the police operation as such had been unwarranted.

91. In view of the foregoing, the Court cannot but find that there has been no violation of the substantive aspect of Article 3 of the Convention,

the investigation carried out by the Serbian authorities themselves having also not fully clarified the relevant facts. The Court further finds that in the light of this conclusion it is not necessary to decide on the Government's preliminary objection regarding the applicants' victim status (see, *mutatis mutandis*, *Palić v. Bosnia and Herzegovina*, no. 4704/04, § 81, 15 February 2011).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

92. 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

93. The applicants sought compensation for the non-pecuniary damage suffered. Specifically, Mr Adnan Habimi, Mr Bojan Vučković, Mr Srđan Lomigora, Mr Robert Franc and Mr Darko Savić claimed 10,000 euros (EUR) each, while Mr Siniša Stanković and Mr Vladimir Ivljanin claimed EUR 6,000 each. The remaining applicants claimed EUR 4,000 each.

94. The Government contested these claims.

95. The Court considers that the applicants have certainly suffered some non-pecuniary damage. Having regard to the nature of the violation found in the present case and making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the sum of EUR 3,500 to each applicant.

B. Costs and expenses

96. The applicants also jointly claimed EUR 3,038.82 for the costs and expenses incurred before the domestic authorities and EUR 8,500 for those incurred before the Court.

97. The Government contested these claims.

98. 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.

99. 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 applicants jointly the sum of EUR 5,000 for the costs and expenses incurred domestically, as well as the costs and expenses incurred before the Court.

C. Default interest

100. 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. *Joins to the merits* the Government's preliminary objection as to the non-exhaustion of domestic remedies and *rejects* it;

2. *Joins to the merits* the Government's preliminary objection as to the applicants' victim status;

3. *Declares* the application admissible;

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

5. *Holds* that there has been no violation of the substantive aspect of Article 3 of the Convention;

6. *Holds* that in the light of its conclusion under point 5 it is not necessary to decide on the Governments' preliminary objection regarding the applicants' victim status mentioned in point 2;

7. *Holds*
   (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, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 3,500 (three thousand and five hundred euros) to each applicant, plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 5,000 (five thousand euros) to the applicants jointly, plus any tax that may be chargeable to them, 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;

8. *Dismisses* the remainder of the applicants' claims for just satisfaction.

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

Santiago Quesada
Registrar

Josep Casadevall
President

Annex

No.	Surname	Name	Date of birth
1.	HABIMI	Adnan	22/05/1967
2.	VUČKOVIĆ	Bojan	11/08/1969
3.	LOMIGORA	Srđan	08/02/1979
4.	FRANC	Robert	12/10/1972
5.	STANKOVIĆ	Siniša	26/05/1973
6.	IVLJANIN	Vladimir	09/04/1977
7.	JURIŠIĆ	Miloš	23/09/1982
8.	LJATIFI	Ramadan	14/04/1968
9.	RAJKOVIĆ	Bratislav	21/11/1953
10.	MATIĆ	Slađan	09/09/1975
11.	ŠEKULARAC	Ivan	21/07/1975
12.	ĐOKIC	Nenad	07/07/1970
13.	VASILJEVIĆ	Vladimir	10/01/1975
14.	BINAJ	Qerim	15/05/1961
15.	JONOVIĆ	Ivica	24/06/1979
16.	SAVIĆ	Darko	11/01/1979
17.	ALEKSIĆ	Predrag	01/09/1959
18.	OSMANOVIĆ	Branislav	02/05/1984
19.	STEVANOVIĆ	Saša	24/12/1973
20.	STOJANOVIĆ	Dejan	26/04/1981
21.	RADULOVIĆ	Branislav	08/11/1973
22.	JOVANOVIĆ	Nenad	28/10/1976
23.	ZDRAVKOVIĆ	Zoran	25/02/1977
24.	KOSTIĆ	Vukašin	22/08/1978
25.	RISTIĆ	Goran	06/04/1963
26.	TANASKOVIĆ	Ivan	26/07/1980
27.	BAŽDAR	Bajram	21/02/1979
28.	BELILOVIĆ	Minuš	07/08/1977
29.	VASIĆ	Zoran	30/01/1976
30.	VUJOVIĆ	Ognjen	10/06/1982
31.	SIMONOVIĆ	Aleksandar	14/05/1982
32.	GAJIĆ	Ivan	01/11/1974
33.	MARKOVIĆ	Zoran	31/05/1982
34.	STRUGAR	Slaviša	03/03/1975
35.	GLUŠICA	Dane	14/01/1978
36.	MATOVIĆ	Zoran	17/12/1955
37.	ANTIĆ	Zoran	1960