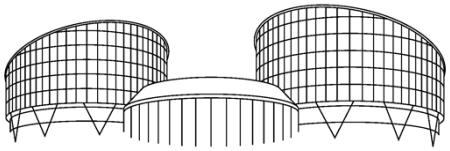

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF SELAMI AND OTHERS v. THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA

(Application no. 78241/13)

JUDGMENT

STRASBOURG

1 March 2018

FINAL

01/06/2018

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

In the case of Selami and Others v the former Yugoslav Republic of Macedonia,

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

Linos-Alexandre Sicilianos, *President,*
Aleš Pejchal,
Krzysztof Wojtyczek,
Ksenija Turković,
Pauliine Koskelo,
Tim Eicke,
Jovan Ilievski, *judges,*

and Renata Degener, *Deputy Section Registrar,*

Having deliberated in private on 6 February 2018,

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

PROCEDURE

1. The case originated in an application (no. 78241/13) against the former Yugoslav Republic of Macedonia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by four Macedonian nationals, Ms Dževrije Selami ("the first applicant"), Ms Nedžmije Aliu ("the second applicant"), Mr Mesut Selami ("the third applicant") and Mr Nedžmi Selami ("the fourth applicant"), on 6 December 2013. The first applicant is the widow of Mr S. Selami, who died on 6 April 2011. The remaining applicants are the children of the first applicant and the late Mr S. Selami.

2. The applicants were represented by Mr Lj. Lazareski, a lawyer practising in Gostivar. The Macedonian Government ("the Government") were represented by their Agent, Mr K. Bogdanov succeeded by Ms D. Djonova.

3. The applicants complained that the compensation awarded by the domestic courts for the unjustified detention of Mr S. Selami and the ill-treatment to which he had been subjected while detained by the police had been too low.

4. On 10 June 2015 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background to the case

5. The applicants alleged, before the domestic courts and before the Court, that on 26 August 2002 police detained Mr S. Selami and took him from Gostivar to Skopje where he was severely beaten. Mr S. Selami sustained serious injuries to his head including a brain haemorrhage and fell into a coma. The police brought him to Skopje Hospital, where he underwent brain surgery. He was in a coma for two weeks and was connected to a ventilator for assisted breathing.

6. By a letter of 28 August 2002 the applicants contacted the Ministry of the Interior seeking information about Mr S. Selami's whereabouts. By a letter of 29 August 2002, the Ministry had informed them that Mr S. Selami had been admitted to Skopje Hospital.

7. According to a medical certificate from Tetovo Medical Centre issued on 29 January 2003 on the basis of the available medical evidence, Mr S. Selami was in a post-operative state (following medical trepanation of his skull and evacuation of the internal brain haemorrhage); parts of his skull and the tough brain membrane had been seriously damaged; he had suffered reduced mobility of all limbs, muscle hypotonia and neck and rib fractures. According to the report, those injuries had qualified as serious and had had permanent effects on the life and body of Mr S. Selami.

8. As to the subsequent establishment of facts by the domestic civil courts, see paragraphs 15-18 below.

B. Criminal proceedings against Mr S. Selami

9. On 31 August 2002, five days after first having been detained and beaten by the police (see paragraphs 15 to 22 below), an investigating judge of the Skopje Court of First Instance ("the trial court") opened an investigation against Mr S. Selami and three other persons in connection with their alleged involvement in enemy activities against the State and ordered their pre-trial detention. The investigating judge specified that Mr S. Selami had been hospitalised and that the detention order would be enforced as soon as he was discharged from hospital. Mr S. Selami's detention was extended on three occasions. The extension orders specified that he had been deprived of his liberty on 18 September 2002 and that he had been held under the detention order in Skopje Hospital until 18 October 2002.

10. On 14 November 2002 Mr S. Selami was indicted for membership of a terrorist group whose aim had been to organise terrorist attacks on the police in order to endanger the security and constitutional order of the State. On 10 December 2002 Mr S. Selami was released on bail on account of, *inter alia*, the "serious deterioration of [his] health".

11. By a judgment of 9 September 2003 the trial court discontinued (*запира*) the criminal proceedings against Mr S. Selami since the prosecution had withdrawn the charges. The remaining accused were acquitted (*ослободени од обвинение*).

C. Compensation proceedings

12. On 18 November 2003 Mr S. Selami contacted the Ministry of Justice with a view to securing an out-of-court settlement and payment of 16,170,000 Macedonian denars (MKD – equivalent to 263,000 euros (EUR)) in respect of pecuniary and non-pecuniary damage caused, so it was asserted, by the unlawful deprivation of his liberty and the serious injuries that he had sustained at the hands of the police on 26 August 2002. In support he submitted the medical certificate from Tetovo Medical Centre (see paragraph 7 above).

13. In the absence of any response from the Ministry, on 30 January 2004 Mr S. Selami and the applicants submitted two separate lawsuits, one in relation to his unlawful detention and one in relation to his physical ill-treatment by the police, claiming pecuniary and non-pecuniary damages in both. They reiterated that on 26 August 2002 Mr S. Selami had been unlawfully deprived of his liberty; that he had been taken to police stations where he had been beaten and physically ill-treated; and that the police had taken him to Skopje Hospital where he had undergone head surgery. On 19 September 2002 he had been transferred from the hospital to Skopje detention facility in view of his detention on remand. The applicants' claim was based on section 190(3) of the Obligations Act (*Закон за облигационите односи*), which entitles a spouse and children to obtain non-pecuniary damages in a case of severe disability of the victim (see paragraph 27 below).

14. Both claims were joined and decided in a single set of proceedings. During the proceedings, the domestic courts commissioned two expert opinions and admitted into evidence extensive medical material issued by relevant medical institutions in Switzerland concerning Mr S. Selami's earlier injury while at work in that State.

15. In a judgment of 22 April 2010, the Gostivar Court of First Instance ruled partly for Mr S. Selami and, relying on section 189 of the Obligations Act (see paragraph 26 below), it awarded him the equivalent of EUR 18,000 in non-pecuniary damages for the unjustified detention between 19 September and 10 December 2002. It dismissed the remaining part of

Mr S. Selami's claim. As to the applicants' claims, the court held that the consequences suffered by Mr S. Selami as a consequence of "the unjustified detention" could not be regarded "extremely severe disability", as required by section 190(3) of the Obligations Act.

16. On the basis of the available medical evidence, the court established that in 1985, while at work in Switzerland, Mr S. Selami had fallen and injured his spine and right leg, which had become dysfunctional. As a result of that injury, he had been certified as disabled for the purposes of work in Switzerland and he had had to use crutches and a disability-adapted car.

17. Relying on the expert evidence admitted at the trial, the court established, as a matter of fact, that during the "incriminating event of 26 August 2002 ... Mr S. Selami had sustained serious bodily injury. As a result of the head trauma, there was haemorrhage ... in the right (part of the brain) ... After the surgery, Mr S. Selami had remained in coma and ... had been connected to a ventilator for assisted breathing. He had recovered after three weeks ...". The court further referred to the expert opinion according to which Mr S. Selami had sustained strong and intensive physical pain, as well as strong emotional pain and humiliation while being beaten. He had sustained serious head injuries, which had affected, though not permanently, the left side of his body and had provoked other negative psychological effects.

18. Relying on the statements of Mr S. Selami and the first and fourth applicants, the court established that in August 2002 the police had searched their house. They had asked Mr S. Selami to come with them to Gostivar police station. There, he had been questioned in relation to an incident in which two policemen had been killed. He had denied having any connection to that incident. He had been taken by police car to Skopje, where he had been placed in "a cellar or a garage" and beaten. The applicants had not been aware of Mr S. Selami's whereabouts for several days after which they had discovered that he had been hospitalised in Skopje Hospital. Despite these findings of fact, the Court of First Instance expressed no conclusion about the lawfulness of any detention prior to 19 September 2002 or the treatment suffered by Mr S. Selami during that detention.

19. Both Mr S. Selami and the applicants appealed to the Skopje Court of Appeal. They argued that the first-instance court had not determined their claim in relation to the serious injuries inflicted on him by the police, as a result of which he had had his skull broken; had suffered a brain haemorrhage; had required head surgery; had been immobilised and had lost the full use of his hands. The Solicitor General also challenged the judgment.

20. On 6 April 2011 Mr S. Selami died.

21. On 24 August 2012 the Skopje Court of Appeal dismissed the appeals by Mr S. Selami and the applicants and allowed the appeal by the Solicitor General. It overturned the lower court's judgment and awarded

Mr S. Selami the equivalent of EUR 9,800 in respect of non-pecuniary damage due to his "unjustified detention between 19 September and 10 December 2002". The court, *inter alia*, stated:

> "In the impugned judgment, the first-instance court established ... on the basis of the expert opinion [that Mr S. Selami] had experienced intense pain on his head and body when he had been physically attacked ... every blow had caused physical pain of different intensity, accompanied by swelling and bruises on his body ... Regarding the intensity and duration of the fear, the experts are of the opinion that when arrested and physically assaulted and hit, particularly on his head, [Mr S. Selami] had had intense, unpleasant, emotional experiences of primary fear ... which persisted until he had fallen into a coma ... Regarding the emotional suffering due to his unjustified deprivation of liberty and detention, the experts are of the opinion that the basis for an award of non-pecuniary damages ... is the time calculated as of 26 August 2002 ... when [Mr S. Selami] was arrested by the police ..., transferred to other police stations, where he was subjected to serious physical ill-treatment and beaten, which caused serious bodily injury ...
>
> This court considers that the [above] facts were correctly established.
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> ...
>
> ... This court established on the basis of medical evidence that in 1989 [Mr S. Selami] had been certified disabled in Switzerland and that he had been receiving disability benefits ever since. The serious injury inflicted on him (during the 2002 detention) had caused his left limbs to become dysfunctional to a minor extent, which cannot be regarded as an extremely severe disability."

22. The court rejected the applicants' arguments that the first-instance court had not decided the claim for compensation for damage sustained as a result of Mr S. Selami's physical ill-treatment. In this connection it stated that:

> "the operative provisions and the reasons given in the [impugned] judgment clearly and unequivocally confirm that the court had decided the entire claim ... This court considers that the emotional suffering due to unjustified detention is a single type of damage which includes all the detrimental effects on the victim, including his physical ill-treatment ... In assessing the amount of the award, this court took into consideration all the circumstances of the case, including the duration of the unjustified deprivation of liberty, the respect with which the plaintiff was held in his family and in the community, that during the unjustified deprivation of liberty he was physically ill-treated and sustained serious bodily injury, as a result of which his left limbs became dysfunctional to a minor extent, that he was hospitalised and operated on and that he had been disabled before ..."

23. By a final decision of 31 October 2012, delivered by a notary public, the fourth applicant was declared the sole heir of Mr S. Selami's inheritance, including the compensation awarded to him. The remaining applicants refused to accept being declared heirs of the late Mr S. Selami.

24. On 1 November 2012 the applicants lodged an appeal on points of law against the judgment of the Skopje Court of Appeal reiterating their earlier arguments. The fourth applicant, as the statutory successor of the late Mr S. Selami, lodged the appeal in his name and on behalf of Mr S. Selami.

25. On 11 July 2013 the Supreme Court dismissed the applicants' appeal on points of law finding no grounds to depart from the established facts and the reasoning given by the lower courts.

II. RELEVANT DOMESTIC LAW

A. Obligations Act

26. Section 189 of the Obligations Act provides for an award of non -pecuniary damages in respect of physical pain, emotional suffering, disfigurement and fear, as well as violation of reputation, honour and human rights and freedoms.

27. Under section 190(3) of the Obligations Act, a spouse and children of a victim are entitled to obtain non-pecuniary damages in a case of the victim's "extremely severe disability" (*особено тежок инвалидитет*).

B. Criminal Proceedings Act of 1997

28. Section 16 of the Criminal Procedure Act, as applicable at the relevant time, provided that criminal proceedings had to be instituted at the request of an authorised prosecutor. In cases involving offences subject to prosecution by the State of its own motion or on an application by the injured party, the authorised prosecutor was the public prosecutor, whereas in cases involving offences for which only private charges could be brought, the authorised prosecutor was the private prosecutor.

29. Section 17 set forth the duty of the public prosecutor to proceed with a criminal prosecution if there was sufficient evidence that a crime subject to *ex officio* prosecution had been committed.

30. Section 96 provided that a civil-party claim (*имотно-правно барање*) of the victim relating to a criminal offence was to be decided in criminal proceedings, unless the determination of the claim would significantly delay them. The civil-party claim could concern monetary compensation, restitution of property or annulment of a legal act.

31. Section 101 provided that the trial court was competent to decide a civil-party claim. If the court found the accused guilty as charged, the victim could be awarded full or partial compensation. In the latter case, the court could advise him or her to seek the remainder by way of civil proceedings.

32. The same rules applied if evidence taken in the criminal proceedings was insufficient for the court to award any damages (section 101(2)). In case of an acquittal or dismissal of the prosecution, if the proceedings were discontinued or the indictment was rejected, the court was to advise the victim to pursue his or her civil-party claim by way of civil proceedings (section 101(3)).

33. Section 140(1) provided that State bodies and public authorities were obliged to report a criminal offence subject to prosecution by the State of which they had been alerted or had found out in any other way.

34. Under section 141(2) and (4), the criminal complaint was to be lodged with the authorised public prosecutor. If the complaint was submitted to a court or unauthorised prosecutor, they would forward it to the competent prosecutor without delay.

C. Criminal Code

35. Section 142 of the Criminal Code prohibits torture and provides for imprisonment between three months and five years.

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 3 AND 5 OF THE CONVENTION

36. The applicants complained that the compensation awarded to the late Mr S. Selami had been too low, given his unjustified detention and the serious bodily injury that he had sustained while detained, "as a consequence of which he [had] died". They also complained about the dismissal of the compensation claim which they had submitted in their own name.

37. The Court, being the master of the characterisation to be given in law to the facts of the case (see, for instance, *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, § 61, ECHR 2016 (extracts) and *Akdeniz v. Turkey*, no. 25165/94, § 88, 31 May 2005), considers that the applicants' complaints are to be examined under Articles 3 and 5 § 5 of the Convention, which read as follows:

Article 3

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

Article 5 § 5

"5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

A. Admissibility

1. The applicants' victim status

(a) The parties' submissions

38. The Government disputed the victim status of the applicants. Concerning "Mr S. Selami's physical ill-treatment while in police custody", the Government stated that "the description of some segments of the factual situation should be accepted with certain reserve, because the facts pertaining to th[o]se events [were] supported [only by] medical documentation and statements by the [victim], but they were not subject [to] examination ... before Macedonian courts, since the defendant and the [applicants] ... omitted to institute criminal proceedings". They submitted that no evidence had been produced that Mr S. Selami's death in April 2011 had resulted from his ill-treatment in August 2002. In such circumstances and relying on the case of *Nassau Verzekering Maatschappij N.V. v. the Netherlands* (dec.) (no. 57602/09, § 20, 4 October 2011), the Government argued that the applicants had failed to demonstrate an interest of their own to have standing to complain about the events of August 2002. That the next of kin of a direct victim could claim non-pecuniary damages under certain statutory conditions (specifically severe disability of the direct victim) was of no relevance, given that the domestic courts had convincingly established that those conditions had not been met in the applicants' case. There was nothing to call into question the findings of the domestic courts.

39. In any event and given the final decision of the notary public according to which the fourth applicant had been declared the sole heir of the late Mr S. Selami, only that applicant could be recognised as having standing to complain under Articles 3 and 5 of the Convention in place of Mr S. Selami. Assuming that the fourth applicant could be regarded as an "indirect victim" in respect of the complaints under Articles 3 and 5 of the Convention, the Government maintained that the amount of damages awarded in the impugned judgments had provided sufficient redress in respect of both the unlawful detention and the physical ill-treatment of Mr S. Selami while detained.

40. The applicants contested the Government's objection. According to the medical evidence, Mr S. Selami's injuries had been serious and had had permanent effects on his life and body (see paragraph 7 above). In this connection they challenged the findings of the domestic courts that those injuries had caused minor dysfunctionality of Mr S. Selami's left limbs. Irrespective of whether those injuries had caused Mr S. Selami's death, the fact that he had been unlawfully detained and tortured by the police, that they had been unaware of his whereabouts for two days and that he had been in a coma for two weeks, had been sufficient for the domestic courts to

find for the applicants, who had been living with Mr S. Selami in a single household.

41. The applicants also objected to the Government's argument that only the fourth applicant, as the sole successor to the late Mr S. Selami, should be given victim status because all the applicants had been admitted as parties to the impugned proceedings and they had each claimed compensation in their own name. Lastly, they disagreed that the amount of compensation awarded in the impugned proceedings had been adequate given the suffering to which Mr S. Selami had been subjected.

(b) The Court's assessment

42. Before dealing with the question of whether the applicants had standing to bring the application in respect of the alleged violations within the meaning of Article 34 of the Convention, the Court considers it appropriate first to determine, in Convention terms, the treatment to which Mr S. Selami was subjected and the nature of his deprivation of liberty.

(i) Whether the impugned treatment was contrary to Article 3

(α) General principles

43. The general principles relevant for the present case are well-established in the Court's case-law (see, among many other examples, *Gäfgen v. Germany* [GC], no. 22978/05, §§ 87-90, ECHR 2010):

> "87. The Court reiterates that Article 3 of the Convention enshrines one of the most fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation (see *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999-V, and *Labita*, cited above, § 119). The Court has confirmed that even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned (see *Chahal v. the United Kingdom*, 15 November 1996, § 79, *Reports of Judgments and Decisions* 1996-V, and *Labita*, cited above, § 119). The nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3 (see *V. v. the United Kingdom* [GC], no. 24888/94, § 69, ECHR 1999-IX; *Ramirez Sanchez v. France* [GC], no. 59450/00, § 116, ECHR 2006-IX; and *Saadi v. Italy* [GC], no. 37201/06, § 127, ECHR 2008).
>
> 88. In order for ill-treatment to fall within the scope of Article 3 it must attain a minimum level of severity. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (see *Ireland v. the United Kingdom*, 18 January 1978, § 162, Series A no. 25, and *Jalloh v Germany* [GC], no. 54810/00, § 67, ECHR 2006-IX). Further factors include the purpose for which the treatment was inflicted together with the intention or motivation behind it (compare, *inter alia, Aksoy v. Turkey*, 18 December 1996, § 64, *Reports* 1996-VI; *Egmez v. Cyprus*, no. 30873/96, § 78, ECHR 2000-XII; and *Krastanov*

v. Bulgaria, no. 50222/99, § 53, 30 September 2004), as well as its context, such as an atmosphere of heightened tension and emotions (compare, for instance, *Selmouni*, cited above, § 104, and *Egmez*, loc. cit.).

89. The Court has considered treatment 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, and *Ramirez Sanchez*, cited above, § 118). Treatment has been held to be "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, or when it was such as to drive the victim to act against his will or conscience (see, *inter alia, Keenan v. the United Kingdom*, no. 27229/95, § 110, ECHR 2001-III, and *Jalloh*, cited above, § 68).

90. In determining whether a particular form of ill-treatment should be classified as torture, consideration must be given to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. As noted in previous cases, it appears that it was the intention that the Convention should, by means of such a distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering (see *Ireland v. the United Kingdom*, cited above, § 167; *Aksoy*, cited above, § 63; and *Selmouni*, cited above, § 96). In addition to the severity of the treatment, there is a purposive element to torture, as recognised in the United Nations Convention against Torture, which in Article 1 defines torture in terms of the intentional infliction of severe pain or suffering with the aim, inter alia, of obtaining information, inflicting punishment or intimidating (see *Akkoç*, cited above, § 115)."

(β) Application of these principles to the present case

44. The Court notes that the domestic civil courts, relying on the available evidence, made the following findings of fact. The first-instance court established that during the "incriminating event of 26 August 2002 ... Mr S. Selami had sustained serious bodily injury. Due to the head trauma, there was haemorrhage ... in the right (part of the brain) ..." He sustained intensive and strong physical pain, as well as strong emotional pain and humiliation while being beaten. "After the surgery, Mr S. Selami had remained in coma and ... had been connected to a ventilator for assisted breathing ..." It further held that he had sustained serious head injuries, which had affected the left side of his body and had provoked other negative psychological effects (see paragraph 17 above).

45. These findings were confirmed on appeal in the following terms. Mr S. Selami had been subjected to "serious physical ill-treatment and beaten, which caused 'serious bodily injury'". Mr S. Selami "... (had been) physically ill-treated and sustained serious bodily injury, as a result of which his left limbs became dysfunctional to a minor extent, he was hospitalised and operated on ..." (see paragraphs 21 and 22 above).

46. The Government confirmed that he had been ill-treated "while in police custody" (see paragraph 38 above). Irrespective of whether Mr S. Selami was beaten in "a cellar or a garage" or in a "police station" (see paragraphs 18 and 21 above), it is undisputed between the parties that

he was ill-treated at the hands of the police in connection with his arrest and questioning.

47. According to the medical evidence accepted in the domestic proceedings, as a result of the beating Mr S. Selami sustained skull, neck and rib fractures. Following surgery on his head, he remained in a coma for two weeks and was connected to a ventilator for assisted breathing. The above injuries affected his left limbs, though not permanently, and had caused various negative psychological effects (see paragraphs 7 and 17 above).

48. The civil courts further established that he had been beaten in the context of his questioning in relation to an incident in which two policemen had been killed (see paragraph 18 above).

49. In view of the above, the Court considers that the actual treatment to which Mr S. Selami was subjected during his interrogation by the police must be regarded as having caused him considerable physical pain, fear, anguish and mental suffering (see paragraph 21 above). It further notes that the above-mentioned measures were intentionally meted out to him with the aim of extracting a confession or inflicting punishment for his alleged involvement in the killing of policemen (see, *mutatis mutandis*, *Hajrulahu v. the former Yugoslav Republic of Macedonia*, no. 37537/07, § 101, 29 October 2015). Accordingly, such treatment must be regarded as torture within the meaning of Article 3 of the Convention.

(ii) Whether Mr S. Selami was a victim of deprivation of liberty in contravention to the provisions of Article 5 of the Convention

(α) General principles

50. The general principles relevant for the present case have been summarised as follows in *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, §§ 230-233, ECHR 2012:

> "230. The Court notes at the outset the fundamental importance of the guarantees contained in Article 5 for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities. It is for that reason that the Court has repeatedly stressed in its case-law that any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from arbitrariness ...
>
> 231. It must also be stressed that the authors of the Convention reinforced the individual's protection against arbitrary deprivation of his or her liberty by guaranteeing a corpus of substantive rights which are intended to minimise the risks of arbitrariness, by allowing the act of deprivation of liberty to be amenable to independent judicial scrutiny and by securing the accountability of the authorities for that act. The requirements of Article 5 §§ 3 and 4 with their emphasis on promptness and judicial supervision assume particular importance in this context. Prompt judicial intervention may lead to the detection and prevention of life-threatening measures or serious ill-treatment which violate the fundamental guarantees contained in Articles 2

and 3 of the Convention. What is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection.

232. Although the investigation of terrorist offences undoubtedly presents the authorities with special problems, that does not mean that the authorities have carte blanche under Article 5 to arrest suspects and detain them in police custody, free from effective control by the domestic courts and, in the final instance, by the Convention's supervisory institutions, whenever they consider that there has been a terrorist offence.

233. The Court emphasises in this connection that the unacknowledged detention of an individual is a complete negation of these guarantees and a most grave violation of Article 5. Having assumed control over an individual, the authorities have a duty to account for his or her whereabouts ..."

(β) Application of the above principles to the present case

51. It is common ground that Mr S. Selami had been deprived of his liberty. In this connection the Court notes that the domestic courts explicitly found that Mr S. Selami's detention was unjustified. Whereas this finding concerned his detention between 19 September and 10 December 2002 (see paragraphs 9, 15 and 21 above), in its description of "incriminating event of 26 August 2002", the first-instance court nevertheless established that he had been apprehended by the police in August 2002, taken by police car to Skopje and then beaten (see paragraph 18 above). The Skopje Court of Appeal was more explicit holding that "[Mr S. Selami's] unjustified deprivation of liberty and detention [was to be] calculated as of 26 August 2002 ... when [Mr S. Selami] was arrested by the police ... transferred to other police stations, where he was subjected to serious physical ill-treatment and beaten, which caused serious bodily injury ..." (see paragraph 21 above).

52. The Court notes that there was no court order for Mr S. Selami's detention on 26 August 2002. His confinement in "a cellar or a garage" or "in a police station" was not authorised by a court, or, at least, no such documents have been submitted to the Court. The court order of 31 August 2002 only concerned Mr S. Selami's detention after 19 September 2002, the date when he had been transferred from the hospital to Skopje detention facility. During the unacknowledged detention, Mr S. Selami was deprived of any possibility of being brought before a court to review the lawfulness of his detention. He was left completely at the mercy of those holding him. An *incommunicado* detention carried out under somewhat similar circumstances was assessed by the Court to have constituted a particularly grave violation of Mr S. Selami's right to liberty and security as secured by Article 5 of the Convention (see, *El Masri*, cited above, § 237).

(iii) Whether the applicants have the standing to bring the application on behalf of Mr S. Selami

53. The Court will now examine whether the applicants can be recognised as having standing in respect of the alleged violations, specifically whether they can complain in their own name of a violation of their rights under Article 3 of the Convention for the treatment to which Mr S. Selami was subjected ("direct" victims) and whether they can complain in respect of Mr S. Selami's torture and alleged lack of sufficient compensation for his unjustified detention under Articles 3 and 5 of the Convention ("indirect" victims).

(α) "Direct" victims under Article 3 of the Convention

54. The Court has always been sensitive in its case-law to the profound psychological impact of a serious human rights violation on the victim's family members who are applicants before the Court. However, in order for a separate violation of Article 3 of the Convention to be found in respect of the victim's relatives, there should be special factors in place giving their suffering a dimension and character distinct from the emotional distress inevitably stemming from the aforementioned violation itself. The relevant factors include the proximity of the family tie, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question and the involvement of the applicants in the attempts to obtain information about the fate of their relatives (see *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, § 177, ECHR 2013).

55. It notes that the applicants are the widow and children of the late Mr S. Selami, with whom they lived in a single household (see paragraph 40 above). They were unaware of his whereabouts for two days after he had been taken into custody (see paragraphs 6 and 40 above). In the Court's view, such a short period of uncertainty as to his fate is not sufficient for their emotional suffering on those grounds to constitute inhuman treatment contrary to Article 3 of the Convention. Nor were the applicants direct witnesses to his torture (contrast *Bazorkina v. Russia*, no. 69481/01, § 140, 27 July 2006). Lastly, there is no evidence of a causal link between Mr S. Selami's torture in August 2002 and his death in 2011, over eight years after the incident engaging the State's responsibility.

56. In such circumstances, the Court does not consider that there are special elements which give the suffering of the applicants a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human-rights violation.

(β) "Indirect" victims under Articles 3 and 5 of the Convention

- *General principles*

57. The relevant principles deriving from the Court's case-law have been summarised in, among other authorities, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, §§ 97-100, ECHR 2014:

"97. ...Where the applicant has died *after* the application was lodged, the Court has accepted that the next-of-kin or heir may in principle pursue the application, provided that he or she has sufficient interest in the case...

98. However, the situation varies where the direct victim dies *before* the application is lodged with the Court. In such cases the Court has, with reference to an autonomous interpretation of the concept of "victim", been prepared to recognise the standing of a relative either when the complaints raised an issue of general interest pertaining to "respect for human rights" (Article 37 § 1 *in fine* of the Convention) and the applicants as heirs had a legitimate interest in pursuing the application, or on the basis of the direct effect on the applicant's own rights (see *Micallef v. Malta* [GC], no. 17056/06, §§ 44-51, ECHR 2009, and *Marie-Louise Loyen and Bruneel v. France*, no. 55929/00, §§ 21-31, 5 July 2005). The latter cases, it may be noted, were brought before the Court following or in connection with domestic proceedings in which the direct victim himself or herself had participated while alive.

Thus, the Court has recognised the standing of the victim's next-of-kin to submit an application where the victim has died or disappeared in circumstances allegedly engaging the responsibility of the State (see *Çakıcı v. Turkey* [GC], no. 23657/94, § 92, ECHR 1999-IV, and *Bazorkina v. Russia* (dec.), no. 69481/01, 15 September 2005).

...

100. In cases where the alleged violation of the Convention was not closely linked to disappearances or deaths giving rise to issues under Article 2, the Court's approach has been more restrictive, as in the case of *Sanles Sanles v. Spain* (dec.), no. 48335/99, ECHR 2000-XI), which concerned the prohibition of assisted suicide. The Court held that the rights claimed by the applicant under Articles 2, 3, 5, 8, 9 and 14 of the Convention belonged to the category of non-transferable rights, and therefore concluded that the applicant, who was the deceased's sister-in-law and legal heir, could not claim to be the victim of a violation on behalf of her late brother-in-law...

In other cases concerning complaints under Articles 5, 6 or 8 the Court has granted victim status to close relatives, allowing them to submit an application where they have shown ... a material interest on the basis of the direct effect on their pecuniary rights (see *Ressegatti v. Switzerland*, no. 17671/02, §§ 23-25, 13 July 2006; and *Marie-Louise Loyen and Bruneel*, §§ 29-30; *Nölkenbockhoff*, § 33; *Grădinar*, § 97; and *Micallef*, § 48, all cited above). The existence of a general interest which necessitated proceeding with the consideration of the complaints has also been taken into consideration (see *Marie-Louise Loyen and Bruneel*, § 29; *Ressegatti*, § 26; *Micallef*, §§ 46 and 50, all cited above; and *Biç and Others v. Turkey*, no. 55955/00, §§ 22-23, 2 February 2006).

The applicant's participation in the domestic proceedings has been found to be only one of several relevant criteria (see *Nölkenbockhoff*, § 33; *Micallef*, §§ 48-49; *Polanco*

Torres and Movilla Polanco, § 31; and *Grădinar*, §§ 98-99, all cited above; and *Kaburov v. Bulgaria* (dec.), no. 9035/06, §§ 52-53, 19 June 2012)."

58. More recently, the Court affirmed that, without losing sight of the strictly personal nature of the Article 3 right, it may recognise standing in the context of complaints under this Article to applicants who complained about treatment exclusively concerning their late relative. Such applicants must show either a strong moral interest, besides the mere pecuniary interest in the outcome of the domestic proceedings, or other compelling reasons, such as an important general interest which required their case to be examined (see *Karpylenko v. Ukraine*, no. 15509/12, § 106, 11 February 2016 and *Boacă and Others v. Romania*, no. 40355/11, § 46, 12 January 2016).

- *Application of the above principles to the present case in respect of the fourth applicant*

59. The Court firstly notes that Mr S. Selami died on 6 April 2011, while the domestic proceedings were still pending before the Court of Appeal (see paragraph 20 above). After his death, the fourth applicant (Mr Nedžmi Selami) was declared the sole heir of Mr S. Selami and stood in his stead in those proceedings. The fourth applicant lodged an appeal on points of law on behalf of the late Mr S. Selami (see paragraph 24 above). On the basis of the decision of the notary public, the fourth applicant inherited the award of damages made for Mr S. Selami (see paragraph 23 above). In such circumstances, the Court considers that the fourth applicant has demonstrated a strong moral interest in seeking that the State was held responsible for the wilful acts of its agents prohibited under Articles 3 and 5 of the Convention, besides the material interest linked with his entitlement to damages after Mr S. Selami's death (see, *mutatis mutandis*, *Stepanian v. Romania*, no. 60103/11, §§ 40 and 41, 14 June 2016).

60. The same, however, cannot be said with respect to the remaining applicants. They participated in the compensation proceedings solely in their own name claiming compensation of the non-pecuniary loss that they had allegedly sustained due to Mr S. Selami's severe disability. The domestic courts, at three levels of jurisdiction, dismissed that claim finding that the treatment to which Mr S. Selami had been subjected at the hands of the police had not caused "extremely severe disability" so as to engage the application of section 190(3) of the Obligations Act. In the absence of a direct link between the remaining applicants' compensation claim and Mr S. Selami's grievances under the Articles complained of, the Court considers that the first, second and third applicants cannot be recognised as having standing to complain about Mr S. Selami's rights under Articles 3 and 5 § 5 of the Convention on this basis.

61. In consequence, it remains to be determined whether there are issues of "general interest" which would justify proceeding with the consideration of the application submitted by the first, second and third applicant.

- Application of the above principles to the present case in respect of the first, second and third applicant

62. As stated above, Mr S. Selami's death cannot be linked to the incident on 26 August 2002 (see paragraph 55 above). Accordingly, it cannot constitute, in itself, a valid ground for the above applicants to be recognised as having the status of victim with respect to Mr S. Selami's treatment at the hands of the police. However, the complaints under this head concern the application of one of the most fundamental provisions in the Convention system. In the *Kaburov* case (see *Kaburov v. Bulgaria* (dec.), no. 9035/06, §§ 56 - 57, 19 June 2012) where the application was submitted on behalf of the applicant's late father who had sustained minor bodily injuries at the hands of the police, the Court stated that "the particular circumstances of a case (for example, an allegation of torture) might lead it to find that an Article 3 claim is transferrable to an heir on general interest grounds".

63. The Court has already established that Mr S. Selami was subjected to torture by the police (see paragraph 49 above). In the Court's view, complaints related to torture, as the gravest form of ill-treatment prohibited under Article 3 of the Convention, in principle raise an issue of general interest pertaining to "respect for human rights". In this connection the Court also reiterates the significance of the deterrent effect of the judicial system in place and of the role it is required to play in preventing violations of the prohibition of ill-treatment and, in particular, torture. This is essential for maintaining public confidence and ensuring adherence to the rule of law and for preventing any appearance of tolerance of or collusion in unlawful acts (see *Cestaro v. Italy*, no. 6884/11, §§ 205 and 206, 7 April 2015). Furthermore, cases before the Court generally also have a moral or principled dimension and next of kin may have a legitimate interest in obtaining a ruling even after the death of the direct victim (see, *mutatis mutandis*, *Hristozov and Others v. Bulgaria*, nos. 47039/11 and 358/12, § 73, ECHR 2012 (extracts)).

64. However, in the light of the fact that the principal issue before the Court is whether the late Mr Selami's torture and undisclosed detention by the police have been adequately sanctioned having regard to the amount of compensation awarded for the treatment he suffered, any "general interest" which may justify the Court proceeding with the examination of the complaints will, in any event, in the Court's opinion, be sufficiently secured by a ruling on the case advanced by the fourth applicant.

- *Conclusion*

65. In view of the foregoing, the Court concludes that the fourth applicant has standing to bring complaints in respect of the alleged violations of Mr S. Selami's rights under Articles 3 and 5 § 5 of the Convention. In that regard, it also notes that the Government accepted that he be recognised as having the requisite standing under Article 34 of the Convention (see paragraph 39 above)

66. It further concludes that the complaints submitted by the remaining applicants are incompatible *ratione personae* with the provisions of the Convention for the purposes of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

67. As to the Government's objection that the amount of compensation awarded in the impugned judgments was sufficient to remove the fourth applicant's victim status (see paragraph 39 above), the Court considers that it goes to the very heart of the complaints made by him under Articles 3 and 5 § 5 of the Convention, regarding the inadequacy of the compensation granted for violation of the Convention. It would thus be more appropriately examined at the merits stage.

2. Non-exhaustion of domestic remedies

(a) The parties' submissions

68. The Government submitted that the fourth applicant had failed to exhaust effective domestic remedies. Notwithstanding that national law provided for both criminal and civil avenues of redress in a case of an alleged violation of Article 3 rights, no criminal complaint had been lodged with the public prosecutor against the responsible police officers. Had Mr S. Selami availed himself of the criminal avenue of redress, after his death the applicants would have been entitled to take over the private prosecution on his behalf. In the absence of a criminal complaint, the national authorities had been prevented from establishing the facts and punishing those responsible.

69. The applicants contested the Government's objection. Mr S. Selami had availed himself of the civil avenue of redress in which he had claimed compensation for his ill-treatment and unjustified detention. The fact that the civil courts had decided his claim on the merits signified that criminal liability of those responsible had not been a precondition for the civil courts to find the State responsible under the rules of tort for the violations found.

(b) The Court's assessment

70. In ruling on the issue of whether the fourth applicant has complied with the obligation to exhaust domestic remedies, the Court must first identify the act of the respondent State's authorities complained of by him. In this connection it observes that the fourth applicant's sole grievance

relates to the allegedly insufficient compensation awarded by the domestic courts (see paragraph 36 above), as a specific aspect of the State's procedural obligation under Article 3 of the Convention (see paragraph 78 below, with references to the Court's case-law). The only act complained of is the final judgment given in the civil proceedings concerning late Mr S. Selami's and the fourth applicant's compensation claim. Accordingly, the object of the complaint is limited to the respondent State's alleged failure to provide adequate monetary redress for the violation of prohibition of torture and undisclosed detention (see paragraphs 49 and 52 above).

71. In such circumstances, the Court needs to determine whether, in the absence of any complaint based on the substantive aspect of Article 3 or alleging lack of an "effective official investigation" the fourth applicant was required to initiate criminal proceedings. In so doing, it has to confine its examination to the complaint as formulated by the fourth applicant and the specific circumstances of the case.

(i) General principles regarding exhaustion of domestic remedies

72. The general principles regarding the exhaustion rule under Article 35 § 1 of the Convention are set out in *Vučković and Others v. Serbia* (see *Vučković and Others v. Serbia* (preliminary objection) [GC] (nos. 17153/11 and 29 others, §§ 70-77, 25 March 2014, with further references, in particular to *Akdivar and Others v. Turkey*, 16 September 1996, *Reports* 1996-IV).

73. In that context, the Court finds it appropriate to reiterate that in order to be effective a remedy must be capable of remedying directly the impugned state of affairs and must offer reasonable prospects of success. There is no obligation to have recourse to remedies which are inadequate or ineffective. In addition, according to the "generally recognised rules of international law" there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his or her disposal (see *Vučković and Others*, cited above, §§ 73-74 and *Akdivar and Others*, cited above, §§ 67 and 71).

74. Furthermore, as regards the distribution of the burden of proof in the area of the exhaustion of domestic remedies, it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement. One such reason may be constituted by the national authorities remaining

totally passive in the face of serious allegations of misconduct or infliction of harm by State agents, for example where they have failed to undertake investigations or offer assistance. In such circumstances it can be said that the burden of proof shifts once again, so that it becomes incumbent on the respondent Government to show what they have done in response to the scale and seriousness of the matters complained of (see *Akdivar and Others*, cited above, § 68; and *Vučković and Others*, cited above, § 77).

(ii) Principles relevant for complaints arising under Article 3 of the Convention

75. In the context of unlawful use of force by State agents – and not mere fault, omission or negligence – the Court has held that civil or administrative proceedings aimed solely at awarding damages, rather than ensuring the identification and punishment of those responsible, were not adequate and effective remedies capable of providing redress for complaints based on the substantive aspect of Articles 2 and 3 of the Convention (see *Jeronovičs v. Latvia* [GC], no. 44898/10, § 76, ECHR 2016).

76. That ruling should be read in the light of the well-established principle deriving from the Court's case-law that the Contracting Parties' obligation under Articles 2 and 3 of the Convention to conduct an investigation capable of leading to the identification and punishment of those responsible in cases of assault is the primary procedural requirement under those provisions. That obligation could be rendered illusory if, in respect of complaints under those Articles, an applicant were required to bring an action leading only to an award of damages (see, for example, *Mocanu and Others v. Romania* [GC], cited above, § 234; *İlhan v. Turkey* [GC], cited above idem; *Salman v. Turkey* [GC], cited above, §§ 83-88, ECHR 2000-VII; and *Isayeva and Others v. Russia*, nos. 57947/00, 57948/00 and 57949/00, § 149, 24 February 2005).

77. However, where an individual has raised an arguable claim that he has suffered treatment infringing Article 3 at the hands of agents of the respondent State, the authorities, in order to fulfil their duty to carry out "an effective official investigation", must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the individual or of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures (see *Bouyid v. Belgium* [GC], no. 23380/09, § 116, ECHR 2015; *El-Masri*, cited above, § 182; *Andonovski v. the former Yugoslav Republic of Macedonia*, no. 24312/10, § 86, 23 July 2015; *Gorgiev v. the former Yugoslav Republic of Macedonia*, no. 26984/05, § 64, 19 April 2012 and *Isayeva v. Russia*, no. 57950/00, § 210, 24 February 2005, in the context of Article 2).

78. As regards the second procedural requirement – an obligation to provide sufficient compensation to remedy a breach of Article 3 at national level – the Court has repeatedly held that, in addition to a thorough and effective investigation, it is necessary for the State to have made an award

of compensation to the applicant, where appropriate, or at least to have given him or her the possibility of seeking and obtaining compensation for the damage he or she sustained as a result of the ill-treatment (see *Gäfgen*, cited above, §§ 116 and 118).

(iii) Whether there has been "an official effective investigation"

79. It is common ground that neither the late Mr S. Selami nor the fourth applicant made a criminal complaint to the public prosecutor in respect of the treatment inflicted on Mr S. Selami by the police and his undisclosed detention. Instead, they brought a civil action against the State seeking pecuniary and non-pecuniary damages arising from the incident of 26 August 2002. Before pursuing the civil avenue of redress, the late Mr S. Selami brought the alleged violation of his rights protected by Articles 3 and 5 to the attention of the Ministry of Justice, proposing an out-of-court settlement and payment of compensation for his unlawful deprivation of liberty and serious injuries that he had sustained at the hands of the police during the impugned incident. The request was accompanied by the medical certificate giving a detailed description of the injuries (see paragraphs 7 and 12 above).

80. In the Court's view, the late Mr S. Selami's communication to the authorities contained enough elements to consider it an "arguable claim" for the purposes of Article 3 (see paragraph 77 above with references to the Court's case-law; see also *Egmez v. Cyprus*, no. 30873/96, § 66, ECHR 2000-XII). However, the Ministry of Justice – an authority whose role is by definition to protect and advance the principles of justice and the rule of law – took no action notwithstanding their statutory duty to notify the authorised public prosecutor of an alleged offence subject to State prosecution (see paragraph 30 above). Nor does there appear to have been any attempt by the authorities to investigate the matter after the final judgment in the civil proceedings against the State had established that the late Mr S. Selami had been subjected "to serious physical ill-treatment and beaten" by the police (see paragraph 21 above).

81. In the absence of any information by the Government proving otherwise, the Court cannot but conclude that there has been no official investigation *proprio motu* in respect of the late Mr S. Selami's allegations.

(iv) Whether the fourth applicant should be required to lodge a criminal complaint

82. In cases against the respondent State the Court has already found that a criminal complaint is an effective remedy which should be used, in principle, in cases of alleged violations of Article 3 of the Convention. It held that the requirement of exhaustion of that remedy applied likewise to cases where allegations of inhuman treatment were the result of a secret operation carried out without any legal basis (see *El Masri*, cited above,

§ 140). The date when the final decision on the criminal complaint became known to the applicant was considered by the Court as the starting point of the six-month time-limit provided for in Article 35 § 1 of the Convention, with which the exhaustion rule is closely intertwined (see *ibid.,* § 147 and *Jørgensen and Others v. Denmark* (dec.), no. 30173/12, §§ 55-76, 28 June 2016).

83. However, it is to be noted that the above principles concern cases in which the applicants complained about a breach of Article 3 in its substantive aspect and/or lack of an effective criminal investigation into their allegations. The present case is to be distinguished from those cases because, as noted above, its scope is limited to the respondent State's alleged failure to provide adequate monetary redress for the treatment infringing Article 3 (see paragraphs 36 and 70 above). The civil action for damages was submitted independently and not in addition or subsequently to any criminal investigation (see, conversely, *ibid*., § 63; *Jasar v. the former Yugoslav Republic of Macedonia*, no. 69908/01, 15 February 2007 and *Sulejmanov v. the former Yugoslav Republic of Macedonia*, no. 69875/01, 24 April 2008; and *Jørgensen and Others v. Denmark*, cited above, §§ 26-35 and §§ 69).

In the absence of any official investigation, the compensation proceedings became a fact-finding forum at domestic level which, as demonstrated by the detailed findings of the civil courts as to the sequence of events on 26 August 2002, the places in which they occurred, the nature of the ill-treatment inflicted on the late Mr S. Selami by the police officers, the manner in which they acted and the injuries and suffering that he sustained, was capable of establishing the relevant facts and identifying the perpetrators. On those grounds the courts established civil responsibility of the State and awarded compensation to the injured parties (see paragraphs 15-18 and 21-22 above).

In that regard, it should also be noted that, had the late Mr S. Selami been successful in pursuing a criminal complaint and been able to act as a civil party in criminal proceedings (see paragraph 30 above), the trial court, if it decided at all to rule on his claim (see paragraph 31 above) would have applied the same standards for its award as the civil courts. The Court would also note that in an earlier case against the respondent State the Government have confirmed that according to domestic practice the criminal courts advised the victims to pursue their civil-party claim by means of a separate civil action even if the defendant was found guilty (see *Popovski v. the former Yugoslav Republic of Macedonia*, no. 12316/07, § 54, 31 October 2013).

84. It is true that by bringing the civil claim the injured parties could not seek to secure "the punishment of those responsible" (see paragraph 75 above with references to the Court's case-law). Yet the punitive element of the procedural obligation under Article 3 cannot be interpreted as

necessarily entailing the punishment at all cost of the officers involved in the alleged ill-treatment. The Convention only requires that there should be "an investigation capable of leading to the punishment of those responsible", irrespective of the outcome of such proceedings and there is no absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence (see *Egmez v. Cyprus,* cited above, § 70; see also, *mutatis mutandis, Armani Da Silva v. the United Kingdom* [GC], no. 5878/08, § 238, ECHR 2016).

85. In view of the foregoing, the Government's argument that in the absence of a criminal complaint the national authorities had been prevented from establishing the facts and punishing those responsible cannot be upheld.

86. However, while the absence of an official criminal investigation is not the object of the Convention complaint in the present case, the authorities' failure to conduct such investigation despite their knowledge of the elements *prima facie* indicating the possibility of a violation of Article 3 is relevant for the assessment of the exhaustion issue.

87. In the Court's view, the acceptance of the respondent Government's arguments would, for all practical purposes, mean that the State can discharge itself from its procedural obligation under Article 3 by shifting the responsibility for the institution and conduct of criminal investigative procedures on the injured party (see paragraph 77 above with references to the Court's case law).

88. Furthermore, given that the national authorities remained totally passive in the face of the late Mr S. Selami's serious allegations of infliction of harm by the State agents (see paragraph 80 above), in the present case there are grounds to consider that there existed special circumstances absolving the injured party from lodging a criminal complaint (see paragraph 74 above with references to *Vučkovic and Others* and *Akdivar and Others*). The failure of the late Mr S. Selami and his successor to have recourse to that remedy cannot therefore be held against them.

89. Last but not least, the Court would note that the Government have not demonstrated that, having regard to the object of the fourth applicant's grievance, a criminal complaint was capable of "remedying directly" the situation complained of or providing him with adequate relief in respect of the alleged lack of sufficient compensation for a breach of Article 3 (*ibid*.). Nor has it been shown that that remedy would have increased the prospects of his obtaining a more significant award for the ill-treatment to which his late father was subjected (see paragraph 83 above).

90. Accordingly, the Court rejects the Government's preliminary objection on the grounds of non-exhaustion of domestic remedies.

3. Conclusion

91. No other ground for declaring them inadmissible having been established, the fourth applicant's complaints on behalf of Mr S. Selami under Articles 3 and 5 § 5 of the Convention must therefore be declared admissible.

B. Merits

1. The parties' submissions

92. The fourth applicant maintained that the award made in the impugned proceedings had not been appropriate and sufficient redress for Mr S. Selami's suffering during his wrongful detention and ill-treatment at the hands of the police. In this connection, he submitted a final domestic court judgment awarding an individual the equivalent of EUR 27,000 for injuries (cuts on the face, broken teeth, ribs and an upper arm) sustained in a car accident, which had been less serious than the injuries inflicted on Mr S. Selami (*Rev2.no.1374/10*) (paragraphs 7 and 19 above).

93. The Government submitted that the award made by the Skopje Court of Appeal had been appropriate and sufficient redress for the wrongful detention and incorrect treatment of Mr S. Selami at the hands of the police. Referring to the relevant parts of the Court of Appeal's judgment, they maintained that "the domestic courts had not disregarded the physical injuries and emotional suffering of Mr S. Selami due to his treatment in police custody when calculating the award of non-pecuniary damages ... Notwithstanding that the award had been made in respect of the unjustified deprivation of liberty, in substance, it had included an award of non-pecuniary damage for the physical, that is to say inhuman treatment to which Mr S. Selami had been subjected while in police custody."

2. The Court's assessment

(a) General principles

94. Having regard to the parties' submissions and its conclusion to join to the merits the Government's objection (see paragraph 67 above), the Court finds it appropriate to reiterate the general principles regarding the "victim status" in the context of compensation measures.

95. As the Court has repeatedly held, a decision or measure favourable to the applicant is not, in principle, sufficient to deprive him or her of his or her status as a "victim" for the purposes of Article 34 of the Convention unless the national authorities have acknowledged, either expressly or in substance, and then afforded appropriate and sufficient redress for the breach of the Convention (see, *Gäfgen,* cited above, § 115 and *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 180, ECHR 2006-V). Only when these

conditions are satisfied does the subsidiary nature of the protective mechanism of the Convention preclude examination of an application (see *Milić and Nikezić v. Montenegro*, nos. 54999/10 and 10609/11, § 73, 28 April 2015).

96. As to the redress which is appropriate and sufficient in order to remedy a breach of a Convention right at national level, the Court has generally considered this to be dependent on all the circumstances of the case, having regard, in particular, to the nature of the Convention violation at stake (see *Gäfgen*, cited above, § 116; and *Scordino (no. 1)*, cited above, § 186). In the context of Article 3, which ranks as one of the most fundamental provisions of the Convention, compensation for the non-pecuniary damage flowing from a breach should in principle be available as part of the range of possible remedies (see *X v. Switzerland*, no. 16744/14, § 46, 26 January 2017).

97. The Court has already indicated that an applicant's victim status may depend on the level of compensation awarded at domestic level on the basis of the facts about which he or she complains before the Court (see *Gäfgen,* cited above,.§ 118; and *Zontul v. Greece*, no. 12294/07, § 95, 17 January 2012 in respect to Article 3 complaints; *Scordino (no. 1)*, cited above, § 202, in respect of a complaint about excessive length of the proceedings under Article 6, or *Jensen and Rasmussen v. Denmark* (dec.), no. 52620/99, 20 March 2003, in respect of a complaint under Article 11). By the nature of things, similar considerations apply to a complaint under Article 5 § 5 which speaks of "an enforceable right to compensation" (see, *mutatis mutandis*, *Shilyayev v. Russia*, no. 9647/02, § 21, 6 October 2005; *Damian-Burueana and Damian v. Romania*, no. 6773/02, § 89, 26 May 2009; and *Cumber v. United Kingdom* (dec.), no. 28779/95, 27 November 1996).

(b) Application of the above principles to the present case

98. Turning to the present case the Court reiterates that the fourth applicant complained only that the award made in the impugned proceedings had been unreasonably low in view of the alleged serious violation of Mr S. Selami's rights under Articles 3 and 5 § 5 of the Convention (see paragraph 36 and 70 above). Since the late Mr S. Selami and the fourth applicant chose to pursue a civil-law remedy rather than make a criminal complaint, the Court's analysis is confined to the examination, firstly, whether the national authorities have acknowledged, either expressly or in substance, the breach of the Convention, and, secondly, whether the compensation awarded amounted to sufficient redress.

99. The Court refers to its findings above regarding the domestic courts' acknowledgement (see paragraphs 15, 17, 21 and 22 above) that Mr S. Selami's detention had been unjustified and, in consequence, at variance with Article 5 of the Convention. They also awarded him

non-pecuniary damages in that connection. The domestic courts further established that during "the incriminating event of 26 August 2002" Mr S. Selami "had been arrested by the police ... transferred to other police stations where he had been subjected to serious physical ill-treatment and beaten, which caused serious bodily injury" (see paragraphs 17 and 21 above). The Skopje Court of Appeal clearly stated that "during the unjustified deprivation of liberty (Mr S. Selami) had been physically ill-treated ..." It further indicated that the compensation awarded to Mr S. Selami "included his physical ill-treatment" (see paragraph 22 above). That was also confirmed by the Government (see paragraph 93 above).

On the other hand, the Court notes that the domestic courts neither explicitly included Mr S. Selami's unacknowledged detention prior to 19 September 2002 in their findings about the unlawfulness of his detention (see paragraph 18 above) nor did they acknowledge, whether expressly or in substance, that the ill-treatment inflicted on him by the police amounted to torture. In that regard, the Court would wish to emphasise that, given the absolute prohibition of torture and inhuman or degrading treatment or punishment, in cases such as the present one, it is incumbent on the domestic courts to recognise expressly the treatment proscribed by Article 3 of the Convention.

100. As to the amount of compensation awarded to Mr S. Selami, the Court notes that the trial court initially set the award at EUR 18,000. Following an appeal by the Solicitor General, the Skopje Court of Appeal reduced the award to EUR 9,800. The Supreme Court confirmed that award.

101. As has been reiterated many times in the Court's case-law, it is primarily for the national authorities, above all the courts, to interpret and apply domestic law, the Court's role being confined to determining whether or not the effects of that interpretation are compatible with the Convention (see *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 54, ECHR 1999-I). The principle of subsidiarity does not mean renouncing all supervision of the result obtained from using domestic remedies; otherwise the rights guaranteed by the Convention would be devoid of any substance. In this connection it reiterates that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective (see *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 45, ECHR 2001-VIII).

102. Where, as in the present case, the victim status and therefore, the existence of a violation, is linked with the monetary redress afforded at domestic level, the Court's assessment necessarily involves comparison between the actual award and the amount that the Court would award in similar cases (see, *mutatis mutandis*, *Scordino (no. 1)*, cited above, §§ 181 and 202 and *Holzinger v. Austria (no. 1),* no. 23459/94, § 21, ECHR 2001-I).

103. In the instant case, having regard to the Court's awards in similar cases, the Court finds that the amount of compensation awarded by the domestic courts cannot be considered an appropriate redress for the violations complained of in the light of the standards set by the Court in comparable situations. It considers that the amount of EUR 9,800 is unreasonably low, taking into consideration its above findings that the treatment to which Mr S. Selami was subjected during his unacknowledged detention by the police amounted to torture (see paragraphs 49 and 52 above).

104. In view of the foregoing, the Court dismisses the remainder of the Government's preliminary objection and considers that there has been a violation of Articles 3 and 5 § 5 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

105. 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

106. The applicants claimed EUR 112,000 in respect of non-pecuniary damage for Mr S. Selami's wrongful detention and ill-treatment. They also claimed EUR 39,000 in their own name for non-pecuniary damage which they had sustained as a result of the treatment to which Mr S. Selami had been subjected.

107. The Government contested the applicants' claims.

108. The Court refers to its above findings declaring the complaints raised by the first, second and third applicants inadmissible (see paragraph 60 above); it therefore cannot deal with their claims under this head. As to the fourth applicant, the Court considers that he must be awarded the difference between the amount obtained from the domestic courts and an amount that would correspond to the Court's standards in cases of a similar degree of seriousness. It accordingly awards the fourth applicant EUR 20,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

109. The applicants did not seek reimbursement of costs and expenses. Accordingly, the Court does not award any sum under this head.

C. Default interest

110. 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. *Declares* the complaints of the fourth applicant under Article 3 (procedural aspect) and Article 5 § 5 of the Convention admissible, and the remainder of the application inadmissible;

2. *Decides* to join to the merits the Government's objection as to the fourth applicant's victim status in respect of redress obtained at domestic level and dismisses it;

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

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

5. *Holds*
   (a) that the respondent State is to pay the fourth applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 20,000 (twenty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 1 March 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener
Deputy Registrar

Linos-Alexandre Sicilianos
President