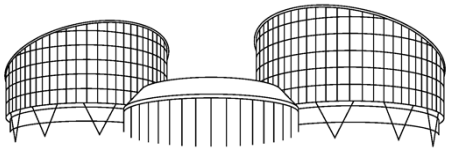

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF ZLIČIĆ v. SERBIA

(Applications nos. 73313/17 and 20143/19)

JUDGMENT

Art 3 (procedural and substantive) • Inhuman and degrading treatment while in police custody and failure to conduct effective investigation, not remedied by awarding inadequate sum of compensation
Art 6 § 1 (criminal) • Fair hearing • Overall fairness of criminal hearing in spite of search seizure certificate obtained through inhuman and degrading treatment • Certificate not relied upon to secure applicant's conviction and having no bearing on the outcome of the proceedings • Seizure certificate not amounting to a statement given by the applicant, but a formal written acknowledgment of seizure of a certain substance from him • Applicant having and using opportunity to freely give statements during proceedings

STRASBOURG

26 January 2021

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

In the case of Zličić v. Serbia,

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

Jon Fridrik Kjølbro, *President,*
Marko Bošnjak,
Aleš Pejchal,
Egidijus Kūris,
Branko Lubarda,
Pauliine Koskelo,
Saadet Yüksel, *judges,*
and Hasan Bakırcı, *Deputy Section Registrar,*

Having regard to:

the applications (nos. 73313/17 and 20143/19) against Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Serbian national, Mr Aleksandar Zličić ("the applicant"), on 7 October 2017 and 6 April 2019 respectively;

the decision to give notice to the Serbian Government ("the Government") of the applicant's complaints made under Articles 3, 6 and 13 of the Convention, raised in applications nos. 73313/17 and 20143/19, as well as to declare inadmissible the remainder of application no. 20143/19;

the parties' observations;

Having deliberated in private on 1 December 2020,

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

INTRODUCTION

1. The applications concern allegations of the applicant's ill-treatment by the police, the respondent State's alleged failure to conduct a proper investigation into this incident or to provide the applicant with adequate constitutional redress, and, lastly, the fairness of the related criminal proceedings which were subsequently brought against the applicant.

THE FACTS

2. The applicant was born in 1981 and lives in Novi Sad. He was represented before the Court by Ms S. Đorđević, a lawyer practising in the same town.

3. The Government were represented by their Agent, Ms Z. Jadrijević Mladar.

I. EVENTS OF 10 JANUARY 2014 AND OTHER RELATED DEVELOPMENTS AND PROCEEDINGS

A. The facts as presented by the applicant

4. On 10 January 2014 at around 10 p.m. the applicant and his friend G.K. were sitting on a bench close to the building where the latter had been living at the time, when two plain-clothes police officers approached them and asked them to show their identity cards. One of the police officers then went behind the bench and, while holding a small plastic bag (*kesicu*) in his hand asked them: "Whose bag is this? Is it yours?" The applicant and his friend replied that they neither knew whose bag it was nor what was in it. The police officers then searched them and took them to the Novi Sad police station.

5. During his questioning at the police station, the applicant was ill-treated in order to elicit a confession. Specifically, four police officers repeatedly punched him in the head and the abdomen and one of those police officers, S.D., threatened to detain him for a period of forty-eight hours and to inform his employer thereof. The same police officer also said that he would harass the applicant's parents and his cohabitee and break into his flat and search it. At one point, the applicant was forced to remove all of his clothes, but was then allowed to get dressed again. Fearing additional police abuse, the applicant ultimately signed a document confirming seizure of the small plastic bag in question ("the seizure certificate"). The interview lasted for more than an hour, following which the applicant was released.

6. On 12 January 2014, at around 1.30 p.m., the applicant went to the accident and emergency unit of the Vojvodina Clinical Centre (*Urgentni centar Kliničkog centra Vojvodine*), together with his lawyer and G.K. The doctor who examined the applicant diagnosed a contusion of the head and face, and a contusion of the left eyeball. On the same day an ophthalmologist of the Vojvodina Clinical Centre found that the applicant had suffered corneal erosion. Lastly, on 14 January 2014 the applicant was examined by an ophthalmologist and a neuropsychiatrist in the Novi Sad Health Centre (*Dom zdravlja*). The ophthalmologist diagnosed mild hyperaemia and an issue with the epithelium of the cornea, while the neuropsychiatrist concluded that the applicant had been suffering from a reaction to a severely stressful situation and an "adaptation disorder".

7. On 21 January 2014 the applicant lodged, through his lawyer and with the first-instance public prosecutor's office (*Osnovno javno tužilaštvo*) in Novi Sad, a criminal complaint against S.D. and three other unidentified police officers concerning the events of 10 January 2014.

8. On 20 February 2014 the first-instance public prosecutor's office requested that the internal investigation unit of the police (*Sektor unutrašnje*

kontrole policije – "the internal investigation unit") carry out an investigation.

9. On 19 and 24 March 2014 the internal investigation unit, notably its office in Novi Sad, interviewed, among other people, the applicant and his cohabitee, as well as G.K. and G.K.'s father J.K.

10. The applicant recounted the abuse which he had suffered while in police custody and stated that Officer S.D. had been one of the police officers who had ill-treated him. He also recognised two other officers from the photographs shown to him, but could not confirm whether they had punched him because he had not been able to see anything after he had received the first blow to the head. The applicant added that on 10 January 2014 he had sustained the injuries listed in the medical reports. Fearing additional police abuse, however, he had not gone to the hospital immediately upon release but had done so on 12 January 2014 together with his lawyer.

11. G.K., the applicant's friend who had also been arrested on the same occasion, stated that he had seen when Officer S.D. had punched the applicant in the head, that is to say on his left temple, and added that he too had been physically and psychologically abused by the police in order to extort his statement, including by Officer S.D. G.K. had not lodged a criminal complaint because that would have involved additional stress and his wife had not wanted them to go through this.

12. The applicant's cohabitee, S.Đ., stated, *inter alia*, that the applicant had come home at around midnight on 10 January 2014 and that she had observed swelling on his left eyelid. The applicant had said that he had been beaten by the police during questioning at the police station and that he had known the identity of one of the police officers involved, a certain S.D. The applicant's cohabitee provided the internal investigation unit with photographs of the applicant's face which she had taken one day after his release, in the evening of 11 January 2014. The photographs showed some swelling and redness around the applicant's left eye and cheekbone.

13. J.K. recounted, *inter alia*, that he had been in front of the police station when his son, G.K., had been released. He had noticed redness in the area of his son's cheekbone and skin abrasions on one of his legs. His son had also told him that he had been punched and ill-treated by the police, and that one of the police officers involved had been S.D.

14. On 10 July 2014 the first-instance public prosecutor's office rejected the applicant's criminal complaint, finding that there were no grounds to suspect that a criminal offence subject to public prosecution had been committed. In so doing, it accepted the police officers' version of events as fully credible (see paragraphs 19 and 20 below). It also noted that J.K. and the applicant's cohabitee had not had any direct knowledge of what had happened in the police station.

15. On 7 November 2014 the high public prosecutor's office (*Više javno tužilaštvo*) in Novi Sad upheld this decision and its reasoning. It furthermore noted that the internal investigation unit, for its part, had been absolutely impartial in the performance of its duties. The first-instance public prosecutor's office was therefore justified in concluding that there were no grounds to suspect that the officers in question, acting in an official capacity, had used force, threats or other inadmissible means with intent to extort a confession or any other statement from the applicant.

16. On 8 January 2015 the applicant lodged a constitutional appeal (*ustavna žalba*). He described the alleged police abuse of 10 January 2014, submitted medical reports corroborating his allegations thereof, and maintained that such police conduct and the lack of a proper investigation in that regard, by the police as well as the public prosecution service, had clearly amounted to a breach of his right to physical and mental integrity as guaranteed under Article 25 of the Constitution (see paragraph 39 below). The applicant, in this context, also referred to his right to a fair trial, the prohibition of discrimination and the obligation to treat all detained persons with dignity, as guaranteed under Articles 32, 21 and 28 of the Constitution respectively. The applicant, lastly, complained about the public prosecutor's ultimate rejection of his criminal complaint and his refusal to press charges against the police officers involved.

17. On 9 June 2017 the Constitutional Court (*Ustavni sud*) dismissed the applicant's appeal, finding that the applicant had essentially complained about the rejection of his complaint by the public prosecution service and that he had done so in connection with the right to a fair trial. However, given the legal nature and the content of those rejections, the Constitutional Court opined that they could not be considered as individual acts against which a constitutional appeal could be lodged on the basis of Article 170 of the Constitution (see paragraph 39 below). In particular, the court noted, *inter alia*, that a criminal complaint was merely an "initial step" aimed at clarifying the allegations in question and that as such it did not mean that criminal charges always had to follow. A prosecutorial rejection of a criminal complaint could not therefore amount to a breach of any of the rights and freedoms guaranteed by the Constitution.

B. The facts as presented by the Government

18. The Government disputed the applicant's description of what had taken place on 10 January 2014, contained in paragraphs 4, 5 and 10-13 above, and furnished additional details.

19. In particular, they did so on the basis of the written statements prepared by Officers S.D. and N.A. on 15 January 2014 and the subsequent testimony provided by Officers S.D., N.A., G.R., M.Š., S.M. and G.C.

between 21 and 25 March 2014 and as part of the investigation carried out by the internal investigation unit.

20. According to these sources, on 10 January 2014 two police officers, S.M., and G.C., had approached the applicant and his friend, G.K., who were sitting on the bench in front of a building. They had done so because they could smell cannabis in the air. At the same time, Officer G.C. had noticed that the applicant had dropped something onto the ground. The officers had then asked the two men to show their identity cards. While searching them, Officer G.C. had found on the ground, next to the applicant, a plastic bag with dried plant matter resembling cannabis. On the applicant's person, Officer G.C. had also found rolling paper used for making cigarettes. The officers had then taken the applicant and G.K. to the Novi Sad police station. While in the station, neither the applicant nor G.K. had been ill-treated. The applicant had not given a formal statement but had "informally" said that the plastic bag at issue was his and that he had thrown it away when he had seen the police officers approaching him.

21. While in the police station, the officers had also provided the applicant with a seizure certificate in respect of the said plastic bag together with its contents, some 5 g in all, and the applicant had signed this document of his own free will. Following this, the applicant had been photographed and his fingerprints and palm prints had been taken by the police. The applicant had also been informed that the plastic bag and its contents would be sent for forensic examination and that if the examination confirmed that cannabis was in the bag, criminal charges would be pressed.

22. The police likewise questioned G.K. on 10 January 2014 about the events which had taken place that evening. An official interview record was prepared and G.K. signed it. The document stated, *inter alia*, that G.K. had denied knowing anything about the plastic bag in question or its contents but noted that he had no objections as to the conduct of the police officers in question.

23. On 30 January 2014 the first-instance public prosecutor's office ordered that the said expert examination be carried out, and on 6 August 2014 the experts found that the substance in question was 4.23 g of cannabis.

II. CRIMINAL CHARGES SUBSEQUENTLY BROUGHT AGAINST THE APPLICANT AND OTHER RELATED PROCEEDINGS

24. On 22 July 2015 the applicant was questioned by the police on charges of unauthorised possession of narcotics. In the presence of counsel, the applicant stated that on 10 January 2014 the police had found a small plastic bag on the ground behind the bench where he and his friend had been sitting but that that bag did not belong to them. The applicant also stated

that he had signed the seizure certificate issued in respect of the said bag under duress.

25. Between 22 July 2015 and 11 March 2016 the first-instance public prosecutor's office took statements from the applicant and G.K., as well as the police officers concerned, all of whom essentially repeated their respective accounts given earlier. In so doing, Officer G.C. reiterated that as he and his colleague had approached the applicant and his friend he had noticed that the applicant had lowered something onto the ground and that this turned out to be a plastic bag containing cannabis. Officer S.M. also largely repeated his earlier statement but specified, *inter alia*, that he remembered that the applicant and G.K. had been asked to show their identity cards and empty their pockets and that it was at this point that a small plastic bag had been dropped onto the ground by one of them.

26. On 13 June 2016 the first-instance public prosecutor's office indicted the applicant for the criminal offence of unauthorised possession of narcotics for personal use in connection with the events of 10 January 2014. The indictment stated, *inter alia*, that the applicant had hidden 4.23 g of cannabis in his underwear.

27. On 30 January 2017 the Novi Sad Court of First Instance (*Osnovni sud u Novom Sadu*) found the applicant guilty and sentenced him to three months' imprisonment, suspended for a period of one year. The court accepted the subsequently amended indictment to the effect that the applicant had been in possession of a plastic bag containing 4.23 g of cannabis and had then dropped it onto the ground when he had seen the police approaching. The court also admitted into evidence the seizure certificate and the expert's opinion to the effect that the substance in the plastic bag had indeed been cannabis. Officers G.C. and S.M., who had arrested the applicant, essentially repeated in court their statements given earlier, adding, *inter alia*, that the plastic bag had been found on the ground very close to the applicant's foot and that there had been no other objects there. The street lights had also been bright and the visibility had been good. Officer S.M., however, made no specific reference to at what point exactly and by whom the plastic bag had been dropped onto the ground. The applicant and G.K. likewise repeated their earlier statements, including their allegations of police abuse. The court ultimately concluded that there was adequate evidence that the applicant had been arrested while in possession of a banned substance, "accepted the officers' account of the events in question", especially in the absence of any reasons as to why they would otherwise have engaged in the planting of evidence, and dismissed the statements given by G.K. and the applicant as aimed at avoiding the latter's criminal responsibility. The court added that it had not based its conclusions as to the applicant's possession of cannabis on the seizure certificate itself but on the officers' own testimony in that connection. It was hence irrelevant for those proceedings as to whether the seizure certificate had

been signed under duress or not. Lastly, the court refused to admit into evidence the applicant's criminal complaint, or the medical or any other evidence of police abuse allegedly suffered by applicant, since, *inter alia*, that too did not relate to the charges brought against him.

28. On 2 March 2017 the applicant and his lawyer lodged separate appeals against this judgment, arguing, *inter alia*, that: (a) there was simply no evidence that the applicant had been in possession of a banned substance, as anyone could have left the bag in question in the public space where the applicant had been arrested; (b) it had never been established that the applicant had been a user of cannabis; (c) the officers' statements themselves had not been consistent but had nevertheless been accepted by the court as decisive, while compelling statements which had been given by the applicant and G.K. had simply been ignored; (d) the seizure certificate itself had been signed under duress; (e) the evidence of the applicant's ill-treatment by the police had not been admitted; and (f) the charges against the applicant had only been brought once the applicant had lodged his criminal complaint against the officers who had abused him.

29. On 11 July 2017 the Novi Sad High Court (*Viši sud u Novom Sadu*) upheld the judgment rendered at first instance as well as its reasoning.

30. On 9 November 2017 the Supreme Court of Cassation (*Vrhovni kasacioni sud*) rejected the applicant's further request for the protection of legality (*zahtev za zaštitu zakonitosti*) lodged against the High Court's judgment of 11 July 2017. In its reasoning the Supreme Court of Cassation noted, *inter alia*, that the fact that the applicant had been in possession of cannabis had been established on the basis of the police officers' testimony and "not solely based on" the seizure certificate. According to the Supreme Court of Cassation, it was therefore obvious that even in the absence of the said written evidence the same judgment would have been rendered.

31. In the meantime, on 24 August 2017, the applicant lodged an appeal with the Constitutional Court. He relied on the arguments already raised earlier in the course of the criminal proceedings, arguing that all that had, *inter alia*, amounted to breach of his right to a fair trial.

32. On 12 October 2018 the Constitutional Court dismissed the appeal, endorsing the reasoning of the criminal courts. In addition, it explained that it was not its role to review the case as yet another appellate court but to ascertain whether there had been a breach of the rights and freedoms enshrined in the Constitution. In the present case, the Constitutional Court concluded that there had been none.

33. On 5 November 2019 the Ministry of Internal Affairs (*Ministarstvo unutrašnjih poslova*) issued a decision on the applicant's rehabilitation, given that the applicant had not had any convictions before the judgment of 30 January 2017, and, furthermore, that he had not committed any new criminal offences thereafter.

III. CIVIL PROCEEDINGS BROUGHT BY THE APPLICANT

34. In his written submissions of 22 September 2019 the applicant informed the Court of the civil proceedings which he had brought in connection with his alleged police abuse of 10 January 2014.

35. In particular, on 9 January 2017 the applicant lodged a claim against the respondent State and its Ministry of Internal Affairs, seeking compensation for the non-pecuniary damage suffered on that occasion.

36. The respondent State, in its written response (*odgovor na tužbu*), contested the applicant's claim, adding that it was important to note the extent to which the applicant had contributed to the "occurrence of the damage" in question.

37. On 27 September 2017 the Novi Sad Court of First Instance ruled in favour of the applicant and ordered the respondent to pay him 80,000 Serbian dinars (RSD) for the physical pain suffered and RSD 100,000 for the fear endured as a consequence of the police ill-treatment (some 670 euros (EUR) and EUR 835 respectively) as well as another RSD 72,500 (approximately EUR 605) on account of the costs and expenses, all with statutory interest. In its reasoning, *inter alia*, the court accepted the applicant's allegations of police abuse, including that he had signed the seizure certificate owing to the ill-treatment in question, and stated that all this had amounted to a breach of his constitutional rights as well as his rights and freedoms guaranteed by ratified international treaties, including the right to be treated with dignity and not to be subjected to violence while in police custody or to have his statement extorted. The issue of the "applicant's contribution to the occurrence of the damage in question", as raised by the respondent, was deemed by the court as immaterial since the fact that the applicant had been suspected of having committed a crime could not have justified his abuse. In any event, there was no evidence that the applicant had done anything that could have justified the use of force against him. Lastly, the court noted that in the meantime the applicant had been convicted of the offence of unauthorised possession of narcotics but that that was a separate issue and had no bearing on its ruling as regards the pain and fear suffered by him as a consequence of the police ill-treatment in question.

38. On 25 April 2018, following appeals lodged by the parties, the Novi Sad Appeals Court (*Apelacioni sud*) upheld this judgment and its reasoning, but reduced the damages for the fear endured by the applicant and the costs and expenses incurred to RSD 70,000 and RSD 60,500 (approximately EUR 590 and EUR 510, respectively). It further decided that no statutory interest had to be paid in respect of the costs and expenses awarded.

RELEVANT LEGAL FRAMEWORK

I. CONSTITUTION OF THE REPUBLIC OF SERBIA (*USTAV REPUBLIKE SRBIJE*, PUBLISHED IN THE OFFICIAL GAZETTE OF THE REPUBLIC OF SERBIA – OG RS – No. 98/06)

39. The relevant provisions read as follows:

Article 25

"1. Everyone's physical and mental integrity shall be inviolable.

2. Nobody may be subjected to torture, inhuman or degrading treatment or punishment, nor subjected to medical and other experiments without their free consent."

Article 170

"A constitutional appeal may be lodged against individual decisions or actions of State bodies or organisations exercising delegated public powers which violate or deny human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies for their protection have already been exhausted or have not been prescribed."

II. CONSTITUTIONAL COURT ACT (*ZAKON O USTAVNOM SUDU*, PUBLISHED IN OG RS No. 109/07, AMENDMENTS PUBLISHED IN OG RS Nos. 99/11, 18/13, 40/15 AND 103/15)

40. Article 84 § 1 provides that a constitutional appeal may be lodged within a period of thirty days as of the date of receipt of the individual decision in question or the date when the impugned actions took place.

III. CONSTITUTIONAL COURT'S OPINION OF 30 OCTOBER 2008 AND 2 APRIL 2009

41. The Constitutional Court is, under Article 170 of the Constitution (see paragraph 39 above above), also entitled to rule on a constitutional appeal if no other legal remedy has been prescribed, meaning if "judicial protection has been excluded" or if "no other legal redress has been provided".

42. The Constitutional Court ruled that the deadline for the submission of a constitutional appeal, as set out in Article 84 § 1 of the Constitutional Court Act (see paragraph 40 above), started running, *inter alia*, as follows: (a) on the date of receipt of the impugned decision adopted in respect of the last remedy pursued; (b) as regards an impugned action, on the date when the action in question had been taken or had ceased; and (c) with respect to an impugned omission, depending on the specific circumstances of the case as well as the conduct of the appellant and the authority at issue.

IV. CONSTITUTIONAL COURT'S CASE-LAW

43. In decisions Už-788/09, Už-10465/13, Už-8236/17 and Už-9113/17, of 29 September 2011, 7 April 2015, 26 September 2018 and 8 November 2018, respectively, decisions Už-10036/17, Už-10356/17, Už-10400/17, all adopted on 27 November 2018, and decisions Už-5336/16 and Už-8201/16, both rendered on 24 December 2018, the Constitutional Court, dismissed, *inter alia*, the appellants' complaints concerning the rejection of their respective criminal complaints by the public prosecution service on the basis that a criminal complaint was merely an "initial step" aimed at clarifying the allegations in questions and that as such it did not mean that criminal charges always had to follow. The Constitutional Court therefore held that a prosecutorial rejection of their criminal complaints, lodged in various contexts albeit not in the context of police abuse, could not amount to a breach of any of the rights and freedoms guaranteed by the Constitution.

44. In decision Už-3361/16 of 14 November 2018 the appellant's complaint of ill-treatment by the police was dismissed as belated, having been lodged more than thirty days after the alleged abuse had taken place. At the same time, the appellant's related complaint concerning the rejection of his criminal complaint by the public prosecution service after that was dismissed on the same basis as described in paragraph 43 above *in fine*.

V. CONSTITUTIONAL COURT'S DECISION UŽ-4100/11 OF 10 JULY2013

45. In this decision the Constitutional Court found, *inter alia*, a substantive and a procedural violation of the appellant's right not to be subjected to inhuman treatment within the meaning of Article 25 of the Constitution (see paragraph 39 above), ordered an effective investigation into the ill-treatment perpetrated by prison guards and awarded the appellant EUR 1,000 for the non-pecuniary damage suffered in that connection. In the appellant's constitutional appeal he had complained of the abuse carried out by State agents and the subsequent failure of the relevant authorities to carry out an effective official investigation.

VI. CRIMINAL CODE (*KRIVIČNI ZAKONIK*, PUBLISHED IN OG RS No. 85/05, AMENDMENTS PUBLISHED IN OG RS Nos. 88/05, 107/05, 72/09, 111/09, 121/12, 104/13 AND 108/14)

46. The relevant provisions read as follows:

122 §§ 1 and 4 (Slight Bodily Harm)

"1. Whoever inflicts slight bodily harm on or causes minor health impairment to another, shall be punished with a fine or imprisoned for up to one year.

...

4. The offence referred to in paragraph 1 of this Article may be prosecuted on the basis of a private [criminal] action ... [brought by the victim personally]."

Article 136 (Extortion of a Statement)

"1. Whoever acting in an official capacity uses force or threat[s] or other inadmissible means ... with intent to extort a confession or another statement from an accused, a witness, an expert witness or another person, shall be punished with imprisonment of from three months to five years.

2. If the extortion of a confession or of a statement is aggravated by extreme violence or if the extortion of a statement results in particularly serious consequences for the accused in a criminal case, the offender shall be punished with imprisonment of from two to ten years."

VII. CODE OF CRIMINAL PROCEDURE (*ZAKONIK O KRIVIČNOM POSTUPKU*, PUBLISHED IN OG RS No. 72/11, AMENDMENTS PUBLISHED IN OG RS Nos. 101/11, 121/12, 32/13, 45/13 AND 55/14)

47. Article 9 prohibits, *inter alia*, any use of torture, inhumane and degrading treatment, or of force, threats and/or coercion, with the aim of extorting a confession or any other statement from the accused or another person taking part in the proceedings.

48. Articles 5, 6 and 51 taken together provide, *inter alia*, that for criminal offences which are subject to prosecution *ex proprio motu*, such as, for example, the offence of extortion of a confession, the authorised prosecutor is the public prosecutor personally. The said official's authority to decide whether to press charges, however, is bound by the principle of legality which requires that he or she must act whenever there is a reasonable suspicion that a crime subject to prosecution *ex propriu motu* has been committed. Should the public prosecutor dismiss a criminal complaint lodged in respect of such an offence, he or she must inform the victim of this decision, who may then lodge an objection with the immediately higher public prosecutor, within eight days as of the date of notification. The immediately higher prosecutor may reject or accept the objection but no appeal or objection is allowed against that decision. Should the immediately higher public prosecutor decide to accept the objection, he or she must issue a mandatory instruction to the competent public prosecutor to start a prosecution or continue therewith.

VIII. POLICE ACT (*ZAKON O POLICIJI*, PUBLISHED IN OG RS No. 101/05, AMENDMENTS PUBLISHED IN OG RS Nos. 63/09, 92/11 AND 64/15)

49. Articles 171 and 178 provided, *inter alia*, that the internal investigation unit was directed by its head, who in turn regularly reported on the unit's work to the Minister of Internal Affairs personally. The latter also issued mandatory instructions, directives and orders to the internal investigation unit as regards the performance of its duties.

50. This Act was repealed and replaced by other legislation in 2016.

IX. OBLIGATIONS ACT (*ZAKON O OBLIGACIONIM ODNOSIMA*, PUBLISHED IN THE OFFICIAL GAZETTE OF THE SOCIALIST FEDERAL REPUBLIC OF YUGOSLAVIA – OG SFRY – No. 29/78, AMENDMENTS PUBLISHED IN OG SFRY Nos. 39/85, 45/89 AND 57/89, AND IN THE OFFICIAL GAZETTE OF THE FEDERAL REPUBLIC OF YUGOSLAVIA No. 31/93)

51. Article 200 provides, *inter alia*, that anyone who has suffered fear, physical pain or mental anguish as a consequence of a breach of his or her reputation, personal integrity, liberty or of his or her other personal rights (*prava ličnosti*) is entitled to seek financial compensation.

52. Article 172 § 1 provides that a legal entity (*pravno lice*), which includes the State, is liable for any damage caused by one of "its bodies" to a "third person".

THE LAW

I. JOINDER OF THE APPLICATIONS

53. Given the similar factual and legal background of the present applications, the Court decides to order their joinder pursuant to Rule 42 § 1 of the Rules of Court.

II. THE GOVERNMENT'S PRELIMINARY OBJECTION AS REGARDS THE ALLEGED ABUSE OF THE RIGHT OF PETITION

54. The Government noted, in their observations of 22 October 2019, that the applicant had failed to inform the Court, from the outset of the proceedings before it, that he had obtained compensation before the civil courts for the alleged police ill-treatment, and maintained that he had thus abused his right of individual application, within the meaning of Article 35 § 3 (a) of the Convention.

55. The Court reiterates that an application may be rejected as abusive under Article 35 § 3 of the Convention if, among other reasons, it was knowingly based on untrue facts and false declarations (see, for example, *Miroļubovs and Others v. Latvia*, no. 798/05, § 63, 15 September 2009; *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 97, ECHR 2012; and *Gross v. Switzerland* [GC], no. 67810/10, § 28, ECHR 2014). The submission of incomplete and thus misleading information may also amount to an abuse of the right of application, especially if the information concerns the very core of the case and no sufficient explanation has been provided for the failure to disclose that information (see *Hüttner v. Germany* (dec.), no. 23130/04, 19 June 2006; *Kowal v. Poland* (dec.), no. 2912/11, 18 September 2012; and *Gross*, cited above, § 28). However, even in such cases, the applicant's intention to mislead the Court must always be established with sufficient certainty (see *Al-Nashif v. Bulgaria*, no. 50963/99, § 89, 20 June 2002; *Melnik v. Ukraine*, no. 72286/01, §§ 58-60, 28 March 2006; and *Nold v. Germany*, no. 27250/02, § 87, 29 June 2006).

56. Turning to the present case, the Court notes that the applicant lodged his first application, no. 73313/17, on 7 October 2017 and did not mention on that occasion the civil proceedings which he had brought regarding the alleged police ill-treatment of 10 January 2014 (see paragraphs 35-38 above). Following the Court's decision to give notice of this application to the Government and the submission of the Government's written comments of 8 July 2019 in reply, in his own written submissions of 22 September 2019 the applicant informed the Court, for the first time, of the course and outcome of the civil proceedings in question (see paragraph 34 above). The said proceedings themselves had lasted from 9 January 2017 to 25 April 2018, which meant that they were pending when the applicant lodged application no. 73313/17 with the Court. In those circumstances, the Court notes that the applicant indeed failed to inform it at the outset of all of the relevant facts concerning his complaints raised in application no. 73313/17. He did, however, do so subsequently, on 22 September 2019, of his own motion and despite the absence of any objection raised by the Government in this regard in their submissions of 8 July 2019. The Court therefore concludes that while admittedly the applicant should have mentioned the relevant facts regarding the civil suit from the very beginning of the proceedings before it, there is no evidence that he intended to "mislead the Court" in that connection (see paragraph 55 above *in fine*).

57. It follows that the Government's preliminary objection must be dismissed.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

58. The applicant complained, under Articles 3 and 14 of the Convention, as well as under Article 1 of Protocol No. 12, of having been ill-treated while in police custody, as well as of the respondent State's subsequent failure to conduct an effective official investigation in that regard.

59. The Court, being the master of the characterisation to be given in law to the facts of the cases before it (see, among many other authorities, *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, §§ 114 and 126, 20 March 2018), considers that the above complaints fall to be examined under Article 3 of the Convention, which reads as follows:

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

A. Admissibility

1. The applicant's victim status

60. The Government maintained that given the outcome of the civil proceedings, the applicant could no longer claim to be a victim of the violation alleged (see paragraphs 35-38 above).

61. The applicant made no comments in this regard.

62. The issue of whether the applicant may still claim to be a victim of a violation of Article 3 of the Convention in respect of his alleged ill-treatment is closely linked to the substance of his complaints under this provision and should, as such, more appropriately be examined at the merits stage. The Court therefore decides to join this objection to the merits of the applicant's complaints (see *Shestopalov v. Russia*, no. 46248/07, § 40, 28 March 2017).

2. Exhaustion of domestic remedies

(a) The parties' submissions

63. The Government argued that the applicant had failed to comply with the exhaustion requirement within the meaning of Article 35 § 1 of the Convention.

64. In the first place, according to the Government, the applicant should, following the rejection of his criminal complaint, have lodged a further private criminal action for the offence of slight bodily harm, an offence which corresponded more closely to the actual nature of the injuries allegedly sustained by him than the offence referred to in his own criminal complaint. The charges for slight bodily harm could, furthermore, have been brought by the applicant personally, without any involvement on the part of the public prosecution service, and would have resulted in a meritorious

adjudication of his police abuse-related allegations by a court of law (see paragraph 46 above).

65. In addition or in the alternative, the Government endorsed the reasoning of the Constitutional Court's decision of 9 June 2017 (see paragraph 17 above) and referred to other relevant case-law on the issue (see paragraph 43 above). According to the Government, however, the applicant should instead have lodged his constitutional appeal within a period of thirty days of when the alleged police ill-treatment had taken place, notwithstanding the, at that time, still ongoing preliminary criminal investigation triggered by his own criminal complaint. In support of this contention the Government referred to a single decision adopted by the Constitutional Court on 14 November 2018, as well as the said court's earlier opinion on the matter (see paragraphs 44, 41 and 42 above, in that order). In any event, the Government submitted that the applicant had also failed to properly raise his complaints before the Constitutional Court since in his appeal lodged therewith he had essentially complained about the violation of his right to a fair trial, having been dissatisfied with the fact that no criminal proceedings had been instituted against the police officers concerned.

66. The applicant maintained that he had complied with the exhaustion requirement by properly making use of the relevant criminal and constitutional remedies.

(b) The Court's assessment

(i) As regards the private criminal action

67. The Court considers that this matter goes to the very heart of the question of whether the applicant suffered a procedural violation of Article 3 and should, as such, more appropriately be examined at the merits stage. It therefore decides to join this objection to the merits of the applicant's complaint (see, *mutatis mutandis*, *Lakatoš and Others v. Serbia*, no. 3363/08, § 57, 7 January 2014, and *Gjini v. Serbia*, no. 1128/16, §§ 64-67, 15 January 2019).

(ii) As regards the constitutional complaint

(1) General principles

68. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 of the Convention obliges those seeking to bring a case against a State before the Court to firstly use the remedies provided by the national legal system. Consequently, States are dispensed from answering for their acts before an international body before they have had an opportunity to put matters right domestically (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 70, 25 March 2014).

69. As regards legal systems which provide constitutional protection for fundamental human rights and freedoms, such as the one in Serbia, it is incumbent on the aggrieved individual to test the extent of that protection (see, *inter alia*, *Vinčić and Others v. Serbia*, nos. 44698/06 and 30 others, § 51, 1 December 2009).

70. It is not necessary for the Convention right to be explicitly raised in domestic proceedings provided that the complaint is raised at least in substance (see *Castells v. Spain*, 23 April 1992, § 32, Series A no. 236; *Akdivar and Others v. Turkey*, 16 September 1996, § 66, *Reports of Judgments and Decisions* 1996-IV; and *Vučković*, cited above, § 72). The applicants must, however, comply with the applicable rules and procedures of domestic law, failing which their application is likely to fall foul of the condition laid down in Article 35 § 1 (see, for example, *Cardot v. France*, 19 March 1991, § 34, Series A no. 200; *Akdivar*, cited above, § 66; and *Vučković*, cited above, § 72).

71. The Court has, however, also frequently underlined the need to apply the exhaustion rule with some degree of flexibility and without excessive formalism (see *Ringeisen v. Austria*, 16 July 1971, § 89, Series A no. 13; *Akdivar and Others*, cited above, § 69; and *Vučković*, cited above, § 76). It would, for example, be unduly formalistic to require the applicants to exercise a remedy which even the highest court of their country would not oblige them to exhaust (see *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, §§ 117 and 118, ECHR 2007-IV).

72. As regards the burden of proof, 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. Once this burden has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from this requirement (see *McFarlane v. Ireland* [GC], no. 31333/06, § 107, 10 September 2010, and *Vučković*, cited above, § 77).

73. The issue whether domestic remedies have been exhausted is normally determined by reference to the date when the application was lodged with the Court (see *Baumann v. France*, no. 33592/96, § 47, ECHR 2001-V (extracts)). This rule, however, is subject to exceptions which may be justified by the specific circumstances of each case (see, for example, *Nogolica v. Croatia* (dec.), no. 77784/01, ECHR 2002-VIII, and *Golubović and Others v. Serbia* (dec.), no. 10044/11 and 8 others, 17 September 2013).

(2) Application of these principles to the present case

74. Turning to the present case and in view of the above, the Court notes that on 8 January 2015 the applicant lodged a constitutional appeal. In this

appeal, *inter alia*, he described the alleged police abuse of 10 January 2014, submitted medical reports corroborating his allegations, and maintained that such police conduct, as well as the lack of a proper investigation in this regard thereafter, amounted to a breach of his right to physical and mental integrity (see paragraphs 16 and 39 above). In those circumstances, the Court cannot but conclude that the applicant properly raised the substance of his Article 3 complaints before the Constitutional Court (see paragraph 70 above; see also *Gjini*, cited above § 63).

75. As regards the Government's contention that the applicant should have lodged his constitutional appeal within a period of thirty days as of when the alleged police ill-treatment had taken place, the Court notes that they referred to a single decision of the Constitutional Court in support of that argument and that the decision itself had only been adopted more than a year after the applicant had already lodged his application with the Court (see paragraphs 44 and 73 above).

76. Furthermore, in its decision of 9 June 2017 the Constitutional Court dismissed the applicant's appeal on the basis that a criminal complaint was merely an "initial step" aimed at clarifying the allegations of police abuse in question and that as such it did not mean that criminal charges always had to ensue. A prosecutorial rejection of a criminal complaint was thus deemed as not amounting to a breach of any of the rights and freedoms guaranteed by the Constitution (see paragraph 17 above). That being so, the Court notes that the Constitutional Court did not reject the applicant's appeal as belated, and considers that it would therefore be unduly formalistic to require the applicant to have exercised a remedy in a manner in which even the highest court of his country did not require him to follow (see, *mutatis mutandis*, paragraph 71 above; see also, *mutatis mutandis*, *Dragan Petrović v. Serbia*, no. 75229/10, §§ 55 and 57, 14 April 2020). In any event, while it is apparent from the Constitutional Court's opinion of 30 October 2008 and 2 April 2009 that, under Article 170 of the Constitution, the said court is also able to rule directly on a constitutional appeal if no other legal remedy has been prescribed, meaning if "judicial protection has been excluded" or if "no other legal redress has been provided" (see paragraph 41 above), this was simply not the case in the applicant's situation.

77. Lastly, the Court considers, without intending to question the power of the Constitutional Court to interpret its own admissibility criteria, that in a situation such as the one in the present case, where a preliminary criminal investigation triggered by an appellant's own criminal complaint was still ongoing, the requirement to lodge a constitutional appeal within a period of thirty days as of the alleged ill-treatment might have the effect of diminishing the importance of criminal redress, despite it being the only avenue capable of leading to the identification and punishment of the alleged abusers (see, *mutatis mutandis*, paragraph 105 below).

78. In view of the foregoing, the Court considers that the Government's objection to the effect that the applicant failed to properly make use of the constitutional appeal procedure, within the meaning of Article 35 § 1 of the Convention, must be rejected.

3. Other grounds of inadmissibility

79. The Court furthermore notes that the applicant's complaints are neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. They must therefore be declared admissible.

B. Merits

1. Whether the applicant was subjected to ill-treatment proscribed by Article 3 of the Convention

(a) The parties' submissions

(i) The applicant

80. The applicant reaffirmed his complaint to the effect that he had been abused by the police, as evidenced by the relevant medical documentation, photographs and witness testimony.

(ii) The Government

81. The Government maintained that there was no evidence that the applicant had been subjected to ill-treatment on the part of the police.

82. In particular, the applicant had been medically examined, for the first time, almost two days after his stay in the police station (see paragraphs 4 and 6 above). It was therefore perfectly possible that his injuries could have been sustained in a situation excluding any police involvement.

83. As regards the photographs provided by the applicant's cohabitee, they had likewise been taken, according to the latter's own statement, one day after the alleged ill-treatment had occurred (see paragraph 12 above). In fact, however, there was no objective corroboration of that assertion, meaning that the photographs in question could have been taken even later. Regardless, it remained unclear why the applicant had not been photographed as soon as he had returned home from the police station.

84. None of the individuals who had been personally involved in the incident had confirmed the applicant's allegations of police abuse, except for G.K. in his later statements. The same witness, however, when first questioned by the police had declared that he had no objections in respect of the officers' conduct (see paragraph 22 above). Furthermore, while G.K. had subsequently claimed that he too had been ill-treated by the police, he

had never lodged a criminal complaint in that connection or obtained any medical evidence in support of his allegations.

85. While in the police station, the applicant had not been subjected to any formal questioning. He had only been issued with a seizure certificate and he had signed it even though this had not been a legal requirement (see paragraph 21 above). The seized substance itself had then been sent for an expert examination, depending on the outcome of which charges against the applicant would or would not have been pressed (ibid.). Since the probative value of the seizure certificate in any subsequent criminal proceedings would not have depended on the applicant's signature, there would have been no reason for the police to have used force against him in order to obtain it. Moreover, it was difficult to imagine why the applicant would have been photographed by the police immediately after his alleged abuse by them.

86. In view of the above, the Government maintained that the applicant had not proved that he had been injured at the time of his release from police custody. The respondent State was therefore not under an obligation to provide a convincing explanation as to how any of the injuries in question might have been caused.

87. Lastly, the Government noted that the domestic civil courts had awarded the applicant compensation in connection with the alleged police abuse (see paragraphs 37 and 38 above). They maintained, however, that this could not be taken to "automatically mean" that there had also been a violation of Article 3 of the Convention.

(b) The Court's assessment

(i) General principles

88. 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, for example, *Pretty v. the United Kingdom,* no. 2346/02, § 49, ECHR 2002-III, and *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, § 124, 21 November 2019). In contrast to the other provisions of 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* 1996-V, and *Rooman v. Belgium* [GC], no. 18052/11, § 141, 31 January 2019).

89. 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; *Jalloh v. Germany* [GC], no. 54810/00, § 67, 11 July 2006; and *Z.A. and Others v. Russia* [GC], nos. 61411/15 and 3 others, § 181, 21 November 2019).

90. Treatment has been held by the Court to be "inhuman" because, *inter alia*, it was premeditated, applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering (see *Labita v. Italy* [GC], no. 26772/95, § 120, ECHR 2000-IV). Treatment has been considered "degrading" when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance (see *Hurtado v. Switzerland*, 28 January 1994, Commission report, § 67, Series A no. 280, and *Wieser v. Austria*, no. 2293/03, § 36, 22 February 2007). Slapping by police officers has likewise been deemed to go beyond the threshold of Article 3 (see *Bouyid v. Belgium* [GC], no. 23380/09, §§ 102-112, ECHR 2015), as was constant mental anxiety caused by the threat of physical violence and the anticipation of such (see *Rodić and Others v. Bosnia and Herzegovina*, no. 22893/05, § 73, 27 May 2008).

91. Where an individual is deprived of his or her liberty or, more generally, is confronted with law-enforcement officers, any recourse to physical force which has not been made strictly necessary by the person's conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention (see *Bouyid*, cited above, § 100). The Court emphasises that the words "in principle" cannot be taken to mean that there might be situations in which such a finding of a violation is not called for, because the above-mentioned severity threshold has not been attained. Any interference with human dignity strikes at the very essence of the Convention. For that reason any conduct by law-enforcement officers *vis-à-vis* an individual which diminishes human dignity constitutes a violation of Article 3 of the Convention. That applies in particular to their use of physical force against an individual where it is not made strictly necessary by his conduct, whatever the impact on the person in question (ibid., § 101).

92. Persons in custody are in a vulnerable position and the authorities are under an obligation to account for their treatment. Where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 of the Convention (see, among many other authorities, *Selmouni v. France* [GC], no. 25803/94, § 87, ECHR 1999-V). While it is not, in principle, the Court's task to substitute its own assessment of the facts for that of the domestic courts, the Court is nevertheless not bound by the domestic courts' findings in this regard (see, for example, *Ribitsch*

v. Austria, 4 December 1995, § 32, Series A no. 336). In assessing evidence, the Court has generally applied the standard of proof "beyond reasonable doubt" (see *Ireland v. the United Kingdom*, 18 January 1978, § 161, Series A no. 25). However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see, for example, *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII).

(ii) Application of these principles to the present case

93. By 25 April 2018 the Court of First Instance and the Appeals Court ruled in favour of the applicant. The respondent State was ordered to pay compensation for his ill-treatment by the police on 10 January 2014. In their reasoning both courts fully accepted the events as presented by the applicant and stated that his abuse amounted to a breach of his constitutional rights, as well as his rights and freedoms guaranteed by ratified international treaties (see paragraphs 37 and 38 above).

94. The above findings by the domestic courts are in themselves sufficient for the Court to conclude that the alleged ill-treatment has been adequately proven and, hence, for it to establish a substantive violation of Article 3 of the Convention. Moreover, the findings of the domestic courts are also supported by the evidence submitted before the Court and it therefore finds no reason to depart from them. The Court, however, deems it important, in this context, to express its views on a number of related issues.

95. For example, the applicant and G.K. consistently claimed that the former had been ill-treated by the police. The applicant himself maintained that during his questioning at the police station he had repeatedly been punched in the head and the abdomen and that, at one point, he had even been forced to remove his clothes (see paragraphs 5, 10, 16, 24, 25, 27 and 28 above). G.K., the witness who had also been arrested on the same occasion, stated that he had seen a police officer punch the applicant in the head (see paragraphs 11, 25 and 27 above). The applicant's cohabitee, S.Đ., furthermore recalled that when the applicant had come home at around midnight on 10 January 2014 she had observed swelling on his left eyelid. The applicant had told her that he had been beaten by the police during his detention at the police station. The applicant's cohabitee subsequently provided the investigating authorities with photographs of the applicant's face which she had taken one day after his release, in the evening hours of 11 January 2014. The photographs showed some swelling and redness around the applicant's left eye and cheekbone (see paragraph 12 above).

96. In terms of medical evidence, on 12 January 2014, at around 1.30 p.m., the applicant went to the accident and emergency unit of the Vojvodina Clinical Centre. The doctor who examined him diagnosed a contusion of the head and face, as well as a contusion of the left eyeball. On the same day an ophthalmologist in the Vojvodina Clinical Centre,

found that the applicant had suffered corneal erosion. Lastly, on 14 January 2014 the applicant was examined by an ophthalmologist and a neuropsychiatrist in the Novi Sad Health Centre. The ophthalmologist diagnosed mild hyperaemia and an issue with the epithelium of the cornea, while the neuropsychiatrist concluded that the applicant had suffered from a reaction to a severely stressful situation and an "adaptation disorder" (see paragraph 6 above).

97. While there was, admittedly, some delay between the police abuse alleged by the applicant and the time when the supporting medical documents and photographs were obtained by him (see paragraphs 4, 6 and 12 above), the fact remains that G.K. repeatedly confirmed that he had personally seen the applicant's ill-treatment (see paragraphs 11, 25 and 27 above). Despite him being the applicant's friend and not having lodged a criminal complaint of his own for the police ill-treatment which he personally had allegedly suffered, it cannot be said, in the Court's view, that this in and of itself was sufficient for his statement to be disregarded as biased. In any event, G.K. maintained that he had not lodged a criminal complaint because this would have meant additional stress for his wife and himself (see paragraph 11 above).

98. Furthermore, the Court notes that the applicant's signature on the seizure certificate does not, clearly, exclude the possibility that it was obtained under duress, which is in fact exactly what the applicant has claimed and what the civil courts themselves accepted when ruling in his favour (see paragraphs 5, 37 and 38 above). Similarly, given G.K.'s allegations of his own abuse by the police, it would seem unrealistic to expect that shortly after the alleged ill-treatment had occurred he would have had the possibility to freely object to it and have that recorded by the police themselves in a written document (see paragraphs 11 and 22 above).

99. In any event, the Government offered no alternative explanation as to how the applicant might have sustained the injuries in question, that is other than through the police abuse alleged. Ultimately, the civil courts considered all of the above and held that the applicant had been ill-treated by the police and that he had also signed the seizure certificate under duress.

100. In view of the foregoing, as well as its relevant case-law on the matter, the Court cannot but accept that the applicant's ill-treatment at the hands of the police on 10 January 2014 has been established, including the fact that he signed the seizure certificate as a consequence thereof. In addition to that, the Court considers that having regard to all of the relevant circumstances of the case the ill-treatment suffered by the applicant must be classified as inhuman and degrading.

2. Whether the authorities carried out an effective investigation within the meaning of Article 3 of the Convention

(a) The parties' submissions

101. The applicant reaffirmed his complaint that the respondent State had failed to conduct an effective and independent official investigation in respect of the police ill-treatment in question.

102. The Government maintained that the investigation procedure, carried out by the public prosecution service and the internal investigation unit, had been thorough, effective, independent and prompt. In particular, it had been completed within a period of no more than six months, during which time all of the persons involved in the incident, including the officers, had been identified and questioned (see paragraphs 9-15 and 18-22 above). Furthermore, the internal investigation unit had been hierarchically and institutionally independent of the Novi Sad police, whose officers had allegedly abused the applicant. Notably, the head of the unit had been the Assistant Minister of Internal Affairs and as such had reported to the Minister of Internal Affairs, while the employees of the unit had been subordinated to the heads and deputy heads of the various departments within it (see paragraph 49 above). The internal investigation unit had four offices, one of which was in Novi Sad, but even this office had not been spatially connected to the Novi Sad police. Lastly, the Government reiterated that the obligation to carry out an investigation within the meaning of Article 3 of the Convention was one of means to be employed and not of results to be achieved, which meant that not every investigation had to lead to an indictment and a conviction.

(b) The Court's assessment

(i) General principles

103. The Court reiterates that where a person raises an arguable claim or makes a credible assertion that he or she has suffered treatment contrary to Article 3 at the hands of State agents, that provision, read in conjunction with the general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation (see, among many authorities, *Assenov and Others v. Bulgaria*, 28 October 1998, § 102, *Reports* 1998-VIII; *Labita*, cited above, § 131; *Bouyid*, cited above, § 124; and *Almaši v. Serbia*, no. 21388/15, § 60, 8 October 2019).

104. 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, for

example, *Stanimirović v. Serbia*, no. 26088/06, § 39, 18 October 2011, and *Almaši*, cited above, § 61).

105. The Court has also held that the investigation should be capable of leading to the identification and – if appropriate – punishment of those responsible. If not, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for State agents to abuse the rights of those within their control with virtual impunity (see *Labita*, cited above, § 131). The investigation must also be thorough: the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions. Furthermore, the investigation must be prompt and independent. Lastly, it must afford a sufficient element of public scrutiny to secure accountability. While the degree of public scrutiny required may vary, the complainant must be afforded effective access to the investigatory procedure in all cases (see *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, § 137, ECHR 2004-IV; *Krsmanović v. Serbia*, no. 19796/14, § 74, 19 December 2017; and *Almaši*, cited above, § 62).

(ii) Application of these principles to the present case

106. Having already found that the applicant suffered inhuman and degrading treatment at the hands of the police (see paragraph 100 above), the Court considers that his complaint in that connection was also sufficiently credible so as to require an effective official investigation.

107. The Court furthermore observes a somewhat inconsistent approach to the assessment of evidence by the national prosecuting authorities in dealing with the applicant's allegations of police ill-treatment. Notably, the public prosecutor's office mostly based its conclusions on the statements given by the police officers involved in the incident and discounted the testimony offered by G.K. and the applicant personally, apparently because they reflected their subjective opinions and constituted an accusation against the officers in question (see paragraphs 14 and 15 above). At the same time, however, the domestic prosecuting authorities accepted the credibility of the police officers' statements, without giving a sufficiently convincing explanation and despite the fact that those statements might also have been subjective and aimed at evading the latter's criminal liability. The Court considers in this regard that the credibility of the police officers' statements should also have been properly questioned, particularly in view of the existing medical and other evidence regarding the applicant's injuries and given that the investigation itself was supposed to establish whether those very officers were criminally liable for the applicant's purported ill-treatment (see, *mutatis mutandis*, *Ognyanova and Choban v. Bulgaria*; no. 46317/99, § 99, 23 February 2006; *Antipenkov v. Russia*, no. 33470/03,

§ 69, 15 October 2009; and *Mikiashvili v. Georgia*, no. 18996/06, §§ 82 and 83, 9 October 2012).

108. Having regard to the above, the Court concludes that the respondent State did not carry out an effective official investigation into the applicant's credible allegations of police abuse.

3. Whether the applicant lost his victim status and whether he should have made use of a private criminal action

109. The Court reiterates that the word "victim" in the context of Article 34 of the Convention denotes the person directly affected by the act or omission at issue, the existence of a violation of the Convention being conceivable even in the absence of prejudice. Consequently, a decision or measure favourable to an applicant is not in principle sufficient to deprive him of his status as a "victim". In respect of complaints under Article 3, such as the ones here at issue, the national authorities have to: (a) acknowledge the breach of the Convention, either expressly or in substance (see, among other authorities, *Murray v. the Netherlands* [GC], no. 10511/10, § 83, ECHR 2016, with further references, and *Jevtović v. Serbia*, no. 29896/14, § 61, 3 December 2019); (b) afford redress, or at least provide a person with the possibility of applying for and obtaining compensation for the damage sustained as a result of the ill-treatment in question (see *Shestopalov*, cited above, § 56; *Gjini*, cited above, § 54; and *Jevtović*, cited above, § 61); and (c) conduct a thorough and effective investigation capable of leading to the identification and – if appropriate – punishment of those responsible (see *Jevtović*, cited above, § 61). A breach of Article 3 cannot therefore, in the Court's view, be remedied only by an award of compensation to the victim because, if the authorities could confine their reaction to incidents of wilful ill-treatment by State agents to the mere payment of compensation, while not doing enough to prosecute and punish those responsible, it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity. The general legal prohibition on torture and inhuman and degrading treatment, despite its fundamental importance, would thus be ineffective in practice (see *Vladimir Romanov v. Russia*, no. 41461/02, § 78, 24 July 2008; *Gäfgen*, cited above, §§ 116 and 119; and *Jevtović*, cited above, § 61). That is why awarding compensation to the applicant for the damage which he sustained as a result of the ill-treatment is only a part of the overall action required (see *Cestaro v. Italy*, no. 6884/11, § 231, 7 April 2015, and *Jevtović*, cited above, § 61). The fact that domestic authorities may not have carried out an effective investigation would, however, be decisive for the purposes of the assessment of an applicant's victim status (see *Shestopalov*, cited above, § 56, and *Jevtović*, cited above, § 61).

110. Turing to the present case, the Court notes that in finding a causal link between the applicant's ill-treatment by the police and his mental and

physical suffering, the civil courts established the respondent State's substantive responsibility for the events of 10 January 2014 (see paragraphs 37 and 38 above). However, the total award of the equivalent of approximately EUR 1,260, in view of the principles set out in the case of *Shestopalov* (cited above, §§ 58-63) and more recently in *Artur Ivanov v. Russia* (no. 62798/09, § 19, 5 June 2018), appears to be substantially less than the award the Court itself would have made given a finding of a violation of the magnitude claimed (see, for example, *Antropov v. Russia*, no. 22107/03, 29 January 2009, and *Scordino v. Italy* (no. 1) [GC], no. 36813/97, §§ 202-16, ECHR 2006-V). Most importantly, the respondent State failed to carry out an effective official investigation into the applicant's allegations of police ill-treatment (see paragraph 108 above). In these circumstances, the applicant may still claim to be a "victim" of a breach of his rights under Article 3 of the Convention on account of the inhuman and degrading treatment to which he had been subjected (see, for example and among many other authorities, *Razzakov v. Russia*, no. 57519/09, § 51, 5 February 2015). Accordingly, the Government's objection in this regard must be dismissed.

111. The Court furthermore notes that, as pointed out by the Government, the applicant could also have brought a private criminal action for the offence of slight bodily harm following the rejection of his criminal complaint lodged against the police officers involved (see paragraph 46 above). However, having received the said criminal complaint the public prosecutor's office was already under a duty to ensure that the preliminary investigation was carried out, that the evidence was obtained and that, if the evidence against the alleged perpetrators was sufficient, criminal proceedings were pursued against them. The Court therefore sees no reason in these circumstances to require the applicant to pursue yet another avenue of pressing criminal charges, this being the responsibility of the public prosecution service which is certainly better, if not exclusively, equipped in that respect (see, *mutatis mutandis*, *Matko v. Slovenia*, no. 43393/98, § 90, 2 November 2006, and *Stojnšek v. Slovenia*, no. 1926/03, § 79, 23 June 2009). The Court therefore dismisses the Government's objection in that connection.

4. Conclusion

112. In view of the above, the Court further finds that there has been a violation of Article 3 of the Convention under its substantive and procedural limbs.

IV. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

113. The applicant complained, under Article 6 § 1 of the Convention, of the overall unfairness of the criminal proceedings which had been

brought against him, specifically the evidence used to convict him and the refusal to examine other evidence proposed by him.

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

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Admissibility

115. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

116. The applicant reaffirmed his complaint. He furthermore maintained that the evidence obtained through his ill-treatment, such as the signed seizure certificate, had been used to convict him, while the substantiation of the abuse which he had suffered at the hands of the police had not been taken into account by the criminal courts. The police officers' statements had likewise been contradictory, but had still been accepted as credible. The applicant's own statement and that of G.K., however, and despite the absence of any good reason for so concluding, had not been deemed reliable. Moreover, it remained unclear as to where exactly in the applicant's vicinity the plastic bag containing cannabis had been found and there was certainly no proof that it had ever been in the applicant's possession. In any event, the applicant had been arrested in a public place and hence the plastic bag could have belonged to anyone. In fact, the indictment brought against the applicant had itself been significantly amended in the course of the criminal proceedings, indicating that neither the police nor the prosecuting authorities had had a clear idea as to where exactly and how had the plastic bag been recovered (see paragraphs 26 and 27 above). The applicant contested the veracity of the Government's claim as regards the "informal conversation" in the course of which he had allegedly admitted to having been in possession of cannabis (see paragraph 20 above *in fine*). Also, the criminal courts had not established whether the applicant had ever been a user of cannabis and had never used in evidence his fingerprints taken by the police (see paragraph 21 above), notwithstanding the fact that this would have been the easiest way for them to ascertain whether he had indeed been in possession of the plastic bag in question. Lastly, the applicant averred that admitting evidence obtained

under duress had to render any criminal proceedings unfair in their entirety irrespective of whether that evidence had been decisive for the conviction.

(b) The Government

117. The Government maintained that the impugned proceedings had been fair and fully endorsed the criminal courts' judgments and their reasoning. The applicant himself had also never alleged that any evidence had been planted by the police, but merely that the plastic bag had not belonged to him. The officers, however, had seen that the applicant had thrown something onto the ground and had then discovered the plastic bag next to him. There had been no other objects nearby and the visibility had been good. The applicant hence could not have dropped anything but the plastic bag in question. Furthermore, the seizure certificate had not been relied upon to convict the applicant. It had, instead, been the testimony of the two police officers concerned that had proved to be crucial. The applicant had also never raised the issue of fingerprints in the course of the proceedings which had been brought against him and the criminal courts themselves had had no obligation to consider this of their own motion. The Government submitted that the Convention did not require the domestic courts to admit all proposed evidence just because a defendant had so requested. The criminal courts in the present case had, in fact, given good reasons as to why the evidence concerning the applicant's alleged police abuse had not been relevant for the determination of the criminal charges brought against him (see paragraphs 27, *in fine*, and 29 above). The public prosecution service was likewise entitled to amend the indictment in view of the facts of the case as they had been established in the course of the proceedings. Lastly, the Government maintained that the applicant had been given an opportunity to present his arguments and that all relevant issues had been thoroughly examined by the criminal courts domestically.

2. The Court's assessment

118. The Court reiterates that it is not its function to deal with errors of fact or law allegedly committed by national courts unless and in so far as they may have infringed rights protected by the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (see *Schenk v. Switzerland*, 12 July 1988, §§ 45-46, Series A no. 140; *Teixeira de Castro v. Portugal*, 9 June 1998, § 34, *Reports,* 1998-IV; and *Heglas v. the Czech Republic*, no. 5935/02, § 84, 1 March 2007). It is, therefore, not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible. The question that must be answered is whether the proceedings

as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the unlawfulness in question and, where the violation of another Convention right is concerned, the nature of the violation found (see *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 76, ECHR 2001-IX; *Allan v. the United Kingdom*, no. 48539/99, § 42, ECHR 2002-IX; and *Almaši*, cited above, § 100).

119. However, particular considerations apply in respect of the use in criminal proceedings of evidence obtained in breach of Article 3. The use of such evidence, secured as a result of a violation of one of the core and absolute rights guaranteed by the Convention, always raises serious issues as to the fairness of the proceedings, even if the admission of such evidence was not decisive in securing a conviction (see, for example, *İçöz v. Turkey* (dec.), no. 54919/00, 9 January 2003; *Göçmen v. Turkey*, no. 72000/01, §§ 73-74, 17 October 2006; *Gäfgen*, cited above, § 165; and *El Haski v. Belgium*, no. 649/08, § 85, 25 September 2012). Therefore, the use in criminal proceedings of statements obtained as a result of a violation of Article 3 – irrespective of the classification of the treatment as torture, inhuman or degrading treatment – renders the proceedings as a whole automatically unfair, in breach of Article 6 (see *Gäfgen*, cited above, §§ 166-167 and 173). This also holds true for the use of real evidence obtained as a direct result of acts of torture (ibid., § 173); the admission of such evidence obtained as a result of an act qualified as inhuman treatment in breach of Article 3, but falling short of torture, will only breach Article 6, however, if it has been shown that the breach of Article 3 had a bearing on the outcome of the proceedings against the defendant, that is, had an impact on his or her conviction or sentence (ibid., § 178; see also *El Haski*, cited above, § 85).

120. The Court furthermore reiterates that, even if the primary purpose of Article 6 of the Convention, as far as criminal proceedings are concerned, is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge", it does not follow that the Article has no application to pre-trial proceedings. Thus, Article 6 may be relevant before a case is sent for trial if and in so far as the fairness of the trial is liable to be seriously prejudiced by an initial failure to comply with its provisions (see, *mutatis mutandis*, *Almaši*, cited above, § 102).

121. Turning to the present case, the Court notes that the first and second instance courts both maintained that the applicant's conviction had not been based on the seizure certificate in question but rather on the expert's opinion to the effect that the substance in the plastic bag had indeed been cannabis and the testimony of Officers G.C. and S.M. confirming that the applicant had been arrested while in possession thereof (see paragraphs 27 and 29 above). On 9 November 2017 the Supreme Court of Cassation itself noted, *inter alia*, that it was obvious that even in the absence of the said seizure certificate the same judgment would have been rendered (see

paragraph 30 above). In those very specific circumstances, the Court concludes that despite the fact that the seizure certificate was obtained by means of inhuman and degrading treatment and was not formally excluded from the case file it was clearly not relied upon in securing the applicant's conviction and had no bearing on "the outcome of the proceedings" against him (see paragraph 119 above, *in fine*, recalling that it has been the Court's consistent case-law that the admission of real evidence obtained as a result of an act falling short of torture will only breach Article 6 if it has been shown that the breach of Article 3 had a bearing on the outcome of the proceedings against the defendant). The Court would lastly note, in this context, that the seizure certificate in question did not amount to a statement given by the applicant but was instead merely a formal written acknowledgment of the fact that a certain substance had been seized from him at a given point in time and as such a document inextricably linked with that real evidence, which ultimately turned out to be cannabis. In any event, the applicant had an opportunity to give his statements on a number of occasions in the course of the criminal proceedings against him and he did so in the absence of any suggestions to the effect that those statements themselves were not given freely (see paragraphs 24, 25 and 27 above).

122. There has accordingly been no breach of Article 6 § 1 of the Convention. It is further recalled, in connection with the applicant's other fairness-related submissions, that it is not this Court's function to deal with errors of fact or law allegedly committed by national courts unless and in so far as they may have infringed rights protected by the Convention (see paragraph 118 above).

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

123. Lastly, under Article 13 of the Convention read in conjunction with Article 3, the applicant complained that the Constitutional Court's refusal to consider the substance of his appeal (see paragraphs 16 and 17 above) had amounted to a separate breach of his right to an effective remedy before the national authorities.

124. Article 13 of the Convention reads as follows:

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

A. Admissibility

125. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

126. The applicant reaffirmed his complaint while the Government maintained that there had been no violation of this provision in view of the existing civil, criminal and constitutional remedies in situations involving police ill-treatment. In addition, they maintained that Article 13 did not guarantee a favourable outcome of any particular avenue of redress, including proceedings before the Constitutional Court.

127. Having already found a violation of the procedural limb of Article 3 of the Convention (see paragraphs 108 and 112 above), the Court considers that it is not necessary to examine separately the applicant's additional complaint under Article 13 of the Convention read in conjunction with that provision (see, *mutatis mutandis*, *Shestopalov*, cited above, § 71).

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

128. 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

129. The applicant claimed a total of EUR 45,000 in respect of the non-pecuniary damage suffered due to the violation of his rights and freedoms enshrined in the Convention.

130. The Government contested this claim.

131. The Court considers that the applicant has certainly suffered some non-pecuniary damage. Having regard to the nature of the violations found in the present case, bearing in mind that the applicant was already awarded the equivalent of approximately EUR 1,260 by the civil courts domestically (see paragraphs 37 and 38 above), and making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant EUR 2,700 in this connection, plus any tax that may be chargeable on that amount.

B. Costs and expenses

132. The applicant also claimed a total of the equivalent of approximately EUR 3,650 in RSD for the costs and expenses incurred domestically, as well as a total of EUR 4,468 for those incurred before the Court.

133. The Government contested these claims.

134. 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 are reasonable as to their quantum (see *Editions Plon v. France*, no. 58148/00, § 64, ECHR 2004-IV). That is to say, 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 (see, for example, *Belchev v. Bulgaria*, no. 39270/98, § 113, 8 April 2004; *Hajnal v. Serbia*, no. 36937/06, § 154, 19 June 2012; and *Bektashi Community and Others v. the former Yugoslav Republic of Macedonia*, nos. 48044/10 and 2 others, § 91, 12 April 2018). In the present case, regard being had to the documents in its possession and the above criteria, as well as taking into account the fact that the applicant was already awarded approximately EUR 510 in RSD by the civil courts domestically (see paragraph 38 above), the Court considers it reasonable to award the sum of EUR 4,000 covering costs under all heads, plus any tax that may be chargeable to the applicant.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Decides*, unanimously, to join the applications;

2. *Decides*, unanimously, to join to the merits the Government's objections concerning the applicant's victim status and the non-exhaustion of a private criminal action, both in respect of his complaints under Article 3 of the Convention, and dismisses them;

3. *Declares*, unanimously, the applications admissible;

4. *Holds*, unanimously, that there has been a violation of the substantive and procedural aspects of Article 3 of the Convention;

5. *Holds*, by six votes to one, that there has been no violation of Article 6 § 1 of the Convention;

6. *Holds*, unanimously, that it is not necessary to examine separately the complaint under Article 13 of the Convention read in conjunction with Article 3 thereof;

7. *Holds*, unanimously,
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 2,700 (two thousand seven hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 4,000 (four thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

8. *Dismisses*, by six votes to one, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 26 January 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı	Jon Fridrik Kjølbro
Deputy Registrar	President

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

J.F.K
H.B

PARTLY DISSENTING OPINION OF JUDGE BOŠNJAK

1. I regret that I am unable to agree with the majority in the Chamber as to the finding that there has been no violation of Article 6 § 1 in the present case.

2. In the light of our well-established jurisprudence in this respect, I cannot agree that, in the present case, a written document signed by the applicant did not amount to a statement which would accordingly have been protected under Article 6 § 1 of the Convention. I will argue that the Court has never before considered a document signed by an applicant to amount to an item of real evidence and the same approach is borne out by comparative jurisprudence.

3. Furthermore, I am also unable to agree with the majority concerning the exact extent to which the impugned evidence was used against the applicant in the domestic proceedings. In fact, the uncertainty of this issue is yet another argument in favour of applying the exclusionary rule in the present case. In this context, the fact that the seizure certificate was admitted in evidence in the domestic proceedings against the applicant should have led the Chamber to find a violation of Article 6 § 1 of the Convention, as has been found time and again by the Court in past cases.

I. REMINDER OF COURT'S CASE-LAW CONCERNING THE COMPATIBILITY OF ADMITTING EVIDENCE OBTAINED IN VIOLATION OF ARTICLE 3 WITH ARTICLE 6 § 1 SAFEGUARDS

4. The Court has previously held that, under Article 6 of the Convention, a defendant in criminal proceedings has the right to a fair trial, and that the fairness of those proceedings may be called into question if domestic courts use evidence obtained as a result of a violation of the prohibition of inhuman treatment under Article 3, one of the core and absolute rights guaranteed by the Convention. There is a vital public interest in preserving the integrity of the judicial process and thus the values of civilised societies founded upon the rule of law (see *Gäfgen v. Germany* [GC], no. 22978/05, § 175, ECHR 2010).

5. Indeed, the Court has previously acknowledged that, in spite of the important interests at stake in the context of Article 6, Article 3 of the Convention enshrines an absolute right (see, among other authorities, *Jalloh v. Germany* [GC], no. 54810/00, § 99, ECHR 2006-IX). Being absolute, there can be no weighing of other interests against it, such as the seriousness of the offence under investigation or the public interest in effective criminal prosecution, for to do so would undermine its absolute nature. Thus, the Court has expressly stated that neither the protection of human life nor the securing of a criminal conviction may be obtained at the cost of

compromising the protection of the absolute right not to be subjected to ill-treatment proscribed by Article 3, as this would sacrifice those values and discredit the administration of justice (see *Gäfgen*, cited above, § 176).

6. In the light of the high importance of protecting individuals against violations of their rights guaranteed by Article 3 of the Convention, including those committed as part of criminal proceedings, and as recognised by the majority in the present case, the Court has found that the admission in evidence of statements obtained as a result of torture (compare *Örs and Others v. Turkey*, no. 46213/99, § 60, 20 June 2006; *Harutyunyan v. Armenia,* no. 36549/03, §§ 63, 64 and 66, ECHR 2007-III; and *Levinţa v. Moldova*, no. 17332/03, §§ 101 and 104-05, 16 December 2008) or of other ill-treatment in breach of Article 3 (compare *Söylemez v. Turkey*, no. 46661/99, §§ 107 and 122-124, 21 September 2006, and *Göçmen v. Turkey*, no. 72000/01, §§ 73-74, 17 October 2006), in order to establish the relevant facts in criminal proceedings, will render the proceedings as a whole unfair. This finding applies irrespective of the probative value of the statements and whether or not their use was decisive in securing the defendant's conviction (see *Gäfgen*, cited above, §§ 166-167; *El Haski v. Belgium,* no. 649/08, § 85, 25 September 2012; *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 254, 13 September 2016; and *Almaši v. Serbia*, no. 21388/15, § 101, 8 October 2019).

7. This also holds true for the use of real evidence obtained as a direct result of acts of torture (see *Gäfgen*, cited above, § 173). However, by contrast, the admission of such evidence obtained as a result of an act characterised as inhuman treatment in breach of Article 3, but falling short of torture, will only breach Article 6 if it has been shown that the breach of Article 3 had a bearing on the outcome of the proceedings against the defendant, that is, if it had an impact on his or her conviction or sentence (see *Gäfgen*, cited above, § 178, and *El Haski*, cited above, § 85).

II. DISTINCTION BETWEEN STATEMENTS AND REAL EVIDENCE OBTAINED IN BREACH OF ARTICLE 3

8. The relevant case-law of the Court having thus been described, what remains to be done is to apply its principles to the facts of the present case.

9. As rightly and unanimously established by the Chamber in this case in the context of the Article 3 complaint, the present applicant was ill-treated, but not tortured. In order to adjudicate upon the complaint under Article 6 § 1 of the Convention, it is necessary to determine whether the seizure certificate at issue amounted to a statement or to real evidence.

10. However, in that respect, the majority in the Chamber, instead of applying the above-mentioned principles reiterated by the Court in numerous cases such as *Gäfgen*, *Jalloh*, *Ibrahim and Others* and *Almaši* (all

cited above), choose to give a new meaning to them and consider that a written document incriminating the applicant and signed by him as the result of ill-treatment by the police does not amount to a statement, but instead either falls somewhere between a statement and real evidence, or possibly amounts to the latter. They moreover find this without clearly specifying the reasons for such a puzzling choice.

11. I respectfully, but strongly, disagree.

12. Indeed, an analysis of the Court's case-law and comparative jurisprudence, even a rapid one, suffices to conclude that never before has a document signed by an applicant amounted to anything other than a statement, in the context of a complaint under Article 6 of the Convention, nor has such a document ever been treated as real evidence.

13. The contrary conclusion reached by the majority in this respect seems therefore to be at odds with our well-established jurisprudence and that of the vast majority of the world's legal systems.

14. The Grand Chamber case of *Gäfgen* (cited above), the leading authority in this area, may shed some light on the issue of what, at least in that particular case, amounted to statements and what amounted to real evidence. In this regard, the Grand Chamber noted that the domestic court had held that statements made by the applicant following threats issued during his interrogation were inadmissible (ibid., §§ 28-30), whereas it had regarded as admissible the real evidence which had become known as a result of such statements, or in other words, the items of evidence which the investigation authorities had secured as a result of the statements he had made under the continuous effect of his treatment in breach of Article 3 (ibid., §§ 31 and 172).

15. The Grand Chamber also noted that in the proceedings before the domestic courts, the impugned real evidence had been classified as evidence which had become known to the investigation authorities as a consequence of the statements extracted from the applicant (the "long-range effect" (*Fernwirkung*) – ibid., § 31). For the purposes of its own assessment under Article 6, it considered it decisive that there had been a causal link between the applicant's interrogation in breach of Article 3 and the real evidence secured by the authorities as a result of the applicant's indications, including the discovery of the victim's body and the autopsy report thereon, the tyre tracks left by the applicant's car at the pond where the victim's corpse had been found, as well as the victim's backpack, clothes and the applicant's typewriter. In other words, the impugned real evidence had been secured as a direct result of his interrogation by the police that breached Article 3 (ibid., § 171).

16. In the Grand Chamber case of *Jalloh* (cited above), where the Court first dealt with real evidence as opposed to statements, the applicant alleged, in particular, that the forcible administration of emetics in order to obtain evidence of a drugs offence constituted inhuman and degrading treatment

prohibited by Article 3 of the Convention, and further claimed that the use of this illegally obtained evidence at his trial breached his right to a fair trial guaranteed by Article 6 (ibid., § 3). The Court recognised that the use at the trial of "real" evidence – as opposed to a confession – obtained by forcible interference with the applicant's bodily integrity was at issue in that case (ibid., § 110).

17. By contrast, the very nature of "statements" considered on their own is, for obvious reasons, ordinarily much less described. Thus, in cases such as *Örs and Others* (cited above, § 60), *Harutyunyan* (cited above, §§ 63, 64 and 66), *Levinţa* (cited above, §§ 101 and 103-05), and *Göçmen* (cited above, §§ 9 and 75), all cited in *Gäfgen* (cited above, § 166), the impugned evidence consisted of statements obtained in violation of Article 3 and which had been made by applicants who were not assisted by their legal counsel at the time of making them, and which incriminated them and later on were used against them in the criminal proceedings. In those cases the Court also referred to such evidence as "confessions", or more generally as statements that were later on held admissible by the domestic authorities (see, for example, *Örs and Others*, cited above, § 53).

18. Finally, I cannot but note that the issues arising in the present case are closely linked to the privilege against self-incrimination and to the right to silence which are also protected by Article 6 of the Convention (see, for example, *Funke v. France*, 25 February 1993, § 44, Series A no. 256-A; *Saunders v. the United Kingdom* [GC], 17 December 1996, § 68, *Reports* 1996-VI; *Jalloh*, cited above, § 100; and *Ibrahim and Others*, cited above, § 267). Be that as it may, the applicant in the present case did not mention this principle in his complaints, and I will therefore refrain from examining it in detail.

19. However, an analysis of some principles concerning the privilege against self-incrimination may shed additional light upon the distinction between statements and real evidence which is of concern here. Such a perspective is traditionally accepted in many of the world's jurisdictions, such as in the United States.

20. Thus it should be noted that the Court considers that the privilege against self-incrimination does not cover material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of his or her will such as, *inter alia*, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing (see *Saunders*, cited above, § 69, and *Jalloh*, cited above, § 112).

21. Similarly, building upon the principles established in *Boyd v. United States*, 116 U.S. 616 (1886), the Supreme Court of the United States in *Schmerber v. California,* 384 U.S. 757, 765 (1966), noted that the protection against self-incrimination applies specifically to compelled communications

or testimony, thus excluding anything that is neither testimony nor evidence relating to some communicative act or writing by the accused.

22. Applying these principles to the facts of the present case, it is clear that the seizure certificate could not have had an existence independent of the will of the suspect, and nor was it obtained pursuant to a warrant. In essence, it constituted a document signed by the applicant communicating a particular position on a given matter and was dependent upon the applicant's will. This document clearly conveyed his recognition that a given object, which was subsequently declared, or rather confirmed, to be incriminating, had been seized from him. Thus it seems clear to me that it amounted to a statement.

23. In any event, in the light of the absence of any unequivocal definition of what amounts to a statement as opposed to real evidence, the lack of any explanation to justify such a peculiar position as the one taken by the majority in this respect, and the uncertainty as to whether they consider the impugned evidence to constitute something in-between a statement and real evidence, or simply the latter, make this even more questionable.

24. Moreover, in an attempt to find a potential justification for such a stance it could be deduced that perhaps the majority in the Chamber, although they never clearly mention this, found that the statement given by the applicant did not fully incriminate him at the time when it was given. This fact alone, however, would not seem to distinguish the present case from any other similar case, such as *Gäfgen*, where the statement given by the applicant in which he told the police where he had hidden the body of the victim was nevertheless not held to be admissible by the domestic courts, unlike the real evidence found as a consequence of it. It could be surmised that, the moment that the statement was given, it did not clearly incriminate the applicant straight away, but only when the corpse was actually found. In any event, as emphasised by the Grand Chamber, it was the second, untainted, confession of the applicant that, along with other evidence, had the consequence that the domestic courts found him to be guilty as charged (see *Gäfgen*, cited above, § 180).

25. In any event, the Court has never held that a statement obtained in violation of Article 3 had to be fully incriminating, or that it had to be incriminating the moment it was given, in order to be protected by Article 6 § 1 of the Convention.

26. In fact, in relation once again to the privilege against self-incrimination, the Court has previously held that this right cannot reasonably be confined to statements which are directly incriminating. Indeed, even testimony obtained under compulsion which appears on its face to be of a non-incriminating nature, such as exculpatory remarks or mere information on questions of fact, may be deployed in criminal proceedings in support of the prosecution case, for example to contradict or

cast doubt upon other statements of the accused or evidence given by him during the trial, or to otherwise undermine his credibility (see *Saunders*, cited above, § 69, and *Ibrahim and Others*, cited above, § 268).

27. Therefore, all in all, one fails to see exactly in what way the majority in the Chamber can conclude that the evidence at issue in the present case does not consist of a "statement", since, if we follow the well-established approach of the Court in this regard, we can only come to the opposite conclusion, thereby entailing a breach of Article 6 § 1 of the Convention.

28. Moreover, this is even more problematic in the light of the fact that the majority in the Chamber in the present case are not only advocating something that has never been thus far considered by this Court, they are also failing to take a clear position in this respect, since nothing in the majority's wording suggests that we are indeed dealing with real evidence. All that is clear from the majority's unexplained position is that in their view we are presumably not dealing with a statement.

29. Ultimately, it is deeply regrettable that, by considering that a written document signed by the applicant and which was later on held to be admissible in criminal proceedings against him did not amount to a statement, irrespective of the extent to which it was, or at least seemed to be, used by the domestic courts, the majority seem to be tacitly creating a new and unjustified exception to the general rule against the admission of evidence obtained in breach of Article 3, one that may encourage domestic authorities to violate Article 3 as part of their criminal investigations. Indeed, this result allows the use of methods contrary to the very basic principles of democratic societies enshrined in Article 3 of the Convention to be tolerated. In my view, such an outcome constitutes an unacceptable violation of the key values defended by our Court.

III. EXTENT TO WHICH THE EVIDENCE WAS USED AND IMPORTANCE OF THIS ISSUE

30. Even if it is assumed that the impugned seizure certificate did not amount to a statement, one cannot exclude the importance of the influence of this piece of evidence upon the outcome of the domestic proceedings against the applicant.

31. First of all, the Supreme Court of Cassation itself noted that the fact that the applicant had been in possession of cannabis had been established on the basis of the police officers' testimony and that this was "not solely based on" the seizure certificate (see paragraph 30 of the judgment). It cannot be denied that the use of the word "solely" in this context clearly implies that the Supreme Court of Cassation considered that the impugned evidence had been used by the domestic courts against the applicant to at least *some* extent. In the light of the principle of subsidiarity, I find it highly

questionable for our Court to diverge from the findings of the Supreme Court of Cassation in this respect.

32. Nevertheless, even if we disregard the findings of the Supreme Court of Cassation and only look at the reasoning of the first and second instance courts, which may lead us to believe that they convicted the applicant on the basis of other evidence, I am of the opinion that it still cannot be excluded that the conviction was influenced by the seizure certificate at least to a certain extent.

33. First of all, the whole point of preventing domestic authorities from admitting evidence obtained as the result of torture or ill-treatment in criminal proceedings, or the so-called exclusionary rule, which is extensively provided for by both national and international instruments (see *Jalloh*, cited above, § 105, and *Gäfgen*, cited above, § 161), is precisely to preserve the integrity of the judicial process itself, since one cannot know for sure to what extent a given item of evidence which came to the knowledge of a judge or juror has influenced their final decision.

34. This is closely linked to the danger of the "psychological contamination" of a judge or juror by inadmissible evidence.

35. Firstly, concerning jurors, although it is traditionally presumed that limiting instructions should reduce the possibility of prejudice to an acceptable level[1], many scholars and judges find this assumption to be nothing other than unmitigated fiction[2]. Once jurors are acquainted with inadmissible evidence or information, the circumstances of a given case may at times require a new trial to take place. This was for instance the case in *United States v. Brown*, 108 F.3d 863 (8th Cir. 1997) where, without any action on the part of the prosecution, the trial judge decided to grant a new trial after it appeared that, during the initial trial, news accounts of the guilty plea of a corporate co-defendant had been read by certain jurors who, as was revealed after trial, considered this information in their deliberations.

36. A number of scholars, and even some courts and legislators, have now accepted that judges may also be prone to such "contamination". Indeed, some experiments conducted to determine whether judges can ignore such information found that they were generally unable to avoid being influenced by relevant but inadmissible information of which they had become aware[3]. Once judges acquaint themselves with inadmissible evidence, they are inevitably exposed to the danger that they may examine other evidence in the light of it. Moreover, even if the inadmissible evidence is not mentioned in a court's opinion, the latter does not necessarily disclose

[1] See, e.g., *United States v. Kilcullen*, 546 F.2d 435, 447 (1st Cir. 1976).
[2] See, e.g., *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring).
[3] See, e.g., J. Rachlinski, A. Wistrich and C. Guthrie, "Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding", *University of Pennsylvania Law Review*, Vol. 153, 2005, pp. 1251-1345. Available at SSRN: https://ssrn.com/abstract=696781

the mental analysis that led the judges to find an applicant guilty. This danger may be weaker than it is in the case of jurors, but it is far from being non-existent.

37. As a result, a number of lawmakers and courts now even go a step further than the exclusionary rule, which in essence only bars courts from referring to inadmissible evidence, without being able to erase it entirely from their reasoning, even when such reasoning is not fully conscious. In order to genuinely prevent the proceedings from being tainted by inadmissible evidence, some sources propose that a judge who has become acquainted with such evidence should withdraw entirely from the trial[4].

38. Such a solution provides a very effective answer to prevent both jurors and judges from basing their decisions on inadmissible evidence, be it consciously or unconsciously, and thus may very well find increasing support in future years.

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[4] Courts in some jurisdictions hold that the hearing of inadmissible evidence by the trial judge generally requires his or her withdrawal. Concerning this issue, see for example *People v. McKee*, 39 Ill. 2d 265, 271, 235 N.E.2d 625, 629 (1968). Concerning the requirement for a different judge to hear a case, see for example *United States ex rel. Spears v. Rundle*, 268 F. Supp. 691, 695-696 (E.D. Pa. 1967), aff'd, 405 F.2d 1037 (3d Cir. 1969) (per curiam) (stating that we cannot "*require a judge who has heard evidence of guilt, to objectively and coldly assess a distinct issue as to the voluntariness of the confession. Objectivity cannot be guaranteed, and reliability must be questioned. ... The only method, ... which the court could have adopted during [the defendant's] trial was upon learning that he placed the confession in issue, to order a separate hearing to be held by another judge unfamiliar with the case and testimony)*; also concerning a withdrawal after a judge heard evidence of the defendant's guilt and assessed the voluntariness of his confession, see *United States v. Parker*, 447 F.2d 826, 829-847 (7th Cir. 1971); similarly, see *United States ex rel. Owens v. Cavell,* 254 F. Supp. 154, 154-155 (M.D. Pa. 1966) (questioning, in another case where an allegedly involuntary confession was admitted into evidence, "*whether a judge sitting as fact-finder would be able to pass on guilt or innocence without being influenced by evidence relating to the voluntariness issue*").

See also, for a European perspective on the influence of irrelevant factors and circumstances, including inadmissible evidence, on judicial decision-making, M. Bergius, E. Ernberg, C. Dahlman and F. Sarwar, "Are judges influenced by legally irrelevant circumstances?", *Law, Probability and Risk*, Vol. 19, 2020, pp. 157-164, DOI: 10.1093/lpr/mgaa008, and B. Englich, T. Mussweiler and F. Strack, "Playing Dice With Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making", *PSPB*, Vol. 32, No. 2, 2006, pp. 188-200, DOI: 10.1177/0146167205282152; see also M. Pantazi, O. Klein and M. Kissine, "Is justice blind or myopic? An examination of the effects of meta-cognitive myopia and truth bias on mock jurors and judges", *Judgment and Decision Making*, Vol. 15, No. 2, 2020, pp. 214-229 (demonstrating that judges tend to believe the information they receive, even if it is clearly flagged as false).

In the European context, by way of example, the concept of "psychological contamination" was embraced by the Constitutional Court of Slovenia in its decision number U-I-92/96, finding it unconstitutional for a judge to sit in a case if acquainted with inadmissible evidence. On the basis of this decision, the Criminal Procedure Act was amended accordingly in order to provide for the mandatory withdrawal of a judge in such a case.

39. Be that as it may, the rationale behind the exclusionary rule is not only linked to the issue of the particular extent to which impugned evidence has been used against an applicant in criminal proceedings, but also to that of the potential extent to which it could have been used and that of the motivation of those who perpetrated the ill-treatment or torture.

40. Admission of evidence obtained in breach of a prohibition of ill-treatment is even more problematic in a situation where, as in the present case, it had not been established prior to its admission whether the evidence in question was indeed obtained by ill-treatment. In such a situation, a judge or juror is not alerted beforehand to the fact that such evidence is tainted by a violation of an absolute human right and that, consequently, he or she should disregard it in the course of the decision-making process. In such a scenario, a danger of "psychological contamination" is accordingly greater. Therefore, it is all the more necessary for the issue of admissibility of evidence to be resolved before that evidence is actually produced at trial. The failure of the domestic authorities in the present case to address the applicant's objection to admission of the seizure certificate further increased the probability that this evidence would influence the course and the outcome of the case (see also below, paragraphs 52 et seq.).

41. Indeed, sanctioning a domestic court for admitting evidence obtained in breach of Article 3 of the Convention does not only prevent intrinsically unreliable evidence from being admitted or used (see *Söylemez v. Turkey*, no. 46661/99, § 122, 21 September 2006, and *Othman (Abu Qatada) v. the United Kingdom,* no. 8139/09, § 264, ECHR 2012 (extracts)), but, most importantly, it has the merit of removing any incentive to use ill-treatment or torture against a suspect in order to obtain incriminating evidence (see *Gäfgen*, cited above, § 160) since the use of evidence obtained in violation of Article 3 is often the reason why acts of ill-treatment are initially used. As emphasised by the Court, admission of such evidence to establish a person's guilt is therefore incompatible with the guarantees of Article 6 of the Convention (see *Söylemez*, cited above, § 122).

42. It can thus be seen how the exclusionary rule constitutes the first and essential shield against violations of Article 3 of the Convention as part of criminal proceedings. If we accept that domestic courts can admit such evidence upon the condition that they simply expressly state that they are not basing their judgment upon it, then we accept that domestic authorities may resort to torture and ill-treatment to obtain evidence in general. If, on the contrary, we consider that merely admitting evidence obtained through the use of torture or ill-treatment renders the whole proceedings unfair, then domestic authorities are no longer tempted to have recourse to such methods of investigation.

43. This is precisely why I find so questionable the Government's claim in the present case according to which the impugned evidence did not have

any bearing on the applicant's final conviction, which instead was based on the testimony of the very police officers who arrested him.

44. This justification is not unknown to the Court, which has previously rejected an argument by a respondent Government to the effect that, although the impugned evidence had been held to be admissible, it had nevertheless not been used to convict the applicant (see *Söylemez*, cited above, § 120). In this respect, the Court noted that, during the relevant proceedings, the applicant's testimony, extorted under duress during police custody, was one element among others which had served as the basis for his conviction (ibid., § 77) since the domestic courts had not taken into consideration the alleged inadmissibility of this piece of evidence. As a result, they had never considered whether the applicant's statements ought to have been excluded from the case file (ibid., § 124).

45. Similarly, the Court has also previously rejected a respondent Government's argument according to which, in spite of the fact that the impugned evidence had been admissible, the applicant's conviction had not been solely based upon it, but instead on an entire body of evidence (see *Örs and Others*, cited above, § 60, and *Göcmen*, cited above, § 74). Indeed, the Court did not consider it necessary to assess whether the applicant's conviction had been based in a conclusive way on the statements which he had allegedly given to the police under duress. It sufficed for it to note that some of the facts established by the domestic authorities were based on the applicant's statements obtained as a result of ill-treatment and in the absence of legal counsel (see *Şahiner*, *Yakış*, *Yalgın and Others v. Turkey* (dec.), no. 33370/96, 11 January 2000; *Fikret Doğan v. Turkey* (dec.), no. 33363/96, 11 January 2000; and *Örs and Others*, cited above, § 60). Therefore, this entailed a violation of Article 6 of the Convention (*Örs and Others*, cited above,§ 61, and *Göcmen*, cited above, § 75).

46. By contrast, in *Gäfgen*, there were particular circumstances which contributed to the Grand Chamber's conclusion that the impugned evidence had not been necessary in securing the applicant's conviction. In that case, the Court found that it was the applicant's second confession at the trial which – alone or corroborated by further untainted real evidence – formed the basis of his conviction for murder and kidnapping with extortion and of his sentence. The impugned real evidence was not necessary and was not used to prove him guilty or to determine his sentence. The Court observed that it could thus be said that there was a break in the causal chain leading from the prohibited methods of investigation to the applicant's conviction and sentence in respect of the impugned real evidence (*Gäfgen,* cited above, § 180).

47. Moreover, the Court confirmed that the breach of Article 3 in the investigation proceedings had had no bearing on the applicant's confession at trial (ibid., § 181), since, prior to it, the applicant had been instructed about his right to remain silent and about the fact that none of the statements

he had previously made on the charges could be used as evidence against him (see paragraph 34 of the judgment). The Court was therefore satisfied that domestic legislation and practice did attach consequences to confessions obtained by means of prohibited ill-treatment (contrast *Hulki Güneş v. Turkey*, no. 28490/95, § 91, ECHR 2003-VII, and *Göçmen*, cited above, § 73) and that the *status quo ante* was restored, that is, to the situation that the applicant had found himself in prior to the breach of Article 3, in this respect (see *Gäfgen*, cited above, § 182).

48. Thus the Grand Chamber clearly contrasted the facts of *Gäfgen* with those described in *Göçmen*, among others, since in *Gäfgen* the Court was satisfied that the domestic legislation and practice did attach consequences to the confessions obtained by means of prohibited ill-treatment. Yet the present case seems to be more akin to *Göçmen* or *Söylemez* in this regard, as well as in the exact extent to which the impugned evidence was, or at the very least could have been, used against the applicant.

49. In the end, even outside the issues strictly relating to Article 3 of the Convention, I reiterate here my position concerning what is, to my mind, governed by Article 6 of the Convention. There is a school of thought according to which the fairness of the outcome of the proceedings has particular importance, thereby entailing that the issue of whether a given item of evidence had some influence upon it may also matter. Nonetheless, I consider on the contrary that Article 6 of the Convention is about the fairness of the proceedings as a whole, not the fairness of the outcome. Here I would refer to my separate opinion in *Murtazaliyeva v. Russia* ([GC], no. 36658/05, 18 December 2018).

50. I cannot but conclude that it is therefore, in any event, not of crucial importance to consider the effect that the impugned item of evidence had on the applicant's final conviction.

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51. Ultimately, I believe that fundamental principles of fairness require the Court to sanction, under Article 6 § 1 of the Convention, domestic courts which have admitted evidence obtained in breach of Article 3 of the Convention.

52. Moreover, it should be noted that Article 6 of the Convention also requires domestic courts to admit evidence only if they have first verified, in view of elements specific to the case, that they had not been obtained as a result of ill-treatment or torture. This is inherent in a court's responsibility to ensure that those appearing before it are guaranteed a fair hearing, and in particular to verify that the fairness of the proceedings is not undermined by the conditions in which the evidence on which it relies has been obtained (see *El Haski*, cited above, §§ 89 and 99).

53. A failure to assess whether evidence had been obtained as a result of ill-treatment or torture has therefore entailed a violation of Article 6 in many cases, such as in *Söylemez* (cited above), where the Court observed that the criminal court had convicted the applicant even though the criminal proceedings against the police officers whom he accused of having ill-treated him were still pending (ibid., § 123). Moreover, the Court also pointed out in that case that no further investigation had been ordered either to determine the reality of the facts or the identity of the perpetrators of the alleged ill-treatment (contrast *Ferrantelli and Santangelo v. Italy*, 7 August 1996, Reports 1996-III, § 49-50, and compare *Örs and Others*, cited above, § 61, and *Söylemez*, cited above, § 124).

54. In *Örs and Others* (cited above), the Court went even further in noting that the security court had not considered it necessary, for example, to refer a preliminary question to the criminal court before which the proceedings were taking place against the police officers accused of having tortured the applicant (ibid., § 59).

55. Thus, in the light of the above-mentioned jurisprudence, it is clear that, in the present case, the failure of the domestic courts to examine the applicant's arguments concerning the ill-treatment to which he had been subjected in order to obtain incriminating statements, instead considering that this was a separate issue, is an important element affecting the fairness of the proceedings as a whole.

56. From a wider perspective, I believe that the importance of values protected jointly by Articles 3 and 6 of the Convention must not be underestimated. Indeed, even the absence of an admissible Article 3 complaint does not, in principle, preclude the Court from taking into consideration an applicant's allegations that the statements made before the police had been obtained using methods of coercion or oppression and that their admission to the case file, relied upon by the trial court, therefore constituted a violation of the fair trial guarantee of Article 6 (see *Mehmet Duman v. Turkey*, no. 38740/09, § 42, 23 October 2018, and *Aydın Çetinkaya v. Turkey*, no. 2082/05, § 104, 2 February 2016).

57. Moreover, the general principle applies not only where the victim of the treatment contrary to Article 3 is the actual defendant but also where third parties are concerned (see *El Haski*, cited above, § 85, and *Kaçiu and Kotorri v. Albania*, nos. 33192/07 and 33194/07, § 128, 25 June 2013).

58. Furthermore, the Court previously held that incriminating evidence – whether in the form of a confession or even real evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture – should never be relied on as proof of the victim's guilt, irrespective of its probative value. Any other conclusion would only serve to legitimise, indirectly, the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, as it was so well put in the United States Supreme Court's

judgment in the *Rochin* case (see *Jalloh*, cited above, § 50), to "afford brutality the cloak of law" (ibid., §§ 99 and 105; *Harutyunyan*, cited above, § 63; and *Gäfgen*, cited above, § 167).

59. Finally, it cannot be overlooked that the Grand Chamber in *Gäfgen* expressly recognised that in the light of its case-law (see *Gäfgen*, cited above, §§ 165-167), the use of evidence secured as a result of a breach of Article 3 raised serious issues as to the fairness of the proceedings. It added that, admittedly, in the context of Article 6, the admission of evidence obtained by conduct absolutely prohibited by Article 3 might be an incentive for law-enforcement officers to use such methods notwithstanding such absolute prohibition. The repression of, and the effective protection of individuals from, the use of investigatory methods that breach Article 3 may therefore also require, as a rule, the exclusion from use at trial of real evidence which has been obtained as a result of any violation of Article 3, even though that evidence may be more remote from that violation than evidence extracted immediately as a consequence of a violation of that Article. Otherwise, the trial as a whole will be rendered unfair.

60. The different conclusion ultimately reached by the majority in the Grand Chamber in *Gäfgen* was the result of a number of factors, namely the lack of a clear consensus among the Contracting Parties to the Convention, the courts of other States and other human rights monitoring institutions about the exact scope of application of the exclusionary rule as far as real evidence is concerned (see *Gäfgen*, cited above, § 174), and the different competing rights and interests at stake, bearing in mind that the interest in considering the trial as being fair in that particular case was particularly high, and that the impugned real evidence was derived from an illegal method of interrogation which was not in itself aimed at furthering a criminal investigation, but was applied for preventive purposes, namely in order to save a child's life, and thus in order to safeguard another core right guaranteed by the Convention, Article 2 (ibid., § 175).

61. The wide range of reasons set forth by the Court in justifying this limitation with regard to real evidence obtained as a result of ill-treatment falling short of torture by all means shows how broad the general principle is and how critical it is to give sufficient grounds in any reasoning to the contrary.

62. In the present judgement, however, the majority in the Chamber fail to give sufficient reasons to depart from the well-established jurisprudence of the Court in this regard, in that they simply assert that a written document signed by the applicant did not amount to a statement, and thus imply that it constituted real evidence, therefore allowing the limitation to the general principle stated in *Gäfgen*, but without in any way explaining why such a document should be considered as anything other than a statement under our jurisprudence.

63. In the end, it seems that the crucial nature of the values protected jointly by Articles 3 and 6 of the Convention in every democratic society has not been sufficiently recognised by the majority in the Chamber in the present judgement.

64. In this connection, I would also refer with approval to the views expressed by Judges Rozakis, Tulkens, Jebens, Ziemele, Bianku and Power in their separate opinion in the case of *Gäfgen* (cited above). Indeed, I firmly agree with their view according to which evidence secured in breach of Article 3 and thereafter admitted into trial cannot be regarded as having had no bearing upon the subsequent development and outcome of the proceedings (see § 7 of the said joint partly dissenting opinion in *Gäfgen*). As rightly observed in their separate opinion, a criminal trial which admits and relies, to any extent, upon evidence obtained as a result of breaching such an absolute provision of the Convention cannot *a fortiori* be a fair one (see § 2 of the said opinion).

65. I also fully endorse their view that the most effective way of guaranteeing the absolute prohibition of violations of Article 3 is a strict application of the exclusionary rule when it comes to Article 6 (see § 10 of the said opinion).

66. Such an approach would indeed leave State agents who are tempted to perpetrate inhuman treatment in no doubt as to the futility of engaging in such prohibited conduct. Furthermore, it would deprive them of any potential incentive or inducement for treating suspects in a manner that is inconsistent with Article 3 (see § 10 of the said opinion).

67. As also rightly highlighted in that opinion, this is so because criminal activity may not be investigated, nor an individual's conviction secured, at the cost of undermining the absolute right not to be subjected to inhuman treatment as guaranteed under Article 3. To hold otherwise would involve sacrificing core values and bringing the administration of justice into disrepute (see § 12 of the said opinion).

68. That being said, the exclusionary rule comes with a price to pay, and as recognised in that joint partly dissenting opinion, at times this price may be very high. However, I also fully endorse their view that, where this occurs, the ultimate responsibility for any "advantage" to the accused lies, firmly, with the State authorities whose agents, irrespective of their motivation, permitted the perpetration of inhuman treatment and thereby risked compromising the subsequent conduct of criminal proceedings (see § 11 of the said opinion).

69. I hope that one day such a stance will prevail in the Court's jurisprudence. In any event, even with the case-law as it stands right now, the mere admission in evidence of the impugned seizure certificate in the present case should be found to entail a violation of Article 6 § 1, for the reasons outlined above.