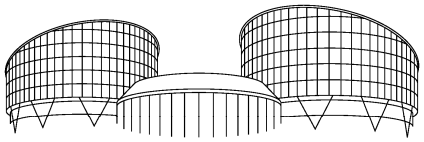

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF GJINI v. SERBIA

(Application no. 1128/16)

JUDGMENT

STRASBOURG

15 January 2019

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 Gjini v. Serbia,

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

Vincent A. De Gaetano, *President,*
Branko Lubarda,
Helen Keller,
Pere Pastor Vilanova,
Alena Poláčková,
Georgios A. Serghides,
Jolien Schukking, *judges,*

and Stephen Phillips, *Section Registrar,*

Having deliberated in private on 4 December 2018,

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

PROCEDURE

1. The case originated in an application (no. 1128/16) against the Republic of Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Croatian national, Mr Fabian Gjini ("the applicant"), on 12 December 2015.

2. The applicant was represented by Mr N. Crnogorac, a lawyer practising in Belgrade. The Serbian Government ("the Government") were represented by their Agent, Ms N. Plavšić.

3. The applicant complained under Article 3 of the Convention of the ill-treatment he had suffered while in detention, and of the lack of an effective investigation on the part of the domestic authorities in that respect.

4. On 23 September 2016 the complaints concerning Article 3 of the Convention were communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

5. Further to the notification under Article 36 § 1 of the Convention and Rule 44 § 1 (a), the Croatian Government did not wish to exercise their right to intervene in the present case.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant, Mr Fabian Gjini, a Croatian citizen of Albanian origin, was born in 1972 and lives in Crikvenica, Croatia.

A. The applicant's arrest

7. On 22 August 2008 the applicant was arrested by the Serbian police on suspicion of having attempted to pay a toll at Tovarnik border crossing (a border crossing between Serbia and Croatia) with a counterfeit ten-euro (EUR) banknote.

8. Upon his arrest, the applicant was taken before an investigating judge. The applicant was unable to provide the EUR 6,000 security for his bail, and the investigating judge ordered his detention.

9. The applicant spent 31 days in custody in Sremska Mitrovica Prison and was released from detention on 22 September 2008.

10. On 30 September 2008 the criminal proceedings against the applicant were discontinued by the prosecuting authorities, because the expert tests performed on the allegedly counterfeit banknote showed that it was actually genuine.

B. The applicant's ill-treatment by his cellmates

1. The applicant's version of events

11. The applicant alleges that in Sremska Mitrovica Prison he was placed in a four-bed cell which already housed four other inmates. Because of the lack of space, the applicant had no proper bed and had to sleep on the floor, on a sheet of foam material.

12. According to the applicant, the ill-treatment and humiliation started immediately. His cellmates forced him to mop the cell floor. While he was mopping, they did not allow him to raise his head, and would kick him sporadically. After he had mopped up, the cellmates would slap and kick the applicant for his "failure" to mop the floor properly. The applicant was compelled to clean the floor again and again. He could not remember how many times he had mopped the cell floor. He remembered, however, that his cellmates poured the water containing detergent over him to teach him how to get "things" clean.

13. According to the applicant, his cellmates thought that he was an informer. They did not believe that he had been put in their cell because of a counterfeit note. Rather, they thought that he had been placed there to spy on them and find out about their crimes.

14. The cellmates threatened the applicant by saying that they would stage his suicide if he told anyone what was happening in the cell. At night, the applicant was put in the toilet. There, the cellmates forced him to keep his feet in cold water for the whole night. He was not allowed to move. The morning after, the skin on his feet tore off and open wounds appeared.

15. The situation worsened after the applicant's cellmates found out about his origin. Upon learning that he lived on the Croatian coast, they said that they wanted to test him to see how well a person from the coast could "dive". They filled a bucket with water and put the applicant's head in it. Afterwards, they would shower the applicant with cold water. This test was performed over and over again.

16. On one occasion, the applicant's cellmates gave him a wet towel and forced him to fight with another prisoner. After the applicant had managed to hit his opponent, his four cellmates jumped on him, punched and kicked him, and abused him for daring to hit a Serb.

17. They made him sing Serb nationalist songs (*četničke pesme*). After he said that he did not know any, they taught him some and forced him to sing them for several nights. The applicant could not remember whether he had also been forced to sing Croat nationalist songs (*ustaške pesme*).

18. According to the applicant, his cellmates raped him. Although he could not remember the rape itself, he assumed that it happened as follows. One day the cellmates gave him a glass of water. The water caused him to feel dizzy, and he felt unable to walk and quickly lost consciousness. The next morning, he had pain in his anus and saw blood in his faeces. On that day his cellmates shaved him and shaved his eyebrows. Later, he discovered that shaved eyebrows were a sign that he had become someone's "girl" (*curica*). Being a "girl" meant that he had been sodomised.

19. According to the applicant, the prison guards were perfectly aware of what was happening to him. In particular, all the events happened while one guard – who appeared to be a school friend of one of the applicant's cellmates – was on duty. The applicant remembered that the prison guards laughed at him openly during his walks in the prison yard. He also had impression that everything that happened to him was because of his origin and nationality.

20. Several days after the start of his detention, the applicant's lawyer noticed changes in the applicant's behaviour and sensed that something was wrong. The applicant was afraid to say anything to his lawyer. Nevertheless, the lawyer urged the prison authorities to move the applicant to another cell.

21. After his relocation, the applicant was no longer ill-treated.

2. The Government's version of events

22. The Government contended that the applicant's version of the events was not supported by evidence. They did not provide a separate description of the events from 22 August 2008 until 22 September 2008 when the applicant was detained in Sremska Mitrovica Prison.

C. Proceedings and developments before the domestic authorities

1. Civil proceedings

23. On 29 October 2008 the applicant invited the Ministry of Justice to make a payment in respect of his allegedly unlawful detention. He received no reply.

24. On 1 September 2009, the applicant amended his proposal, adding a request for compensation for the ill-treatment he had suffered during the period of detention. Again, he received no reply.

25. On 25 December 2009 the applicant lodged a civil complaint against the Republic of Serbia with the Second Municipal Court (subsequently renamed the Court of First Instance) in Belgrade. He requested compensation for his detention, and in respect of the non-pecuniary damage he had sustained in terms of fear, physical pain and mental anxiety owing to the ill-treatment to which he had been subjected during his time in detention.

26. On 12 March 2010 the Republic Attorney General's Office (*Republičko javno pravobranilaštvo*) contested the applicant's claims. The office underlined that the applicant had failed to submit any medical evidence in support of his claims concerning the alleged ill-treatment.

27. On 15 June 2010 a hearing was held before the Court of First Instance. The Republic Attorney General's Office was not present. The applicant was represented by his lawyer. However, owing to the nature of the applicant's complaints, the domestic court decided that the applicant had to be present at hearings. The applicant was summoned to attend the next hearing, scheduled for 21 October 2010, subsequently rescheduled for 2 February 2011.

28. At the hearing of 2 February 2011, and the further hearing on 20 May 2011, the judge interviewed several witnesses: (i) P.S., who had been serving a sentence in Sremska Mitrovica Prison at the same time when the applicant had been there; (ii) D.Ž., who had represented the applicant in the criminal proceedings and was familiar with the events in prison; and (iii) M.Č., the applicant's uncle.

29. P.S. stated that he had met the applicant in Sremska Mitrovica Prison. The applicant was placed in a cell in the part of the prison where he was imprisoned. P.S. remembered hearing someone singing Serb and Croat nationalist songs at night. That was before the applicant was transferred to another part of the prison. P.S. and the applicant used to talk during the morning walks in the prison. One morning P.S. observed that the applicant's eyebrows had been shaved. On that occasion, he also noticed haematomas behind the applicant's ears and on the upper part of his arm. He could see the injuries because it was summer and they were all in T-shirts. The applicant had a strange look in his eyes and seemed very scared. The applicant avoided the company of other prisoners and complained to P.S. regarding the ill-treatment to which he had been subjected by his cellmates. The applicant also complained that his anus was bleeding and that he had been given some

medicine which had made him lose consciousness. P.S. could not remember whether someone had screamed at night. Their cells were 10-15 metres apart. P.S. confirmed that shaved eyebrows in prison meant that the person had been raped. He also saw the damaged skin on the applicant's feet. The guards in prison must have heard that somebody was singing songs, and they must also have noticed other signs of maltreatment. The guards knew what shaved eyebrows meant. Prison guards patrolled the prison corridors day and night. Through peepholes, they controlled what prisoners did in their cells. There were cameras placed in the corridors, but there were no cameras in the cells. The applicant was moved to another cell after his lawyer urged the prison authorities to relocate him. P.S. left Sremska Mitrovica Prison seven to eight days before the applicant.

30. D.Ž. met the applicant in 2008 when he represented him in the criminal proceedings concerning the use of an allegedly forged banknote. He visited the applicant in prison. On that occasion, D.Ž. noticed that the applicant had been shaved and his eyebrows had also been shaved. The applicant looked disorientated and scared. D.Ž. asked the applicant whether there was any problem, but the applicant could not give him a clear answer. The applicant seemed frightened and confused. D.Ž. urged the prison authorities to transfer the applicant to another cell. Specifically, D.Ž. called the prison authorities, expressed his concern about the applicant's treatment, and underlined that the authorities should respect the laws and regulations concerning the placement and status of detainees. D.Ž. also talked to another client, V.D., who informed him what had happened to the applicant.

31. M.Č. had known the applicant since birth. He was the applicant's uncle. He visited the applicant once during his time in prison. On that occasion, he could not recognise the applicant. The applicant was bald, with shaved eyebrows. M.Č. also noticed bruises on the applicant's right arm, as well as bruises on his head. M.Č. stated that he wanted to know what had happened to the applicant, yet the applicant was evasive and avoided eye contact. M.Č. had previously known the applicant to be a happy and cheerful person, but said that the applicant had never fully recovered from what had happened to him in prison.

32. Between the two hearings, a statement was taken from another witness, V.D., who was still serving his sentence in Sremska Mitrovica Prison. This witness remembered the applicant, but was not exactly sure what had happened to him during his time in the prison. V.D. recalled seeing him with shaved eyebrows and a strange haircut. He also recalled hearing the applicant singing or screaming at nights, but he could not remember what he had actually been singing.

33. At the hearing of 9 November 2011 two expert witnesses – an expert on traumatology and a neuropsychiatrist – submitted their reports. They found that, due to his suffering in prison, the applicant had suffered certain

physical pain and had sustained an overall loss of 10% in his "vital activity" (*umanjenje opšte životne aktivnosti*).

34. The Republic Attorney General's Office denied the events in Sremska Mitrovica Prison as alleged by the applicant. It, in particular, referred to the absence of medical evidence.

35. On 9 November 2011 the Court of First Instance in Belgrade accepted the applicant's complaint concerning the request for compensation for his detention, but rejected his request in respect of compensation for non-pecuniary damage caused by ill-treatment in a State-owned institution. The court found:

> "[The applicant has] no medical certificate proving the injuries. Medical expert witnesses testified on the basis of the claimant's statement. The testimonies of other witnesses are based on what the claimant told them. The claimant, if injured at all, should have gone to see the doctor in the detention unit; he ought to have visited the doctor, who would have confirmed the injuries, or he should have said something in order to be transferred to another cell and protected. The claimant has no medical certificate concerning any injuries."

36. On 17 October 2012 the Court of Appeal in Belgrade upheld the Court of First Instance's decision as regards the compensation for detention, but quashed the rejection of the claim for compensation in respect of the ill-treatment. The case was remitted to the Court of First Instance for reconsideration. As regards the Court of First Instance, the Court of Appeal stated the following:

> "[It] failed to properly evaluate the evidence in accordance with Article 8 of the Law on Civil Procedure, in accordance with which a court must decide on the facts established as proven, but on the basis of a conscientious and meticulous assessment of each particular piece [of evidence] and of all the evidence together, as well as in relation to the outcome of the whole proceedings. Given that such an evaluation was not carried out in this particular case, the findings of the first-instance court that it had not been proved that the claimant had been ill-treated and molested by other cellmates during his time in detention – causing him to sustain different types of non-pecuniary loss for which the [State] could be held responsible as defined in Article 172 of the Obligations Act (*Zakon o obligacionim odnosima*) – cannot be accepted with any certainty."

37. In the reopened proceedings, the Court of First Instance re-examined the applicant's first lawyer, D.Ž., as well as the two expert witnesses. The court also considered reports produced by a psychologist and a psychiatrist from Rijeka, Croatia concerning the applicant's current mental health and emotional distress. Those reports confirmed that, because of the ill-treatment he had sustained in Sremska Mitrovica Prison, the applicant was still in a state of mental anxiety.

38. On 10 May 2013 the Court of First Instance awarded the applicant 200,000 Serbian dinars (RSD – approximately EUR 1,900) in respect of non-pecuniary damage for the 10% loss in his general vital activity associated with the events in detention. However, the claim for the applicant's physical suffering was rejected because, in the court's view, his suffering had not

constituted grievous but rather slight bodily harm, for which no compensation could be awarded, according to the law. Also, the court refused to award the applicant compensation for non-pecuniary damage for his fear.

39. On 10 December 2013 the Court of Appeal in Belgrade upheld the decision of the Court of First Instance in part and reaffirmed the findings of that court that the applicant had suffered from an acute stress disorder as a result of being detained and harassed by other inmates, which, in general, had led to his experiencing post-traumatic stress and a loss in his general vital activity. However, the Court of Appeal awarded the applicant an additional RSD 50,000 (approximately EUR 450) for the fear arising from the events during his detention, and explained its reasoning in the following manner:

> "Taking into account the established factual situation and all the circumstances of the present case, as well as the findings of the neuropsychiatrists, according to which the claimant suffered post-traumatic stress during and after his detention, this being, in itself, a complex reaction when a person's physical and personal integrity is threatened, which [in this case] lasted for days and involved fear, emotional distress, a feeling of sadness, distraction and despair, and being a reaction which, by its nature, is more complex than a fear of strong intensity, the Court of Appeal finds that, in accordance with Article 200 of the Obligations Act, the claimant is entitled to a just award for non-pecuniary damage for the fear he experienced."

40. On 18 January 2014 the applicant lodged a constitutional appeal. He complained under Articles 21, 23, 25, 28, 29, 32, 35 and 36 of the Constitution (articles corresponding to Articles 3, 6, 13 and 14 of the Convention). In particular, his complaint was as follows:

> "The domestic courts have unlawfully and unconstitutionally rejected the claimant's clearly justified claim for compensation in respect of the non-pecuniary damage he suffered on account of the violation of his human dignity after being placed in illegal detention, where he was molested for days by a group of prisoners as a person of Croatian and Albanian origin, being beaten and kicked all over his body, drenched with water, beaten with wet towels, tortured, battered, raped and thereafter shaved all over his body, which was the symbol of a raped person, and being subjected to real and serious threats that he would 'commit suicide by hanging [himself] over the door handle', or be cut with a razor blade and similar items. And all this was done with the silent approval of prison officers who knew which cell they had put the claimant in, and who knew or ought to have known about everything that happened to him."

41. On 9 June 2015 the Constitutional Court rejected the applicant's constitutional appeal. It only considered his complaint under Article 6 of the Convention, and found it to be manifestly ill-founded. The Constitutional Court did not address any other complaint raised by the applicant.

2. Other relevant facts

42. About the ill-treatment he had suffered during the period of detention, the applicant also complained to the President of the Republic and to the Minister of Justice herself. No one ever replied to those complaints.

43. On 24 February 2010 the applicant's representative complained to the Provincial Ombudsperson (*Pokrajinski ombudsman*) regarding the applicant's ill-treatment in prison. On 16 March 2010 the Provincial Ombudsperson replied that he had no jurisdiction over the case, as the applicant was no longer in detention.

44. On 1 March 2010 the applicant's representative also informed the State Ombudsperson (*Zaštitnik građana Republike Srbije*) about the detention and ill-treatment of the applicant. He particularly highlighted the fact that even if State authorities knew or ought to know about the applicant's ill-treatment in detention, none had ever launched an investigation into the case. The State Ombudsperson replied on 26 April 2010 that he had no jurisdiction over the work of the public prosecutor's office or the courts, and accordingly had no jurisdiction over the case.

II. RELEVANT DOMESTIC LAW

A. The Constitution of the Republic of Serbia (*Ustav Republike Srbije*, published in the Official Gazette of the Republic of Serbia no. 98/2006)

45. The relevant provision reads as follows:

Article 25

"Physical and mental integrity is inviolable.

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

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

46. The Code of Criminal Procedure was in force from 28 March 2002 until 1 October 2013. The relevant Articles read as follows:

Article 20

"Unless otherwise provided for by this Code, the public prosecutor is required to institute a criminal prosecution where there is reasonable suspicion that a person has committed a criminal offence which is subject to public prosecution"

Article 222

"1. All public authorities, territorially autonomous authorities, local self-government authorities, public enterprises and institutions are required to report

all criminal offences subject to public prosecution of which they are informed or of which they learn in some other manner.

2. Those who submit the criminal complaint referred to in paragraph 1 of this Article shall state the evidence known to them and implement measures aimed at preserving: traces of the criminal offence, objects against which the criminal offence was committed or with whose assistance the criminal offence was committed, and other evidence."

Article 223

"1. Everyone should report a criminal offence subject to public prosecution.

2. Cases in which failure to report a criminal offence represents a criminal offence are prescribed by the Criminal Code."

Article 224

"1. Criminal complaints shall be submitted to the competent public prosecutor in writing or orally.

...

3. If a criminal complaint is submitted to a court, an internal affairs authority, or a public prosecutor who is not competent, that [court, authority or public prosecutor] shall receive the complaint and promptly deliver it to a competent public prosecutor."

III. RELEVANT INTERNATIONAL DOCUMENTS

A. The European Committee for the Prevention of Torture

47. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) developed standards concerning violence among prisoners, see the 11th General Report (CPT/Inf (2001) 16), paragraph 27:

Inter-prisoner violence

"27. The duty of care which is owed by custodial staff to those in their charge includes the responsibility to protect them from other inmates who wish to cause them harm. In fact, violent incidents among prisoners are a regular occurrence in all prison systems; they involve a wide range of phenomena, from subtle forms of harassment to unconcealed intimidation and serious physical attacks.

Tackling the phenomenon of inter-prisoner violence requires that prison staff be placed in a position, including in terms of staffing levels, to exercise their authority and their supervisory tasks in an appropriate manner. Prison staff must be alert to signs of trouble and be both resolved and properly trained to intervene when necessary. The existence of positive relations between staff and prisoners, based on the notions of secure custody and care, is a decisive factor in this context; this will depend in large measure on staff possessing appropriate interpersonal communication skills. Further, management must be prepared fully to support staff in the exercise of their authority. Specific security measures adapted to the particular characteristics of the situation encountered (including effective search procedures) may well be required; however, such measures can never be more than an adjunct to the above-mentioned basic

imperatives. In addition, the prison system needs to address the issue of the appropriate classification and distribution of prisoners."

48. In 2006 the CPT published its first report on Serbia and Montenegro (CPT/Inf (2006) 18). The report was published following its first visit to the member State, which took place in September 2004.

At that time, the CPT observed the alarming situation in Sremska Mitrovica Prison and noted the following:

"82. *Sremska Mitrovica Penitentiary Reformatory* is the largest prison establishment in Serbia. Located some 70 kilometres west of Belgrade, it opened in 1895 and has been used as a prison ever since. Its surface extends to 670 hectares, including a variety of agricultural fields. At the time of the visit it was accommodating 1206 inmates, 61 on remand (among them 3 women) and 1145 male sentenced prisoners (of whom 154 were foreign nationals, the establishment being the only prison in Serbia holding foreign detainees sentenced for criminal offences). It has an open, a semi-open and a closed section; the delegation focussed its attention on the closed section, where 721 inmates were held. ...

83. At Sremska Mitrovica Penitentiary Reformatory, the CPT's delegation received a considerable number of allegations of physical ill-treatment by staff. Most of the allegations related to before 2004. Nevertheless, the delegation heard a number of recent allegations of slaps and kicks, as well as of verbal abuse, in particular of persons of Roma origin, foreign prisoners and members of national minorities in Serbia. In addition, a number of inmates alleged to have been formally warned that they would be beaten if caught asleep during the day. ...

87. The CPT's mandate is not limited to ill-treatment of persons deprived of their liberty which is inflicted or authorised by prison staff. It is also very concerned when it discovers a prison culture which is conducive to inter-prisoner intimidation/violence. In this context, the delegation found evidence of a high number of cases of such violence at Sremska Mitrovica, confirmed by different documents (medical records, register of accidental injuries, security logbooks, etc.) and, to a lesser extent, at Belgrade District Prison. In both establishments, medical records quite frequently contained accounts of injuries for which a prisoner could not (or did not want to) reveal their cause; in the CPT's experience, this is frequently a sign of inter-prisoner violence.

88. By way of example, in the already mentioned 'register of accidental injuries' at Sremska Mitrovica, some 60 injuries had been recorded by the prison's medical staff since the beginning of 2004. ...

89. As far as the delegation could ascertain, no action whatsoever had been taken by the prison authorities in any of these cases. The delegation was informed that a number of prisoners had themselves pressed criminal charges against other inmates, on account of the alleged assaults.

90. The CPT wishes to emphasise that the duty of care which is owed by the prison authorities to prisoners in their charge includes the responsibility to protect them from other prisoners who might wish to cause them harm. The prison authorities must act in a proactive manner to prevent violence by inmates against other inmates.

Addressing the phenomenon of inter-prisoner violence and intimidation requires that prison staff be alert to signs of trouble and both resolved and properly trained to intervene when necessary.

> The existence of positive relations between staff and prisoners, based on the notions of dynamic security and care, is a decisive factor in this context; this will depend in large measure on staff possessing appropriate interpersonal communication skills. It is also obvious that an effective strategy to tackle inter-prisoner intimidation/violence should seek to ensure that prison staff is placed in a position to exercise their authority in an appropriate manner. Consequently, the level of staffing must be sufficient (including at night-time) to enable prison officers to supervise adequately the activities of prisoners and support each other effectively in the exercise of their tasks. Both initial and ongoing training programmes for staff of all grades must address the issue of managing inter-prisoner violence. **The CPT recommends that the authorities develop a comprehensive strategy aimed at combating the phenomenon of inter-prisoner violence throughout the Serbian prison system.**" [emphasis in the original]

49. The CPT visited Serbia again in November 2007. The visit again included a visit to Sremska Mitrovica Prison. In its subsequent report (CPT/Inf (2009)1), the CPT noted the following:

> "72. The importance of medical screening of newly arrived prisoners cannot be over-emphasised. Such screening is indispensable, in particular in the interests of preventing the spread of transmissible diseases, suicide prevention, and ensuring the timely recording of injuries.
>
> The House Rules in Correctional Facilities and District Prisons stipulate that prisoners should be medically examined within 24 hours of their arrival at the establishment. However, the information gathered by the delegation indicates that compliance with this provision was not always guaranteed. For example, at Belgrade District Prison, up to three days could elapse before a newly arrived prisoner was medically examined for the first time (e.g. if a prisoner arrived on Friday afternoon, the examination took place on the following Monday). Delays of up to 9 days in the initial medical examination were observed at Sremska Mitrovica Correctional Institution, and up to 15 days at Požarevac-Zabela Correctional Institution.
>
> Further, the medical examination upon admission appeared to be cursory, consisting merely of asking the prisoner questions about previous diseases, and taking his pulse and blood pressure (there were no paraclinical examinations). As already mentioned in paragraph 47, the thoroughness of the initial examination with respect to the recording of injuries borne by newly-arrived prisoners left much to be desired. In addition, the delegation noted that injuries sustained by prisoners within the prison establishments – following the use of 'coercive means' (e.g. truncheons) or incidents of inter-prisoner violence – were not properly recorded (if at all)."

50. The CPT's 2016 report, (no. CPT/Inf (2016) 21), concerned a visit to Serbia which, once again, included Sremska Mitrovica Prison. In that report, the CPT noted the following:

> "51. Further, the level of inter-prisoner violence and intimidation was particularly worrying at Sremska Mitrovica Correctional Institution and Pančevo District Prison, and was linked to their understaffing. The CPT recommends that the authorities devise an effective national strategy to curb this phenomenon, which will require additional prison officers."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

51. The applicant complained of having been ill-treated by his cellmates while in detention pending the outcome of the investigation into his case and the failure of the domestic authorities to protect him, and of the absence of an effective response on the part of the domestic authorities in that regard. He relied on 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 as regards the alleged ill-treatment by his cellmates

(a) The parties' submissions

52. The Government maintained that the applicant could no longer claim to be a victim, given the reasonable and realistic assessment by the Court of First Instance and the Court of Appeal of his compensation for non-pecuniary damage.

53. The applicant contested those arguments, stating that the amount of compensation awarded to him had not been sufficient.

(b) The Court's assessment

54. 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 in 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, the national authorities have to: 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, and authorities cited therein); and afford redress, or at least provide a person with the possibility of applying for and obtaining compensation for damage sustained as a result of the ill-treatment (see *Shestopalov v. Russia*, no. 46248/07, § 56, 28 March 2017).

55. In the present case, in finding a causal link between the applicant's ill-treatment and his mental and physical suffering, the national authorities established the State's responsibility in respect of events in prison. However, the award in the amount of RSD 250,000 (approximately EUR 2,350, see paragraphs 38 and 39 above), 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 consequent on a finding of a violation of the magnitude claimed (see, for example, *Antropov v. Russia*, no. 22107/03, 29 January 2009, and also *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 202-216, ECHR 2006-V).

56. Therefore, the applicant may still claim to be a "victim" of a breach of his rights under the substantive limb of Article 3 of the Convention. The Government's objection in this regard is thus dismissed.

2. Non-exhaustion of domestic remedies

(a) Failure to make proper use of a constitutional appeal

(i) The parties' submission

57. The Government submitted that the applicant had failed to properly use a constitutional remedy. In particular, they maintained that although he had complained to the Constitutional Court and invoked Articles of the Constitution of the Republic of Serbia that corresponded to Article 3 of the Convention, he had failed to substantiate his complaints, and accordingly had failed to complain properly.

58. Relying on the case of *Vučković and Others v. Serbia* (preliminary objection) [GC] (nos. 17153/11 and 29 others, §§ 35 and 82, 25 March 2014), the Government emphasised that the Constitutional Court could not examine the applicant's complaint under Article 3 of the Convention, as it was "bound" by the request formulated in a constitutional appeal, and could only consider the complaint within the limits of the formulated request. Had the applicant complained properly, the constitutional remedy would have offered him a reasonable prospect of success.

59. The applicant did not comment on this point.

(ii) The Court's assessment

60. 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 through their own legal system (see *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V).

61. As regards legal systems which provide constitutional protection for fundamental human rights and freedoms, such as the one in Serbia, the Court reiterates that 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). An applicant's failure to make use of

an available domestic remedy or to make proper use of it (that is, by bringing a complaint at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law) will result in an application being declared inadmissible before this Court (see *Gäfgen v. Germany* [GC], no. 22978/05, § 142, ECHR 2010).

62. The Court notes that, in the present case, the applicant lodged a constitutional appeal complaining under, *inter alia*, Articles 21, 23, and 25 of the Constitution of ill-treatment in Sremska Mitrovica Prison that had taken place "with the silent approval of officials who had known which cell they had put the claimant in, and who knew or ought to have known about everything that happened to him" (see paragraph 40 above). The applicant lodged those complaints in a form and within the time-limits prescribed in domestic law, and supported them with the relevant documents and decisions of domestic authorities.

63. The Court finds that the terms in which the applicant formulated his constitutional complaints were such as to enable the Constitutional Court to afford him redress in the terms sought, or at least to address them (see paragraph 41 above). The Court therefore rejects the Government's objection to the effect that the applicant failed to make proper use of the constitutional appeal.

(b) The applicant's failure to make proper use of available domestic remedies as regards his complaint concerning the respondent State's alleged failure to investigate

(i) The parties' submissions

64. The Government claimed that the applicant had failed to exhaust available and effective domestic remedies in respect of his complaint that there was no effective response on the part of the respondent State. Specifically, they claimed that the applicant had failed to lodge a criminal complaint against the persons who had allegedly ill-treated him.

65. The applicant stated that the domestic authorities had been under a duty to conduct an investigation. He insisted that he could not have initiated criminal proceedings, as they were supposed to be carried out by the public prosecutor *ex officio*.

66. In their additional written observations, the Government disputed those claims adding that the applicant had been legally obliged to lodge a criminal complaint (see paragraph 46 above).

(ii) The Court's assessment

67. The Court considers that this objection goes to the heart of the question of whether the State fulfilled its obligation under the procedural aspect of Article 3 of the Convention, and is closely linked to the substance of the applicant's complaint that the State failed to conduct an investigation.

It would thus be more appropriately examined at the merits stage (see *Tahirova v. Azerbaijan*, no. 47137/07, § 50, 3 October 2013, and *Mikheyev v. Russia*, no. 77617/01, § 88, 26 January 2006).

3. Conclusion

68. The Court notes that the applicant's complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. Obligation of the State to prevent ill-treatment or to mitigate its harm

(a) The parties' submissions

69. The applicant maintained that he had been ill-treated by his cellmates while in detention in Sremska Mitrovica Prison. He also claimed that the respondent State had failed to protect him, even though it had been aware that, as a Croatian national of Albanian origin, he would be treated terribly in any penal institution in Serbia.

70. The Government disputed that the applicant had been subjected to ill-treatment by his cellmates in Sremska Mitrovica Prison. They also argued that the applicant had failed to submit sufficient evidence to prove otherwise. In particular, they stated that the applicant had failed to submit medical records or call any eyewitness who could confirm and corroborate his allegations of ill-treatment.

71. Whilst acknowledging that Article 3 encompasses a positive obligation on State authorities to take preventive measures and protect persons whose physical well-being is at risk from private individuals, the Government maintained that, in the instant case, the prison authorities had not been and could not have been aware of any real and immediate risk to the applicant. In that respect, the Government noted that, as the applicant had neither informed the prison authorities that he had been subjected to ill-treatment nor lodged a complaint against his cellmates, the prison authorities could not protect him.

(b) The Court's assessment

(i) General principles

72. Article 3 of the Convention enshrines one of the most fundamental values of democratic societies (see, among other authorities, *Selmouni* [GC], cited above, § 95; *Labita v Italy* [GC], no. 26772/95, § 119, ECHR 2000‑IV; and *Bouyid v. Belgium* [GC], no. 23380/09, § 81, ECHR 2015).

Unlike most of the substantive clauses of the Convention, Article 3 makes no provision for exceptions, and no derogation from it is permissible. On the contrary, Article 3 of the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (see *Rodić and Others v. Bosnia and Herzegovina*, no. 22893/05, § 66, 27 May 2008, and the authorities cited therein).

73. For ill-treatment to fall within the scope of Article 3, it must attain a minimum level of severity. The Court has considered treatment to be "inhuman" where it was premeditated, applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering (see *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 220, ECHR 2011, and other authorities cited therein). The Court has considered treatment to be degrading where it humiliated or debased an individual, showing a lack of respect for, or diminishing, his or her human dignity, or aroused feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance and debasing them (*V. v. the United Kingdom* [GC], no. 24888/94, § 71, ECHR 1999-IX).

74. Where allegations are made under Article 3 of the Convention, the Court must apply particularly thorough scrutiny and those allegations must be supported by appropriate evidence (see *Matko v. Slovenia*, no. 43393/98, § 100, 2 November 2006, and *Vladimir Romanov v. Russia*, no. 41461/02, § 59, 24 July 2008). To assess this evidence, the standard of proof "beyond reasonable doubt" has been adopted. A reasonable doubt "means ... a doubt for which reasons can be given drawn from the facts presented" (*The Greek Case – Denmark v Greece; Norway v. Greece; Sweden v. Greece, Netherlands v. Greece*; Yearbook of the Convention, p. 196, § 30), whereas the standard of proof "beyond reasonable doubt" follows from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of facts (see *Simeonovi v. Bulgaria* [GC], no. 21980/04, § 124, 12 May 2017).

75. While many of the cases with which the Court has dealt show that persons who have allegedly been ill-treated usually provide medical certificates to prove their allegations (see *Bouyid v. Belgium* [GC], cited above, § 92), in cases where domestic proceedings have taken place and the domestic courts have established that a person has experienced suffering, such decisions provide strong support for the allegations raised. It is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for those courts to assess the evidence before them (see *Gäfgen* [GC], cited above, § 93). Although the Court is not bound by the findings of domestic courts, in normal circumstances, it requires cogent elements to lead it to depart from the findings of fact reached by those courts (ibid.).

76. According to the Court's settled case-law, it is particularly important to secure Article 3 safeguards in respect of persons who are deprived of their liberty. In this connexion, the Court reiterates that, under Article 1 of the Convention, the High Contracting Parties are under an obligation to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention. Taken in conjunction with Article 3, Article 1 requires the States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including ill-treatment administered by private individuals (see *A. v. the United Kingdom*, 23 September 1998, § 22, *Reports of Judgments and Decisions* 1998-VI).

77. In such circumstances, the absence of any direct State involvement in acts of violence that meet the condition of severity such as to engage Article 3 of the Convention does not absolve the State from its obligations under this provision (see *Premininy v. Russia*, no. 44973/04, § 71, 10 February 2011). This positive obligation is to be interpreted in such a way as to not impose an excessive burden on the authorities to guarantee, through the legal system, that inhuman or degrading treatment is never inflicted by one individual on another (see *Premininy*, cited above, § 73). Yet, the State is obliged to at least provide effective protection of persons within its jurisdiction, including reasonable steps to prevent ill-treatment of which State authorities had or ought to have had knowledge (see *O'Keeffe v. Ireland* [GC], no. 35810/09, § 144, ECHR 2014 (extracts)).

78. In this connection, the Court refers to the relevant principles concerning State responsibility, supervision and control in relation to detention, as well as the obligation to protect an individual from inter-prisoner violence, which are set out in the case of *Premininy* (cited above, §§ 82-88).

79. In particular, the Court refers to Articles 1 and 3 of the Convention which, taken together, place a number of positive obligations on the High Contracting Parties such as to prevent and provide redress for torture and other forms of ill-treatment (see *Premininy*, cited above, § 71-72). By virtue of the said two provisions, States are required to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including ill-treatment administered by private individuals (see *M.C. v. Bulgaria*, no. 39272/98, § 149, ECHR 2003-XII, and *Premininy,* cited above, § 72).

80. In view of the importance of the protection afforded by Article 3, a State must ensure that persons under the control of authorities and placed in detention are kept in conditions which are compatible with respect for their human dignity, that the manner and method of the execution of the measure do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention, and that, given the practical demands of imprisonments, their health and well-being are adequately secured (see *Rodić and Others v. Bosnia and Herzegovina*, cited above, § 67).

(ii) Establishment of the facts and assessment of the severity of the ill-treatment

81. Turning to the circumstances of the present case, at the outset, the Court observes that the parties are in dispute as to whether the applicant was ill-treated at all by his cellmates in Sremska Mitrovica Prison.

82. In the civil proceedings which the applicant brought, the domestic courts found that, as a result of his suffering in detention, the applicant had lost 10% of his general vital activity. They also confirmed the causal link between his suffering and the events in prison (see paragraph 38 above), and awarded him RSD 200,000 (approximately EUR 1,900) in respect of the damage he had sustained, and a further RSD 50,000 (approximately EUR 450) in respect of continuing distress after his release. Whilst no detailed findings of dates or facts were made, those domestic decisions established that the applicant had indeed sustained damage in the early days of his detention, and had suffered post-traumatic stress.

83. In the Court's view, the domestic finding that the applicant lost 10% of his general vital activity admits of no other conclusion than that he was the victim in the early days of his imprisonment of an event or a sequence of events that seriously impaired his health. That being so, the Court accepts the general credibility of the applicant's domestic claims. It thus finds that it has been established that the applicant suffered ill-treatment at the hands of his cellmates, and that that ill-treatment was of such severity that Article 3 applies.

(iii) State responsibility for the events

84. The Court observes that, in the present case, the Government declined to take any responsibility for the ill-treatment alleged by the applicant, denying any failure or omission on the part of the prison authorities. In their view, as no official complaint had been lodged by the applicant, the prison authorities could not be expected to protect him.

85. The Court, however, notes that in the CPT reports inter-prisoner violence in Sremska Mitrovica Prison has repeatedly been pointed out as a serious problem, both before and after the events in the present case (see paragraphs 48-50 above). In those reports, the CPT noted a high number of cases concerning inter-prisoner violence and observes that no action whatsoever has been taken by the prison or state authorities to correct such behaviour or reduce it. The CPT also criticised the failures of medical personnel in Sremska Mitrovica Prison to properly record injuries consequent on inter-prisoner violence (see paragraph 48 above).

86. In view of the circumstances of the present case the Court notes that the prison staff in Sremska Mitrovica Prison must have noticed that the applicant's eyebrows had been shaved, that he had a strange haircut, and that his skin had been damaged (see paragraph 28 above). They also must or ought to have heard the applicant's screams and singing of nationalist songs at night (see paragraph 32 above).

87. Applying the principles set out in paragraph 78 to the present case, the Court finds that the prison authorities failed to notice or react to any of the signs of violence listed above; they further failed to secure a safe environment for the applicant and, also, failed to detect, prevent or monitor the violence he was subjected to.

88. Accordingly, there has been violation of Article 3 of the Convention in this respect.

2. Failure to investigate

(a) The parties' submissions

89. The Government maintained that they could not conduct an effective investigation, as no arguable claim had ever been raised by the applicant concerning his ill-treatment in Sremska Mitrovica Prison. In their view, the reason why there had been no investigation into the circumstances of the applicant's case was because he had failed to lodge his complaints with the relevant domestic authorities. Besides, the Government claimed that the circumstantial evidence established in the civil proceedings would not have been sufficient to trigger or prompt a criminal investigation on the part of the State.

90. The applicant argued that the State had been under an obligation to conduct an investigation, and that its failure to take any effective step had violated his rights guaranteed under Article 3 of the Convention.

91. In their additional observations, the Government claimed that complaints to various domestic authorities, including ombudspersons, could not be considered effective. Accordingly, no violation of Article 3 in this respect could be attributed to the State.

(b) The Court's assessment

(i) General principles

92. The Court reiterates that, under the procedural limb of Article 3 of the Convention, respondent States have an obligation to put in place effective criminal-law provisions and deter the commission of offences against personal integrity. Those provisions have to be backed up by law-enforcement machinery capable of providing practical and effective protection of the rights guaranteed (see *M.S. v. Croatia (no. 2)*, no. 75450/12, § 74, 19 February 2015), so that when a person raises an arguable complaint of ill-treatment under Article 3 of Convention, the authorities can conduct an effective investigation (see *Selmouni* [GC], cited above, § 79, and *Filip v. Romania*, no. 41124/02, § 47, 14 December 2006), even if the ill-treatment has been inflicted by private individuals (see, *mutatis mutandis*, *M.C. v. Bulgaria* , cited above, § 151).

93. Article 3 of the Convention additionally requires that an official investigation be conducted even in the absence of an express complaint, if there are sufficiently clear indications that ill-treatment might have occurred (see, for example, *Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*, no. 71156/01, § 97, 3 May 2007; and also *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, § 133, ECHR 2004-IV (extracts)).

94. In previous cases, such an obligation has arisen on the basis of various explicit or implicit indications, such as: facts implied in complaints made by an applicant during criminal proceedings against him (see *J.L. v. Latvia*, no. 23893/06, §§ 11-13 and 73-75, 17 April 2012); a letter from an applicant to a county court in relation to civil proceedings concerning his involuntary admission to a psychiatric hospital (see *M.S. v. Croatia (no. 2)*, cited above, §§ 82-83); the presentation of evidence of ill-treatment by an applicant in civil proceedings (see *Muradova v. Azerbaijan*, no. 22684/05, §§ 122-126, 2 April 2009); and an allegation of ill-treatment in an applicant's appeal against a first-instance judgment and in his constitutional complaint (see *Mađer v. Croatia*, no. 56185/07, §§ 88-89, 21 June 2011). Besides, o<nce the matter has come to the attention of the authorities an obligation to lodge a formal complaint cannot be left exclusively to the applicant's initiative. For the purposes of the procedural obligation under Articles 2 and 3 of the Convention, the domestic authorities are, at least, those under an obligation to react (see, *mutatis mutandis, Gongadze v. Ukraine*, no. 34056/02, § 175, ECHR 2005-XI, see also *Muradova*, cited above, § 123).

95. For an official investigation to satisfy the requirements of an effective investigation under Article 3, it has to be: capable of leading to the identification and punishment of those responsible for the ill-treatment; independent from those implicated in the events; thorough, meaning that the authorities must always make a serious attempt to find out what happened, and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions; prompt and initiated as soon as an official complaint has been lodged – and even when, strictly speaking, no complaint has been made, the investigation must start if there are sufficiently clear indications that there has been ill-treatment; and able to provide the complainant with effective access to the investigatory procedure at all stages (see *Krsmanović v. Serbia*, no. 19796/14, § 74, 19 December 2017, and the authorities cited therein).

(ii) Application of these principles to the present case

96. It is true, as the Government observe, that the applicant never lodged a formal criminal complaint with the relevant authorities (that is, the police or the public prosecutor's office), or complained to the prison administration about the specific acts of ill-treatment he was subjected to in Sremska Mitrovica Prison.

97. However, it is uncontested that after the applicant's lawyer complained to the prison authorities about his ill-treatment after several days, the applicant was moved to another cell (see paragraph 20 above).

98. Further, on 25 December 2009 the applicant lodged his civil complaint with the civil court in Belgrade, complaining, *inter alia*, of his ill-treatment in Sremska Mitrovica Prison, and seeking compensation for it. The applicant continued to complain, throughout 2008, 2009 and 2010, to various domestic authorities – including the President of the Republic, the Ministry of Justice and ombudspersons – about the ill-treatment he had suffered (see paragraphs 23-24 and 42-44 above).

99. It is uncontested that no investigation was ever conducted into the applicant's allegations concerning his ill-treatment by his cellmates in Sremska Mitrovica Prison. It is, thus, not for the Court to establish whether the investigation into applicant's allegations was effective, because there was no such investigation. The question is rather whether the applicant's failure to lodge a formal criminal complaint either prevented the State authorities from carrying out the investigation or relieved them of their general duty to do so (compare and contrast *Tahirova*, cited above, § 54).

100. The Court notes in this respect that the authorities knew or ought to have known at the time about the applicant's ill-treatment (see paragraph 86 above), in addition, he raised the matter on a number of occasions thereafter. There was therefore no formal or factual element which stood in the way of an investigation.

101. Moreover, there was nothing in the domestic law to prevent the prison authorities from reacting or to prevent other authorities from initiating a criminal investigation. On the contrary, the Serbian legal framework, and in particular the provisions of the Code of Criminal Procedure, are explicit in imposing an obligation on all public authorities to report criminal offences subject to public prosecution of which they are informed (see paragraph 46 above).

102. In view of the above, the Court observes that the absence of a criminal complaint by the applicant did not prevent the public prosecutor from initiating criminal proceedings or preclude other domestic authorities from informing the public prosecutor about the allegations of ill-treatment.

103. In the light of the foregoing, in the absence of an effective official investigation, the Court dismisses the Government's objection as to the applicant's failure to exhaust domestic remedies by making use of the criminal-complaint procedure, and concludes that there has been a violation of Article 3 of the Convention under its procedural limb.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

104. 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

105. The applicant claimed 100,000 euros (EUR) in respect of non-pecuniary damage.

106. The Government contested this claim. They considered it excessive and groundless.

107. The Court accepts that the applicant suffered humiliation and distress on account of the ill-treatment inflicted on him by his cellmates. In addition, as a person in a vulnerable position, the Government failed to protect him, and he did not have the benefit of an effective investigation into his complaints of ill-treatment. In these circumstances, the Court considers that the applicant's suffering and frustration cannot be compensated for by a mere finding of a violation. Making its assessment on an equitable basis, and bearing in mind that the applicant received EUR 2,350 in the civil proceedings instituted against the State, it awards the applicant EUR 25,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount (see paragraph 55 above).

B. Costs and expenses

108. The applicant also claimed EUR 2,000 for costs and expenses incurred before the Court.

109. The Government contested this claim, arguing that the applicant had failed to substantiate it.

110. 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 quantum. In the present case, regard being had to the documents submitted by the parties and the above criteria, the Court considers it reasonable to award the sum of EUR 2,000 for costs and expenses incurred in the proceedings before the Court.

C. Default interest

111. 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 to the merits the Government's objection as to non-exhaustion of domestic remedies in respect of the complaint under the procedural aspect of Article 3 of the Convention, and *dismisses* it after considering the merits;

2. *Declares*, unanimously, the application admissible;

3. *Holds*, unanimously, that there has been a violation of Article 3 of the Convention on account of the authorities' failure to protect him against ill-treatment by his cell-mates;

4. *Holds*, unanimously, that there has been a violation of Article 3 of the Convention on account of the authorities' failure to investigate the applicant's allegations of ill-treatment;

5. *Holds*, by five votes to two,
   (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 sums, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 25,000 (twenty five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 2,000 (two 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;

6. *Dismisses*, by five votes to two, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 15 January 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Registrar

Vincent A. De Gaetano
President

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

V.D.G.
J.S.P.

JOINT PARTLY DISSENTING OPINION OF JUDGES PASTOR VILANOVA AND SERGHIDES

(Translation)

1. The majority conclude that the injuries inflicted on the applicant should be characterised generically as ill-treatment (see, for instance, paragraph 83 of the judgment). For our part, we would argue that they should be characterised as torture, as the applicant maintained. Point 3 of the operative provisions states that there has been a violation of the substantive aspect of Article 3 of the Convention on account of the national authorities' failure to protect the applicant against ill-treatment by his cellmates. We voted in favour of that finding in so far as it does not come into direct conflict with the position which we defend. However, we opposed the quantification of non-pecuniary damage (see points 5(i) and 6 of the operative provisions), which we consider to be inadequate since it is broadly in line with the amounts awarded by the Court in cases of inhuman or degrading treatment.

2. We will now elaborate on the reasons which prompted us to consider that the applicant was tortured by fellow inmates, in breach of his right to have his integrity protected by the authorities.

3. It should be observed at the outset that the applicant spent a month in detention pending investigation because he tried to pay a toll with a ten-euro banknote which the authorities initially thought to be counterfeit. They subsequently acknowledged that it was genuine. The applicant alleged that, while in detention, he had been tortured, beaten and raped. Unfortunately, the applicant's allegations of torture and rape were not examined by the majority, even though the Court's usual practice is to specify the type of ill-treatment suffered in the body of the judgment and/or in the operative provisions. As a result, like the applicant, we are unable to address them directly.

4. Nevertheless, we believe that the proof of these allegations does indeed exist. The burden of proof in respect of the rape of the applicant (with its implications for the legal characterisation of the facts) should not lie solely with him, especially since the authorities did not conduct an investigation despite being legally bound to do so (Article 223 § 1 of the Code of Criminal Procedure). It can readily be inferred that the reason why the applicant did not report the incident immediately was because, as he explained, he was very afraid, particularly of the other prisoners who had threatened to kill him if he reported them (see paragraph 14 of the judgment). Nevertheless, it appears that the applicant was moved from his original cell following the meeting with his lawyer, who observed an appreciable change in his behaviour (see paragraph 20). The fact that the authorities agreed to the transfer means that a problem must have existed. It is well known that prisoners are not allowed to change cell unless there is a good reason for it. However, the fact is that no investigation, even of a summary nature, was instituted following that

request. In our view, the lack of an investigation is further evidence, if any were needed, corroborating the applicant's version of events.

5. As regards the burden of proof, our case-law is based on the existence of proof "*beyond reasonable doubt*". This criterion stems from common law and requires conclusive proof in order to override the principle of the presumption of innocence. However, the Court's practice is quite different, in that it has gradually relaxed the rigid nature of this principle, which comes from the sphere of criminal law. For instance, in the absence of direct proof confirming that an act was committed, notably when the alleged abuse occurred while the person concerned was in the custody of the State, our Court is content to rely on other evidence. Thus, it has used evidence arising from the coexistence of sufficiently strong, clear and concordant inferences or similar unrebutted presumptions of fact (see *Labita v. Italy* [GC], no. 26772/95, § 121, 6 April 2000), from primary facts, or contextual facts or sequences of events which can form the basis for inferences about the primary facts, and also from statements by international observers (see *Merabishvili v. Georgia* [GC], no. 72508/13, § 317, 28 November 2017).

One wonders, therefore, whether the expression "*beyond reasonable doubt*" should not be abandoned, as it sits ill with the judicial nature of the Court. It would seem much more sensible to us to use the test of proof on the balance of probabilities, at least in cases concerning Articles 2, 3 and 4 of the Convention.

6. In the instant case it seems clear to us that the applicant's version was detailed, coherent and substantiated. He stated that he had been drugged and subsequently raped and had his head and eyebrows shaved by his cellmates. He added that the removal of his eyebrows was an outward sign that he had been sodomised (see paragraph 18 of the judgment). A double humiliation! Indeed, this fact was confirmed before a judge by four witnesses (see paragraphs 29-32 of the judgment). The Government, for their part, offered no explanation as to the relationship between the shaving and the alleged rape. Their disingenuous silence on the subject should count against them, especially since no effective investigation was carried out by the authorities into the applicant's subsequent allegations of ill-treatment. Such an investigation was all the more vital since the right in issue here has a special ranking under the Convention (Article 3). Nor can the context be overlooked. In that connection, the CPT, in the reports following its visits of September 2004 (paragraphs 87 and 89 of document CPT/Inf(2006) 18, reproduced in paragraph 48 of the judgment) and June 2015 (paragraph 51 of document CPT/Inf(2016) 21, reproduced in paragraph 50 of the judgment), emphasised the very high level of inter-prisoner violence in the prison in question. All this evidence should have served to confirm the applicant's version of events.

7. It is true that the applicant did not produce a medical certificate concerning possible rape. Nevertheless, we consider that this omission does not suffice to automatically cast doubt on his allegations. This is the approach

taken by the Inter-American Court of Human Rights (see, *inter alia*, *J. v. Peru*, § 333, 27 November 2013, and *Espinoza Gonzales v. Peru*, § 152, 20 November 2014), and with which we agree. We cannot overlook the existence of several factors which, in combination, justify this omission: (1) the fear of reprisals, (2) the shortage of doctors in the prison (paragraph 118 of document CPT/Inf(2006) 18 reports the presence of one doctor to take care of 1,200 prisoners), (3) the failure of the prison authorities to act when injuries to prisoners were recorded (paragraph 89 of the report), and (4) the fact that rape does not necessarily leave physical traces, especially after some time has elapsed.

8. The likelihood that the applicant was raped, an extremely serious and cruel act, combined with the other ill-treatment to which he was subjected, should have led the Chamber to find that acts of torture were committed. Even if no rape took place, it could be argued that the shaving of the applicant's eyebrows, coupled with the cruel stares of other people, caused him acute mental distress amounting to an act of torture.

9. One last factor establishes a link between the inhuman experience undergone by the applicant and the State's responsibility. The applicant contended before our Court that all these acts of violence were carried out under the orders or with the tacit approval of the prison authorities, particularly on account of his Croatian nationality. Once again, the Government omitted to respond to this complaint. However, they could not have been unaware of the aftermath of the Balkans war (1992-95) and the atrocities committed at that time. The prison authorities therefore had a duty to prevent possible inter-ethnic tension. Moreover, in its 2006 report the CPT referred to complaints concerning the ill-treatment of prisoners on account of their nationality:

> "At Sremska Mitrovica Penitentiary Reformatory, the CPT's delegation received a considerable number of allegations of physical ill-treatment by staff. Most of the allegations related to before 2004. Nevertheless, the delegation heard a number of recent allegations of slaps and kicks, as well as of verbal abuse, in particular of persons of Roma origin, foreign prisoners and members of national minorities in Serbia" (paragraph 83 of the CPT report CPT/Inf(2006) 18).

Unfortunately, this aspect of the issue is absent from the majority's analysis, in disregard of the Court's case-law on the subject (see *Premininy v. Russia,* no. 44973/04, § 87, 10 February 2011, and *Rodić and Others v. Bosnia and Herzegovina*, no. 22893/05, §§ 69-71, 27 May 2008).

10. We are of the view that the conclusion reached by the majority, who acknowledge the State's responsibility under the substantive aspect of Article 3, is not entirely consistent. One cannot on the one hand accept that the applicant's claims are credible (see paragraph 83 of the judgment), including his account of being shaved and being made to sing Serb nationalist songs, while at the same time reaching a finding that falls short of his claims (by ruling implicitly that he was "only" subjected to inhuman or degrading

treatment), without offering an express and convincing explanation. In sum, this human tragedy was not subjected to the meticulous scrutiny that was fully warranted in the circumstances. Therefore, this dissenting opinion is about more than merely questioning the award made for non-pecuniary damage.

11. The principle of effectiveness, which is inherent in the Convention, including in the provisions of Article 3, cannot be satisfied if the Court does not appropriately ascertain the true nature of an alleged violation under this Article and characterise it accordingly as torture or inhuman or degrading treatment, having regard to the facts of the particular case before it and the degree of seriousness of the said violation. Failure for the Court to do so, as, in our humble view, happened in the present case, will result in: (a) not giving the right under Article 3 its due and fullest weight and effect consistent with its wording and aim and purpose, and (b) awarding an insufficient amount of just satisfaction for non-pecuniary damage under Article 41 of the Convention.

12. To sum up, three serious problems are combined here: the fact that the ill-treatment in question is not expressly characterised in the judgment, the ongoing relevance of the standard of proof "beyond reasonable doubt" and, lastly, the omission to consider a possible discriminatory motive based on the applicant's nationality.