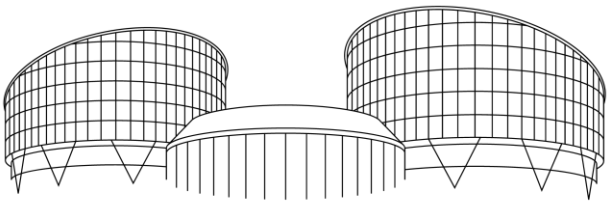

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

FIRST SECTION

CASE OF TOPORKOV v. RUSSIA

(Application no. 66688/01)

JUDGMENT

STRASBOURG

1 October 2009

FINAL

01/01/2010

This judgment may be subject to editorial revision.

In the case of Toporkov v. Russia,

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

Christos Rozakis, *President*,
Anatoly Kovler,
Elisabeth Steiner,
Dean Spielmann,
Sverre Erik Jebens,
Giorgio Malinverni,
George Nicolaou, *judges*,

and André Wampach, *Deputy Section Registrar*,

Having deliberated in private on 10 September 2009,

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

PROCEDURE

1. The case originated in an application (no. 66688/01) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Sergey Leonidovich Toporkov ("the applicant"), on 28 July 2000.

2. The applicant was represented by Ms K. Kostromina, a lawyer practising in Moscow. The Russian Government ("the Government") were initially represented by Mr P. Laptev, former Representative of the Russian Federation at the European Court of Human Rights, and subsequently by Mr G. Matyushkin, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that he had been subjected to threats and beatings while in police custody on 9 March and 27 April 1999.

4. On 8 July 2005 the Court decided to give notice of the application to the Government.

5. By a decision of 27 November 2008 the Court joined to the merits the Government's objection concerning the exhaustion of domestic remedies in respect of the applicant's complains under Articles 3 and 13 of the Convention about the ill-treatment in custody and the ensuing investigation, declared admissible the said complaints and declared inadmissible the remainder of the application.

6. The Government, but not the applicant, filed further written observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1968 and is serving a prison sentence in Sorda, in the Kirov region.

A. The applicant's detention in March 1999

8. On 9 March 1999 senior police officer U. sent his subordinates, including officers M. and Sh., to arrest the applicant at his flat and take him to the Regional Department of the Interior (УВД Кировской области) for questioning with regard to several cases of theft. According to the applicant, the police officers put him in the back seat of the car, where they started beating him to make him confess to the thefts until he almost lost consciousness. At the police station he was handcuffed and stripped naked in the presence of the police officers and Ms B., an investigator. One of the police officers pulled a knitted hat down over his eyes. Then they pinned him to the table and threatened to rape him with a rubber truncheon.

9. In the evening of the same day the applicant was taken to the Kirov temporary detention facility (*ИВС г. Кирова*), where he was held for two days.

10. Following the prosecutor's refusal to authorise the applicant's detention pending investigation, the applicant was released on 12 March 1999 on a written undertaking that he would not leave town.

11. On 15 March 1999 the applicant was examined by a general practitioner and a surgeon at Severnaya Hospital in Kirov. The applicant complained to the doctors that he had been beaten up by police officers and was experiencing pain in the lumbar region. The excerpt from the applicant's medical file read as follows:

> "15 March 1999. On 10 March 1999 [the applicant] was beaten up at the police station. Since then [he] has been bothered by pain in the right lumbar and subcostal region. No dysuria. Satisfactory general condition. Blood pressure measurement 120/80 mmHg. Clear heart beat. Vesicular breathing. Soft abdomen, moderate pain in the right subcostal region. Painful muscle palpation in the right lumbar region. Diagnosis: contusion (*ушиб*) in the lumbar region?"

B. The applicant's arrest in April 1999

12. On 27 April 1999 investigator B. summoned the applicant for questioning in connection with a case of robbery. The applicant denied involvement in the robbery. Despite a refusal by the prosecutor to place the

applicant in custody, he was allegedly detained at the police station, where he spent the night sitting on a chair handcuffed to a radiator.

13. After the applicant had been identified by a witness as one of the alleged perpetrators, the prosecutor authorised his detention pending investigation on 28 April 1999.

14. On 29 April 1999 the applicant appointed Ms O., a lawyer, to represent him in the criminal proceedings against him.

C. The investigation into the applicant's complaints of alleged ill-treatment

15. On an unspecified date the applicant made complaints of ill-treatment to the Kirov Town Prosecutor's Office.

16. On 21 June 1999 the assistant prosecutor of Kirov Town refused to institute criminal proceedings against the police officers. The assistant prosecutor based her findings on statements made by the police officers and Investigator B., who denied the applicant's allegations, and on the applicant's medical file. In particular, the assistant prosecutor stated as follows:

> "...On 10 June 1999 the Kirov Town Prosecutor's Office received a complaint by [the applicant]...in which he alleges that officers Sh. and B. of the Internal Affairs Department used unlawful methods of investigation. In particular, they subjected him to physical and mental pressure to make him confess to the offences he was charged with... [The applicant] contests his guilt and requests to be released from custody.
>
> ...Furthermore [the applicant] indicates that on 10 March 1999 he was unlawfully detained... On the way to the [police station] he was beaten, the beatings continued upon arrival, the officers bullied and humiliated him ... Investigator B. was also present ...
>
> Officer M. submits that he participated in [the applicant's] arrest... On the way to the [police station] there was no need for them to apply physical force. [The applicant] had voluntarily agreed to come [to the police station] with the officers. At [the police station] [M.] talked to [the applicant] briefly until Investigator B. was available [to question him]. However, [M.] did not apply physical or mental pressure [to the applicant], he did not humiliate or debase him as he was not personally or professionally interested in finding [the applicant] guilty because [M.] did not know the applicant and the cases he dealt with did not involve [him]. He was only assigned to conduct a search at [the applicant's] flat. [Senior officer] U. confirmed that he had sent his subordinates, including M., to arrest [the applicant], but had not talked to him himself.
>
> According to Investigator B., she was in charge of the criminal case involving [the applicant] ... On 9 March 1999 she ordered his arrest ... He was brought [to the police station] by police officers ... She did not see any injuries on him. Nor did he complain to her that he had been beaten on the way to the [police station]. In her presence none of the police officers of the department had pressured [the applicant physically or

mentally] ... The prosecutor refused to authorise his detention and [the applicant] was released on a written undertaking not to leave the town ...

According to a report from the temporary detention unit where [the applicant] was held from 9 to 11 March 1999, he did not request medical assistance and did not have any bodily injuries ...

An excerpt from the [the applicant's] medical file states that on 15 March 1999 he consulted a general practitioner complaining that he had been beaten at [the police station] on 10 March 1999... However, it is impossible to establish beyond reasonable doubt that the applicant's injuries were caused by the police officers. On 10 March 1999 the applicant was held at the temporary detention unit ... and did not ask for medical assistance. Furthermore, he was released from the temporary detention unit on 11 March 1999, but he did not consult [the doctors] until 15 March 1999, that is, four days later. During that period he could have been injured in different circumstances ...

The applicant's allegations are not consistent with the findings of the inquiry. This indicates that the applicant is trying to mislead the prosecutor's office and the court with regard to his guilt."

17. The prosecutor also dismissed as unfounded the applicant's complaint that he was handcuffed on the night of 27 April 1999.

D. The trial

18. In September 1999 the Oktyabrskiy District Court in Kirov opened the trial. The applicant maintained his innocence and alleged, *inter alia*, that the police officers had used unlawful investigation methods to make him and other defendants confess to the crimes, which resulted in the false testimonies against him given by other defendants.

19. On 23 November 1999 the District Court found the applicant guilty of robbery and theft and sentenced him to twelve years' imprisonment. The court dismissed the applicant's allegations that he had been subjected to beatings and unlawful investigation methods while in police custody, stating as follows:

"The court cannot accept the allegations made by defendants K., O. and [the applicant] that police officers subjected them to psychological or physical pressure during the investigation. As pointed out earlier, the prosecutor's office conducted thorough inquiries in respect of the actions of the police officers, and the [defendants'] allegations proved to be unfounded .... Furthermore, the court questioned officers Sh., U., M. and [investigator] B., who had been involved in the criminal investigation. They testified to the court that they had not subjected the defendants to any unlawful treatment. The Court has no reason to doubt their testimonies, given that they... had been warned of their criminal liability for perjury or refusal to testify."

20. The applicant appealed against his conviction, alleging, in particular, that the police officers had subjected him to ill-treatment.

21. On 22 February 2000 the Kirov Regional Court upheld the applicant's conviction on appeal. The court did not make a specific ruling on the applicant's allegations of ill-treatment.

E. Authorities' further responses to the applicant's complaints

22. On 17 August 2000 the applicant lodged a complaint about his conviction and ill-treatment with the Kirov Regional Prosecutor. On an unspecified date he forwarded a similar complaint to the General Prosecutor of the Russian Federation.

23. On 30 August 2000 the First Deputy Regional Prosecutor responded that the applicant's conviction was in compliance with law. As regards the applicant's complaint of the ill-treatment, the prosecutor noted as follows:

> "The [applicant's] allegations that he had been subjected to physical and psychological pressure lack any substantiation. The Kirov Town Prosecutor's Office had earlier conducted an inquiry and refused to open a criminal investigation."

24. On 31 September 2001 the General Prosecutor's Office informed the applicant that they did not discern any irregularities in the way the courts had determined the criminal charges against him. Nor had "any unlawful methods of investigation" been employed against the applicant.

II. RELEVANT DOMESTIC LAW AND PRACTICE

25. A prosecutor, investigator or judge is under an obligation to accept for review any complaint concerning a criminal offence and to decide whether a criminal investigation is necessary. They may request relevant material or explanations (Article 109 of the Russian Code of Criminal Procedure in force until 1 July 2002, the "old CCrP").

26. Where there are sufficient grounds to believe that a crime has been committed, the prosecutor, the investigator or the judge initiates a criminal investigation (Article 112 of the old CCrP).

27. The complainant may appeal against the refusal to open a criminal investigation to a prosecutor or a court (Article 113 of the old CCrP).

THE LAW

I. THE GOVERNMENT'S OBJECTION AS TO THE NON-EXHAUSTION OF EFFECTIVE REMEDIES

28. The Court joined to the merits the Government's objection concerning exhaustion of domestic remedies in respect of the applicant's complaints of ill-treatment under Article 3 and 13 of the Convention and about the ensuing investigation (see *Toporkov v. Russia* (dec.), no. 66688/01, 27 November 2008).

29. In particular, the Government submitted that the applicant had failed to exhaust domestic remedies in that he had not challenged the Kirov Town Assistant Prosecutor's refusal to open a criminal case by applying to a superior prosecutor or to a court.

30. The applicant asserted that he had exhausted domestic remedies because he had complained to the Regional Prosecutor and the General Prosecutor, and had raised the complaint during his trial, but all his attempts to bring the perpetrators to justice had been to no avail.

31. As regards an appeal to a superior prosecutor, the Court has already held that it does not constitute an effective remedy within the meaning of Article 35 of the Convention (see, among other authorities, *Slyusarev v. Russia* (dec.), no. 60333/00, 9 November 2006).

32. The position is different, however, with regard to the possibility of challenging before a court of general jurisdiction a prosecutor's decision not to investigate complaints of ill-treatment. The Court has previously held that in the Russian legal system the power of a court to reverse a decision not to institute criminal proceedings is a substantial safeguard against the arbitrary exercise of powers by the investigating authorities (see *Trubnikov v. Russia* (dec.), no. 49790/99, 14 October 2003).

33. Turning to the circumstances of the instant case, the Court observes that, instead of pursuing a normal avenue of appeal against the assistant prosecutor's decision of 21 June 1999 by submitting his complaint about it to a district court in a separate set of proceedings, the applicant raised the ill-treatment issue before the same court during the trial. The court took cognisance of the merits of the applicant's complaint, reviewed the assistant prosecutor's findings summed up in her decision of 21 June 1999, questioned the applicant and the alleged perpetrators, and ruled that there was no case to answer against them. Its findings were upheld by the Regional Court on appeal.

34. The Court reiterates that non-exhaustion of domestic remedies cannot be held against the applicant if, in spite of the latter's failure to observe the formalities prescribed by law, the competent authority has nevertheless examined the substance of the claim (see, *mutatis mutandis,*

Dzhavadov v. Russia, no. 30160/04, § 27, 27 September 2007; *Skałka v. Poland* (dec.), no. 43425/98, 3 October 2002; *Metropolitan Church of Bessarabia and Others v. Moldova* (dec.), no. 45701/99, 7 June 2001; and *Edelmayer v. Austria* (dec.), no. 33979/96, 21 March 2000). The Court finds in the particular circumstances of the present case that, by raising before the trial and appeal courts a complaint concerning ill-treatment and the inadequacy of its investigation, the applicant provided the domestic authorities with the opportunity to put right the alleged violation and thus cannot be said to have failed to exhaust domestic remedies. The Court is not convinced that a challenge to the assistant prosecutor's decision through the avenue of a separate set of proceedings before the same courts would have been more successful, or that it would have been decided on the basis of different material.

35. It follows that the applicant cannot be said to have failed to exhaust domestic remedies because he did not lodge a separate judicial complaint against the assistant prosecutor's decision of 21 June 2001. Thus, the Government's objection as to the non-exhaustion of domestic remedies must be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

36. The applicant complained that he had been subjected to ill-treatment while in police custody in breach of Article 3 of the Convention which reads as follows:

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

37. The Government denied the applicant's allegations of ill-treatment, referring to the fact that he had no visible injuries on his body after the events in question. Nor had he sought medical assistance when detained in the temporary detention unit between 9 and 11 March 1999. The applicant had been released from custody on 12 March 1999. He had consulted the doctors only on 15 March 1999. It was possible that he had sustained the contusion in the lumbar region between 12 and 15 March 1999 when he had been at large. The prosecutor had conducted a proper investigation and had dismissed the applicant's allegations as unsupported by evidence and found no case to answer against the alleged perpetrators. The prosecutor's findings confirmed that the criminal investigation against the applicant had been conducted in strict compliance with the rules of criminal procedure. The applicant's allegations had been verified by the competent authorities and rejected as ill-founded. The Government relied on the assistant prosecutor's decision of 21 June 1999. According to the Government's memorandum of 1 November 1005, they could not submit any other material pertaining to the prosecutor's inquiry since all such material had been destroyed on the

expiry of the time-limit for its storage. In their additional observations of 29 January 2009, the Government submitted that the material in question had been destroyed on 5 April 2004. The Government also submitted a statement made by Investigator B. on 8 August 2005 in which she denied the applicant's allegations.

38. The applicant maintained his complaint. As regards the statement by B. submitted by the Government, the applicant argued that it could not be taken into consideration since it had been made some six years after the events in question.

39. The Court reiterates that allegations of ill-treatment must be supported by appropriate evidence. To assess this evidence, the Court adopts the standard of proof "beyond reasonable doubt" but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Labita v. Italy* [GC], no. 26772/95, § 121, ECHR 2000-IV).

40. Where an individual claims to have been injured by ill-treatment in custody, the Government is under an obligation to provide a complete and sufficient explanation as to how the injuries were caused (see *Ribitsch v. Austria*, 4 December 1995, § 34, Series A no. 336).

41. The 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 is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim. In respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 (see *Assenov and Others v. Bulgaria*, 28 October 1998, § 94, *Reports of Judgments and Decisions* 1998-VIII).

42. The Court considers that the contusion diagnosed by the doctors who examined the applicant indicate that his injuries were sufficiently serious to amount to ill-treatment within the scope of Article 3 (compare *Assenov and Others*, cited above, § 95). It remains to be considered whether the State should be held responsible under Article 3 in respect of those injuries.

1. Alleged ill-treatment

43. Turning to the circumstances of the present case, the Court observes that the parties did not dispute that the applicant sustained the injuries. They disagreed as to their time and cause.

44. The Court notes that the medical evidence submitted by the parties conclusively demonstrates that the applicant had a contusion in the lumbar region six days after the events in question. However, the remainder of the material in the Court's possession, including the results of the authorities'

inquiry into the applicant's allegations of ill-treatment, does not elucidate the disputed facts as to the time and cause of the applicant's injuries.

45. In the circumstances of the case, the Court finds it impossible to establish "beyond reasonable doubt" whether or not the applicant's injuries were caused by the police as he alleged. Accordingly, the Court cannot but conclude that there has been no violation of Article 3 of the Convention under its substantive limb.

2. Adequacy of the investigation

46. The Court does, however, consider that the medical evidence and the fact that the applicant was being held in custody until three days before he sought medical assistance raise a reasonable suspicion that the injuries he sustained might have been caused by the police.

47. The Court reiterates that where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's 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 *Assenov and Others*, cited above, § 102).

48. An obligation to investigate "is not an obligation of result, but of means": not every investigation should necessarily be successful or come to a conclusion which coincides with the claimant's account of events; however, it should in principle be capable of leading to the establishment of the facts of the case and, if the allegations prove to be true, to the identification and punishment of those responsible (see *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 71, ECHR 2002-II, and *Mahmut Kaya v. Turkey*, no. 22535/93, § 124, ECHR 2000-III).

49. An investigation into serious allegations of ill-treatment must be thorough. That means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis for their decisions (see *Assenov*, cited above, §§ 103 et seq.). They must take all reasonable steps available to them to secure evidence concerning the incident, including, *inter alia*, eyewitness testimony and forensic evidence (see, *mutatis mutandis*, *Salman v. Turkey* [GC], no. 21986/93, § 106, ECHR 2000-VII; *Tanrıkulu v. Turkey* [GC], no. 23763/94, ECHR 1999-IV, § 104 et seq.; and *Gül v. Turkey*, no. 22676/93, § 89, 14 December 2000). Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard.

50. Furthermore, the investigation must be expedient. In cases under Articles 2 and 3 of the Convention, where the effectiveness of the official

investigation is at issue, the Court has often assessed whether the authorities reacted promptly to the complaints at the relevant time (see *Labita v. Italy*, cited above, § 133 et seq.). Consideration is given to the the date of commencement of investigations, delays in taking statements (see *Timurtaş v. Turkey*, no. 23531/94, § 89, ECHR 2000-VI, and *Tekin v. Turkey*, 9 June 1998, *Reports* 1998-IV, § 67), and the length of time taken to complete the initial investigation (see *Indelicato v. Italy*, no. 31143/96, § 37, 18 October 2001).

51. Turning to the facts of the present case, the Court observes that the authorities did carry out an inquiry into the applicant's allegations. The assistant prosecutor conducted it promptly and informed the applicant of the result without undue delay. The Court is not convinced, however, that the inquiry was sufficiently thorough and effective to meet the requirements of Article 3.

52. As regards the thoroughness of the investigation, the Court notes a number of significant omissions capable of undermining its reliability and effectiveness. Firstly, when refusing to institute the criminal proceedings against the police officers, the assistant prosecutor confined herself to questioning the investigator and some of the police officers involved. At no point did she talk to the applicant or organise a confrontation between him and the police officers or investigator B. Nor did she try to identify and question any potential witnesses in an attempt to elucidate the events under inquiry. The Court finds it also striking that the assistant prosecutor even failed to question all the alleged perpetrators. For example, officer Sh. was summoned to testify on the issue only in court, whereas the applicant clearly indicated him as one of the perpetrators.

53. Secondly, the Court observes that the assistant prosecutor applied different standards when assessing the credibility of the applicant and that of B. and the police officers. She considered the applicant's complaint to be an attempt to evade criminal responsibility. However, she accepted the statements made by B. and the police officers even though they could also have been interpreted as similar attempts on their part. In the Court's view, the credibility of the alleged perpetrators should have been subjected to equally strict scrutiny since the inquiry was supposed to establish whether they were to be prosecuted on disciplinary or criminal charges.

54. The Court further observes that no attempt was made to explain the inconsistency between the applicant's allegations and the testimonies of the police officers by reference to medical data. No expert opinion was commissioned as to the possibility of the contusion having been caused by the alleged ill-treatment, or to rule out such a possibility. Nor did the prosecutor question the doctors who had attended the applicant. The investigation made by the Regional Prosecutor and the General Prosecutor did not in any way rectify the above shortcomings.

55. The subsequent investigation carried out by the trial court in response to the applicant's complaint did not seem to rectify the omissions of the assistant prosecutor's inquiry. In fact, the court did not discern any flaws in the inquiry and stated in the verdict that it had been thorough. Admittedly, the court did not confine itself to the review of the assistant prosecutor's findings and examined in person the alleged perpetrators, including officer Sh., thus providing the applicant with an opportunity to confront them and challenge their credibility. However, similar to the assistant prosecutor, the trial court rejected the applicant's allegations and gave preference to the account of the events provided by the police officers and investigator B. only because they had been warned of criminal liability for perjury. Neither the appeal court nor superior prosecutors took any further action to investigate the applicant's allegations. They dismissed his complaints on the basis of the findings of the subordinate prosecutor's office and the trial court.

56. Lastly, the Court notes that, apart from a copy of the assistant prosecutor's decision of 21 June 1999 and a statement made by B. some six years after the events in question, the Government have provided no relevant material to substantiate their argument that the investigation in response to the applicant's complaint of ill-treatment was effective. They submitted that the file had been destroyed owing to the expiry of the time-limit for its storage.

57. Having regard to the above, the Court finds that the authorities failed to carry out an effective investigation into the applicant's allegations of ill-treatment. Accordingly there has been a violation of Article 3 of the Convention in this respect.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

58. The applicant complained that the investigation into his allegations of ill-treatment was ineffective contrary to Article 13 of the Convention, which provides:

> "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."

59. The Court observes that this complaint concerns the same issues as those examined above under the procedural limb of Article 3 of the Convention (see paragraphs 46-57). Having regard to its conclusion above under Article 3 of the Convention, the Court considers it unnecessary to examine those issues separately under Article 13 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

60. 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."

61. On 4 December 2008 the Court invited the applicant to submit his claims for just satisfaction. The applicant did not submit any such claims. Accordingly, the Court makes no award in this respect.

62. The applicant did not submit a claim for costs and expenses. Accordingly, the Court considers that there is no call to award him any sum on that account.

FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the Government's objection as to the exhaustion of domestic remedies in respect of the applicant's complaint about ill-treatment;

2. *Holds* by six votes to one that there has been no violation of Article 3 of the Convention on account of the applicant's allegations of ill-treatment by the police;

3. *Holds* unanimously that there has been a violation of Article 3 of the Convention on account of the authorities' failure to carry out an effective and thorough investigation into the applicant's allegations of ill-treatment by the police;

4. *Holds* unanimously that there is no need to examine the complaint under Article 13 of the Convention.

Done in English, and notified in writing on 1 October 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach
Deputy Registrar

Christos Rozakis
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following opinions are annexed to this judgment:

(a) concurring opinion of Judge Malinverni;

(b) partly dissenting opinion of Judge Spielmann.

C.L.R.
A.M.W.

CONCURRING OPINION OF JUDGE MALINVERNI

(Translation)

1. I voted in favour of finding no violation of Article 3 in its substantive aspect, but only after having hesitated for a long time. I am not certain that, in the instant case, the applicant was not a victim of a violation in this respect also. In addition to the blows allegedly inflicted on him, he complains of having been subjected to a whole series of other forms of ill-treatment while in police detention. In particular, he alleges that he was obliged to undress completely, although there was a woman among the police officers present. He was also allegedly threatened with rape with a "rubber truncheon" (see paragraph 8). A few days later, he spent the entire night sitting in a chair, handcuffed to a radiator (paragraph 12).

2. In concluding that there was no violation of Article 3 in its substantive aspect, the judgment has focused on "the contusion diagnosed by the doctors who examined the applicant", which "indicate[s] that [these] injuries were sufficiently serious to amount to ill-treatment within the scope of Article 3" (paragraph 42). The Court concludes, however, that "the material in its possession does not elucidate the disputed facts as to the time and cause of the applicant's injuries" (paragraph 44). Consequently, "the Court cannot but conclude that there has been no violation of Article 3 of the Convention under its substantive limb" (paragraph 45). The Court thus limits its examination to "visible injuries on the victim's body".

3. I am not entirely convinced by this method of proceeding. By focusing exclusively on ill-treatment that leaves visible traces on the victim's body, does the Court not run the risk of passing over treatment which does not leave such traces, and which is equally prejudicial to human dignity?

4. Indeed, can one reasonably consider that the applicant invented all of the ill-treatment that he recounted in detail and which is referred to in paragraphs 8 and 12 of the judgment? It should not be forgotten that such treatment is impossible to prove, given that the only witnesses present were precisely those individuals accused of inflicting it.

5. Faced with the impossibility of providing evidence of a substantive breach of Article 3, the Court salves its conscience by finding a procedural violation of that provision. Is this not to take the easy way out? Is it not also to forget that a procedural violation does not have the same seriousness as a substantive violation?

6. In conclusion, in a case such as this, must the Court really always stick to the principle that, in order to be taken into consideration, the facts must have been established "beyond reasonable doubt"? I have grave reservations on this subject, and that is why I have felt it necessary to write these few lines.

PARTLY DISSENTING OPINION OF JUDGE SPIELMANN

1. I agree with the conclusion finding a violation of Article 3 of the Convention on account of the authorities' failure to carry out an effective and thorough investigation into the applicant's allegations of ill-treatment by the police.

2. However, I cannot share the majority's opinion that there was no violation of Article 3 in its substantive aspects as regards the alleged ill-treatment.

I. As to the factual circumstances of the case

3. According to the applicant, the police officers, after having arrested him on 9 March 1999, put him in the back seat of the car, where they started beating him to make him confess to the thefts until he almost lost consciousness. At the police station he was handcuffed and stripped naked in the presence of the police officers and Ms B., an investigator. One of the police officers pulled a knitted hat down over his eyes. Then they pinned him to the table and threatened to rape him with a rubber truncheon (see paragraph 8 of the judgment).

4. The applicant was released on 12 March 1999 (paragraph 10 of the judgment) and he was examined three days later by a general practitioner and a surgeon who took into account his allegations of ill-treatment and made a diagnosis of contusion as specified in paragraph 11 of the judgment.

5. In paragraph 42 of the judgment, the Court rightly "considers that the contusion diagnosed by the doctors who examined the applicant indicate that his injuries were sufficiently serious to amount to ill-treatment within the scope of Article 3". And yet the majority give the State the benefit of the doubt, raising the question "whether the State should be held responsible under Article 3 in respect of those injuries".

6. In my view there is no doubt that the State should be held responsible. To support the contrary view, the majority rely in paragraph 44 of the judgment *inter alia* on "the results of the authorities' inquiry into the applicants' allegations of ill-treatment", an inquiry which has been held to fall short of the requirements of Article 3 (paragraphs 46-57 of the judgment).

7. For my part, I am satisfied that the applicant has, at the least, established an arguable claim. As the Court rightly notes in paragraph 46 of the judgment, "the medical evidence and the fact that the applicant was being held in custody until three days before he sought medical assistance raise a reasonable suspicion that the injuries he sustained might have been caused by the police".

8. It goes without saying that a particularly thorough scrutiny should be applied where the applicant raises an arguable complaint of ill-treatment. In my view, the majority view does not take sufficient account of the enormous difficulties faced by the applicant in gathering evidence.

9. The applicant's arguable complaint of ill-treatment should have prompted a serious and detailed investigation. The numerous shortcomings of the investigation have led the Court to find a violation of the procedural limb of Article 3. The inadequacy of the investigation deprived the Court of more precise information concerning the substance of the claim.

II. As to the uncertainties surrounding the burden and standard of proof in proceedings concerning alleged violations of Article 3 of the Convention

10. As I have already explained in my partly dissenting opinion in the case of *Alibekov v. Russia* (no. 8413/02, 14 May 2009), a case of this nature highlights once again the two technical problems faced by the Court when it comes to establishing the factual circumstances relating to allegations of ill-treatment.

11. Firstly, there is the question of the burden of proof and, secondly, the question as to the standard of proof.

12. As to the *burden of proof*, in the event of an arguable complaint of ill-treatment, I am of the opinion that the onus of proof should shift to the State to provide a full account of the events.[1] In the present case, as in the case of *Alibekov*, the State has provided nothing by way of explanation. The Court found in this respect a procedural violation of Article 3 of the Convention.

13. As to the *standard of proof*, I would like to emphasise firstly that in exceptional cases such as the present one, the standard of proof "beyond reasonable doubt" is too stringent a standard to be of practical use. Indeed, one should not forget that the victim of alleged violations of Article 3 is, in most cases, deprived of the means of substantiating his grievance and the only evidence he can produce is his own testimony.[2] Admittedly, the Court has never softened this standard in its case-law.[3] However, as Judge Bonello pointed out in his partly dissenting opinion in the case of *Sevtap Veznedaroğlu v. Turkey* (no. 32357/96, 11 April 2000),

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[1] See Judge Bonello's partly dissenting opinion in the case of *Sevtap Veznedaroğlu v. Turkey*, no. 32357/96, 11 April 2000.

[2] See Loukis Loucaides, "Standards of Proof in Proceedings Under the European Convention on Human Rights", in *Présence du droit public et des droits de l'homme. Mélanges offerts à Jacques Velu*, Brussels, Bruylant, 1992, p. 1431, and reprint in *Essays on the Developing Law of Human Rights*, Leiden, Boston, Martinus Nijhoff, 2007, p. 158.

[3] On the standard of proof, see Patrick Kinsch, "On the Uncertainties surrounding the Standards of Proof in Proceedings before International Courts and Tribunals", in *Individual Rights and International Justice, Liber Fausto Pocar*, Milan, Giuffrè Editore, 2009, p. 427.

> "expecting those who claim to be victims of torture to prove their allegations 'beyond reasonable doubt' places on them a burden that is as impossible to meet as it is unfair to request. Independent observers are not, to my knowledge, usually invited to witness the rack, nor is a transcript of proceedings in triplicate handed over at the end of each session of torture; its victims cower alone in oppressive and painful solitude, while the team of interrogators has almost unlimited means at its disposal to deny the happening of, or their participation in, the gruesome pageant. The solitary victim's complaint is almost invariably confronted with the negation 'corroborated' by many." (see paragraph 14 of the opinion)

14. In my view, therefore, the time has come for the Court to reconsider its traditional approach as to the burden and standard of proof in those cases where it identifies numerous and serious shortcomings in the investigation.

III. As to the consequences to be drawn from an inadequate and ineffective investigation

15. However, even applying the traditional standard of "proof beyond reasonable doubt", I am of the opinion that the Court should have found a violation of Article 3 in its substantive aspect.

16. The applicant set out his complaint in a coherent and convincing manner. He presented an arguable claim based on credible assertions which, regrettably, did not prompt an effective and thorough official investigation.

17. Consequently, in my view, the inadequacy and ineffectiveness of the investigation into the applicant's complaint amounts not only to a violation of the procedural aspect of the complaint in question. It amounts also to a strong corroboration of the same complaint in its substantive aspects, as there is a serious risk that a deficient investigation covered up guilty behaviour by the members of the police. Indeed, in the present case "the assistant prosecutor confined herself to questioning the investigator and some of the police officers involved" (paragraph 52 of the judgment).

18. As Judge Loucaides rightly pointed out in his dissenting opinion in the case of *Petropoulou-Tsakiris v. Greece* (no. 44803/04, 6 December 2007), the majority's approach may encourage the authorities to use unacceptable methods of investigation into facts amounting to ill-treatment in respect of individuals such as the applicant or other persons who do not have eyewitnesses to corroborate their complaints of ill-treatment. This is particularly true with regard to violence within the closed environment of a police car and a police station. Or, as Judge Bonello put it in his partly dissenting opinion in the case of *Veznedaroğlu v. Turkey*, "[the applicant] has been penalised for not coming up with evidence that the Convention *obliges* the State to procure" (see paragraph 19 of the opinion).

19. In the case of *Ireland v. the United Kingdom* (18 January 1978, § 161, Series A no. 25), the Court stated that it

> "adopts the standard of proof beyond reasonable doubt but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or

of similar unrebutted presumptions of fact. In this context the **conduct of the Parties** when evidence is being obtained has to be taken into account". (emphasis added)"[1]

20. To sum up, and in the light of the above, I believe that the applicant's version of events is true and I am satisfied that there has been a violation of Article 3 in its substantive aspect.

[1] See also the partly dissenting opinion of Judge Loucaides, joined by myself, in the case of *Zubayrayev v. Russia* (no. 67797/01, 10 January 2008).