



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

FIRST SECTION

CASE OF VLADIMIR ROMANOV v. RUSSIA

(Application no. 41461/02)

JUDGMENT

STRASBOURG

24 July 2008

FINAL

26/01/2009

This judgment may be subject to editorial revision.

In the case of Romanov v. Russia,

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

Christos Rozakis, *President*,

Nina Vajić,

Anatoly Kovler,

Khanlar Hajiyeu,

Dean Spielmann,

Giorgio Malinverni,

George Nicolaou, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 3 July 2008,

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

PROCEDURE

1. The case originated in an application (no. 41461/02) 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 Vladimir Anatolyevich Romanov (“the applicant”), on 21 October 2002.

2. The applicant was represented by Ms M. Bystrova, a lawyer practising in Ivanovo. The Russian Government (“the Government”) were represented by Mr P. Laptev, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that he had been severely beaten up in a detention facility, that there had been no effective investigation of his complaints of ill-treatment and that he had not been afforded an adequate opportunity to confront two prosecution witnesses at the trial proceedings.

4. On 3 June 2005 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

5. The Government objected to the joint examination of the admissibility and merits of the application. Having examined the Government’s objection, the Court dismissed it.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1973 and lived until his arrest in the town of Ivanovo.

A. Criminal proceedings against the applicant

7. On 27 October 2000 four individuals attacked Mr I. near his flat, beat him up and attempted to rob him. Mr I. fought back and the attackers ran away.

8. Three days later the applicant was arrested on suspicion of having attempted to rob Mr I. in conspiracy with Mr B. and Mr V. The arrest record indicated that he had been arrested for disorderly conduct. The applicant was placed in detention facility no. IZ-37/1.

9. An investigator interviewed Mr B. and Mr V. who were drug addicts and were suffering from drug withdrawal syndrome. They confessed to robbery, committed with the applicant. According to the applicant, they had confessed because policemen had promised to supply them with drugs. The applicant insisted that in October and November 2000 Mr B. and Mr V. had written statements confessing to the robbery after the policemen had given them drugs.

10. On 30 October 2000 emergency doctors visited Mr V. The medical report of 30 October 2000 showed that Mr V. was a drug addict and that he had been provided with medical assistance. On 5 and 6 November 2000 the emergency doctors examined Mr B. He was diagnosed with drug addiction and withdrawal syndrome. Medical assistance was provided.

11. On 2 November 2000 the applicant had a confrontation interview with Mr I. who stated that four men wearing balaclava masks had attempted to rob him on 27 October 2000. Mr I. noted that the applicant was of the same height as one of the attackers. The applicant did not dispute Mr I.'s submissions and did not ask any questions.

12. While being questioned by the investigator the applicant admitted that he had intended to beat Mr I. up because a friend had asked him to do it. He denied that he had ever attempted to rob Mr I. The applicant maintained that testimony at the trial.

13. On 26 October 2001 the applicant was committed to stand trial before the Frunzenskiy District Court of Ivanovo.

14. A lawyer representing Mr V. successfully asked the District Court to examine the medical report of 30 October 2000 indicating that Mr V. was a drug addict.

15. At the trial Mr V. and Mr B. retracted their confessions made during the pre-trial investigation. They claimed that they had confessed to the robbery under the influence of drugs and in the absence of a lawyer. They insisted that on 27 October 2000 they had met Mr I. but had merely intended to beat him up and had had no intention of robbing him.

16. Mr I. did not attend the trial and the District Court found that there were “good reasons” for his absence. The Government, relying on a written statement by a District Court secretary, submitted that on 29 November 2001 Mr I. had notified the secretary by telephone that he had not been able to attend the trial hearings as he had been in another country. Mr I. had confirmed his statements made during the pre-trial investigation. The Government also produced a written statement issued on 28 November 2001 by a lay assessor who had sat in the applicant’s case. According to the lay assessor, Mr I.’s wife informed her by telephone that Mr I. had left Russia and had been unable to come back before 3 December 2001.

17. At the hearing on 29 November 2001 the District Court read out depositions made by Mr I. on 23 April and 8 May 2001. The court record indicated that the District Court had not asked the applicant or his lawyer whether they had agreed to the reading of the depositions. According to the depositions, on 27 October 2000 Mr I. opened the entrance door and saw four men wearing balaclava masks. One of them hit him in the face. Mr I. attempted to close the door but an attacker followed him into the flat. The entrance door of the flat accidentally closed and other perpetrators could not enter. Mr I. fought the attacker, opened the entrance door and was able to push the attacker out of the flat. After he had opened the door, he saw another man, whom he identified as the applicant. The applicant hit Mr I. with the handle of a gun and ran away. Mr I. claimed that the attackers had intended to rob him.

18. The District Court summonsed three witnesses, Mr L., Mr S. and Mr T. Mr L. and Mr S. attended the trial and testified that on 27 October 2000, the day of the alleged robbery, they had seen four men running but had not been able to identify them. Mr T., who lived in Israel, did not appear at the trial and his depositions made during the pre-trial investigation were read out. His statements were identical to those given by Mr L. and Mr S.

19. On 9 January 2002 the Frunzenskiy District Court of Ivanovo found the applicant guilty of aggravated robbery and sentenced him to eleven years and three months’ imprisonment. The court issued a confiscation order in respect of the applicant’s property.

20. The District Court based its judgment on the depositions by Mr I. made during the pre-trial investigation, the testimony by Mr L. and Mr S., the deposition by Mr T. made during the pre-trial investigation, the confession statements made by Mr V. and Mr B. during the pre-trial investigation, and the applicant’s statements in which he had admitted that

on 27 October 2000 he had visited Mr I. but had not robbed him. The District Court noted that it had not been established of what property the defendants had intended to rob Mr I.

21. The District Court rejected the co-defendants' arguments that they had confessed in a state of drug intoxication. It noted that there was no indication that Mr V. and Mr B. had been forced to confess or that they had been administered drugs to induce them to admit their guilt. Throughout the pre-trial investigation they had given consistent and detailed statements in the presence of attesting witnesses and their interviews had been recorded on video. The District Court watched those video recordings. The defendants had appeared to be in a normal state of health and had no longer claimed that they had been drugged.

22. On 16 and 22 January 2002 the applicant and his lawyer filed appeal statements against the judgment of 9 January 2002. They complained, *inter alia*, that the District Court had based the conviction on the depositions by Mr I. and Mr T. given during the pre-trial investigation.

23. On 23 April 2002 the Ivanovo Regional Court upheld the judgment of 9 January 2002, endorsing the reasons given by the District Court. In particular, it noted that the District Court had rightfully convicted the applicant on the basis of the statements given by Mr I. and Mr T.

24. On 18 October 2002 the Presidium of the Ivanovo Regional Court, on a supervisory review, reduced the applicant's sentence to nine years and three months' imprisonment, having regard to the fact that the gravity of the offence did not correspond to the severity of the sentence.

B. Ill-treatment by wardens

1. The events of 22 June 2001

25. The applicant submitted that on 22 June 2001, on an order of the director of detention facility no. IZ-37/1, warders had entered cell no. 81 where he had been detained. The warders, hitting the inmates with rubber truncheons, forced them to leave the cell. In the corridor they continued hitting the applicant with rubber truncheons. The applicant fell on the floor and the beatings continued. After the beatings stopped, he crawled into his cell. Several hours later he felt extreme pain and his fellow inmates asked for a prison doctor. The applicant was taken to a hospital where doctors removed his spleen.

26. According to the Government, on 22 June 2001 the applicant took part in a prison disobedience action. They relied on written statements by warders, including the warder Mr Ye., and a report issued on 23 June 2001 by the head of the task unit of detention facility no. IZ-37/1. The report, in its relevant part, read as follows:

“On 22 June 2001, at 8.05 a.m., a junior inspector, senior sergeant of the internal service Mr P., who was on duty,... raised the alarm and informed a senior lieutenant of the internal service Mr La... that detainees in cell no. 81 were attempting to kick the cell door out, banging on it with boots, metal plates and cups. On an order of the senior lieutenant of the internal service Mr La., a group of off-duty warders... went to cell no. 81... Upon their arrival, a senior lieutenant of the internal service Mr Pa... ordered the detainees to stop their unlawful actions and warned them that force might be used if they did not comply with the lawful order. However, the inmates ignored the order of the facility administration and continued their collective disobedience actions. Moreover, [inmates] in certain other cells... supported the actions of the inmates of cell no. 81 [and] also started knocking on the doors, which could have turned into a prison riot.

The facility director, who by 8.15 a.m. had received full information on the incident involving inmates in cell no. 81, raised a general alarm and ordered that the senior lieutenant of the internal service Mr La. repeat his orders and warn the detainees of special means and consequences if they did not comply.

After the repetition of the administration's orders and the warning of the possible use of force had no effect on the detainees, the facility director decided to carry out a special operation in respect of the detainees in cell no. 81. In the presence of a group of medical staff members, the group of off-duty warders, other staff members who had gathered on an alarm signal and had been equipped accordingly, the cell door was opened and the detainees were requested to stop their active demonstration of discontent, to leave the cell [and] go into the corridor. In response to that lawful order the inmates climbed on to the upper bunks, refusing to leave the cell. They accompanied their actions with obscene and defamatory language towards the representatives of the facility administration. After rubber truncheons PR-73 had been applied to certain detainees who had clearly refused to comply, all the inmates went into the corridor. In the course of a discussion they did not raise any complaints nor did they substantiate claims against the facility administration which could serve as objective justification for confrontation... Inmates who had been allowed to return to the cell stopped their disorderly actions. Detainees in other cells followed their lead.

It was established in the course of the investigation pertaining to that incident that the majority of the inmates in cell no. 81 had not known the real reasons for the disorderly actions when those actions had started, assuming that the flame of discontent had been fanned by the appalling (according to them) conditions of detention in the cell and [they] had taken part in those actions obeying exclusively the feeling of corporate solidarity. Secret operative measures taken with the purpose of establishing the true reason for the conflict allowed the conclusion that a voice message from an inmate of a cell on the lower floor about beatings of another inmate, Mr D., by warders, which took place at the same time... served as an incentive for the beginning of the collective disobedience....

As it follows from the inmates' explanations, most of them heard orders addressed to them to stop disorderly actions and warnings that special measures would be used, but they did not react in any way.

As a result of the selective application of rubber truncheons by the warders injuries were sustained by... and Mr Romanov Vladimir Anatolyevich... who were examined and received the necessary assistance from medical personnel of the facility.

The investigation showed that the facility personnel in that situation had acted firmly, without compromise, taking the special measures promptly, without delay and in compliance with requirements of paragraph 2 of Section 45 [of the Custody Act]..., that is as it was required in the situation at hand, which was of a complicated nature since the actions of the detainees from cell no. 81 had been supported by detainees from other cells and other preventive measures of a non-violent nature had appeared to be ineffective.”

27. The Government submitted a record of the applicant’s medical examination drawn up on 22 June 2001 by the prison dermatologist. The record stated that the applicant had had bruises on his legs and four linear bruises on the back and the left side of the small of his back. The bruises measured 3.5 centimetres in width and 4 to 10 centimetres in length.

28. The Government, relying on an extract from the applicant’s medical record, further stated that on the evening of 22 June 2001 the applicant had been taken to the surgical division of the prison hospital and had been diagnosed with “a blunt chest injury, a splenic rupture, hemoperitoneum, first-degree shock, and an injury to the small of the back”. Doctors discovered signs of internal bleeding and decided to remove the spleen. Later in the evening the applicant underwent surgery. He remained in the hospital until 16 July 2001 and was transferred to the medical department of detention facility no. IZ-37/1 in “a satisfactory state of health”.

2. Investigation of the events of 22 June 2001

29. On 25 June 2001 the facility administration informed the Ivanovo regional prosecutor’s office that on 22 June 2001 force had been used against inmates, including the applicant.

30. An assistant of the Ivanovo Regional Prosecutor carried out an inquiry. On 3 July 2001 he issued a report, refusing to institute criminal proceedings as there had been nothing criminal in the warders’ actions. The relevant part of the report read as follows:

“On 22 June 2001, at 7.45 a.m., before placement in a punishment cell, warders of the detention facility searched a detainee, Mr D. [He] resisted and as a result, force was used against him and forbidden correspondence was seized. Mr D. shouted loudly that the warders were beating him up, urging inmates to knock on their cell doors and protest. Detainees supported him, thus violating the detention rules, and [inmates] in cell no. 81, in particular, started banging hard on the cell door. At 8.05 a.m. a junior inspector of the task and guard unit, Mr P., sounded the general alarm in the facility.

As follows from statements of staff members of the detention facility, ... on 22 June 2001, after the general alarm signal at 8.10 a.m. they arrived in cell no. 81, whose inmates were banging hard on the door. The detainees did not comply with repeated orders to stop their unlawful actions. The same orders and warnings of the possible use of special measures made by Mr P. through the door grille also had no result. On an order of the director of the detention facility, Mr Lu., the cell door was opened at 8.15 a.m. and the detainees were requested to go into the corridor. That order was lawful, taking into account the aggressive state of the inmates, the possibility of their attacking the warders, taking possession of cell keys and weapons, and taking

hostages. Furthermore, the detention regime required a morning roll-call of the detainees. The inmates refused to comply with the order. In that situation [the warders] decided to force the inmates into the corridor. Four inmates, including Mr Romanov, urged their fellow detainees not to leave the cell, [he] actively disobeyed, swinging his arms and pushing warders Mr Ye. and Mr Zh., away, and did not respond to repeated orders to stop those unlawful actions. Following Mr Ye.'s repeated warnings about the possible use of special measures, [Mr Romanov] continued his actions. Mr Ye. hit Mr Romanov with a rubber truncheon three to four times on the back and legs, after which Mr Romanov was taken out of the cell into the corridor.

The fact that the special measures were used is confirmed by statements of facility warders and their reports, as well as an official record of the use of special measures and an official record of the medical examination of Mr Romanov by a medical committee consisting of three persons. According to that record, Mr Romanov had injuries to his knees and feet and four red linear bruises on the back and the left side of the small of the back.

The head of the medical department of the detention facility, Mr M., and a dermatologist, Mr Bo., stated that at about 3.00 p.m. on 22 June 2001 Mr Romanov had asked for medical assistance, complaining of pain in the left subcostal area. After a consultation with a surgeon from the prison hospital Mr Romanov was transferred to the hospital.

According to statements by the head of the surgical division of the prison hospital Mr Ti. and the medical record, on the same day, at 8.10 p.m., Mr Romanov underwent surgery and his injured spleen was removed.

In an interview Mr Romanov stated that on 22 June 2001 he had been woken up at 8.00 a.m. before the morning roll-call... He heard his inmates banging on the cell door. Soon afterwards warders entered the cell and forced everyone into the corridor. At that time he was near his sleeping place. A warder hit him several times with a rubber truncheon on the back and forced him into the corridor, where other warders also hit him numerous times on his back with rubber truncheons. He did not resist in any way and did not urge [inmates] to resist the warders.

As a result of the investigation, Mr Romanov's statements were not confirmed and they are of a contradictory nature. In particular, Mr Romanov could not explain the discrepancies between his arguments about the numerous blows and the results of the medical examination. Moreover, he was examined in the course of the prosecutor's investigation on 27 June 2001, and no other injuries, save for those recorded in the report of the medical examination, were discovered.

The detainees, Mr Bl., Mr Ve.... and Mr Y. did not see how the special measures were applied to Mr Romanov, stating that on 22 June 2001, before the morning roll-call, they had knocked at the cell door. [They] did not comply with the warders' orders [and] did not stop their actions. [They] were warned about the possible use of special measures.

Thus, taking into account the facts and the results of the investigation, it is necessary to note that a special measure, namely a rubber truncheon, was applied by Mr Ye. to Mr Romanov lawfully and in accordance with the requirements of Section 45 [of the Custody Act]..."

3. *Proceedings for compensation*

31. Following the prosecutor's refusal to institute criminal proceedings, the applicant lodged an action against the Ministry of Justice and the Ministry of Finance seeking compensation for damage caused by the use of force on 22 June 2001. He also argued that the prosecutor's office had unlawfully refused to institute criminal proceedings against the warders.

32. On 11 June 2002 the Oktyabrskiy District Court of Ivanovo accepted the applicant's action in part and awarded him 10,000 Russian roubles (RUB, approximately 330 euros). The District Court cited the assistant prosecutor's decision of 3 July 2001 in support of its finding that the use of force against the applicant had been lawful. The District Court further noted that the applicant had sustained serious damage which threatened his life. It observed that while using special measures such as rubber truncheons and physical force, warders should have ensured that the applicant sustained minimal damage. The District Court concluded that the detention facility, as a legal person, did not have sufficient control over whether the staff members performed their work safely. The applicant had sustained physical and moral suffering and compensation should therefore be paid.

33. On 14 October 2002 the Ivanovo Regional Court confirmed the District Court's findings. However, it increased the amount of compensation to RUB 30,000 (960 euros).

II. RELEVANT DOMESTIC LAW

A. Use of force and special measures in detention facilities

1. *Code on Execution of Punishments (no. 1-FZ of 8 January 1997)* (Уголовно-исполнительный кодекс РФ)

34. Detainees and the premises where they live may be searched (Article 82 §§ 5 and 6).

35. Physical force, special means or weapons may be used against detainees if they offer resistance to the officers, persistently disobey lawful demands of the officers, engage in riotous conduct, take part in mass disorders, take hostages, attack individuals or commit other publicly dangerous acts, escape from the penitentiary institution or attempt to harm themselves or others (Article 86 § 1). The procedure for application of these security measures is determined in Russian legislation (Article 86 § 2).

2. *Penitentiary Institutions Act (no. 5473-I of 21 July 1993) (Закон РФ «Об учреждениях и органах, исполняющих уголовные наказания в виде лишения свободы»)*

36. When using physical force, special means or weapons, the penitentiary officers must:

(1) state their intention to use them and afford the detainee(s) sufficient time to comply with their demands unless a delay would imperil life or limb of the officers or detainees;

(2) ensure the least possible harm to detainees and provide medical assistance;

(3) report every incident involving the use of physical force, special means or weapons to their immediate superiors (section 28).

37. Rubber truncheons may be used to

(1) stop assaults on officers, detainees or civilians;

(2) repress mass disorder or group violations of public order by detainees, as well as to apprehend (*задержание*) offenders who persistently disobey or resist the officers (section 30).

3. *Custody Act (no. 103-FZ of 15 July 1995) (Федеральный закон «О содержании под стражей подозреваемых и обвиняемых в совершении преступлений»)*

38. Rubber truncheons may be used in the following cases:

- to repel an attack on a staff member of a detention facility or on other persons;

- to repress mass disorder or put an end to collective violations of the detention regime;

- to put an end to a refusal to comply with lawful orders of facility administration and warders;

- to release hostages and liberate buildings, rooms and vehicles taken over by a detainee;

- to prevent an escape;

- to prevent a detainee from hurting himself (section 45).

B. Civil law remedies against illegal acts by public officials

39. Article 1064 § 1 of the Civil Code of the Russian Federation provides that the damage caused to the person or property of a citizen shall be compensated in full by the tortfeasor. Pursuant to Article 1069, a State agency or a State official shall be liable to a citizen for damage caused by their unlawful actions or failure to act. Such damage is to be compensated at the expense of the federal or regional treasury. Articles 151 and 1099-1101 of the Civil Code provide for compensation for non-pecuniary damage. Article 1099 states, in particular, that non-pecuniary damage shall be compensated irrespective of any award for pecuniary damage.

C. Criminal law remedies against illegal acts by public officials

40. Article 117 § 2 (f) of the Criminal Code of the Russian Federation makes acts of torture punishable by up to seven years' imprisonment. Pursuant to Article 286 § 3 (a) and (e) the abuse of official power associated with the use of violence or entailing serious consequences carries a punishment of up to ten years' imprisonment.

D. Investigation of criminal offences

41. The RSFSR Code of Criminal Procedure (in force until 1 July 2002, "the CCrP") established that a criminal investigation could be initiated by an investigator upon the complaint of an individual or on the investigative authorities' own initiative when there were reasons to believe that a crime had been committed (Articles 108 and 125). A prosecutor was responsible for general supervision of the investigation (Articles 210 and 211). He could order a specific investigative action, transfer the case from one investigator to another or order an additional investigation. If there were no grounds to initiate a criminal investigation, the prosecutor or investigator issued a reasoned decision to that effect which had to be notified to the interested party. The decision was amenable to an appeal to a higher prosecutor or to a court of general jurisdiction (Article 113).

E. Confession as a basis for conviction

42. Article 77 of the RSFSR Code of Criminal Procedure provided that a conviction could not rest solely on the admission of the accused.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

43. The applicant complained that on 22 June 2001 he had been subjected to treatment incompatible with Article 3 of the Convention and that the authorities had not carried out an effective investigation of that incident, which amounted to a breach of Article 13 of the Convention. The Court will examine this complaint from the standpoint of the State's negative and positive obligations flowing from Article 3, which reads as follows:

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

A. Submissions by the parties

44. The Government argued that the applicant had not exhausted the available domestic remedies as he had not appealed against the decision of 3 July 2001 to a higher-ranking prosecutor or a court. At the same time the Government noted that the applicant had made use of his right to judicial protection as he had successfully lodged an action before the Oktyabrskiy District Court of Ivanovo and obtained compensation for damage caused. They further submitted that the applicant had not been subjected to torture or to inhuman or degrading treatment in June 2001. The lawful use of force had been a response to his unlawful actions. In the situation of the possible prison riot and the detainees', including the applicant's, refusal to comply with lawful orders of the facility administration, warders had no choice but to resort to the use of force. The Ivanovo Regional prosecutor's office carried out a thorough investigation of his complaints and found them to be unsubstantiated.

45. The applicant maintained his complaints.

B. The Court's assessment

1. Admissibility

(a) Non-exhaustion issue

46. The Court notes the Government's argument that the applicant had failed to exhaust domestic remedies by failing to appeal against the assistant's prosecutor's decision of 3 July 2001 to a higher-ranking prosecutor or a court. In this connection, the Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to use first the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. Article 35 § 1 also requires that complaints intended to be brought subsequently before the Court should have been made to the appropriate domestic body, at least in substance, and in compliance with the formal requirements laid down in domestic law, but not that recourse should be had to remedies which are inadequate or ineffective (see *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports* 1996-VI, pp. 2275-76, §§ 51-52, and *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports* 1996-IV, p. 1210, §§ 65-67).

47. The applicant's allegations of ill-treatment were examined by the investigator, who in a decision of 3 July 2001 decided not to institute criminal proceedings. Under Article 113 of the RSFSR Code of Criminal Procedure, which was in force at the material time, that decision was amenable to an appeal to a higher prosecutor or a court of general

jurisdiction (see paragraph 41 above). The parties did not dispute that the applicant, after learning about the decision of 3 July 2001, had not appealed to a higher-ranking prosecutor. However, the applicant argued that he had made use of the judicial avenue of exhaustion by lodging an action for damages before the Oktyabrskiy District Court. The Government somewhat supported that assertion, noting that the applicant had availed himself of judicial protection against ill-treatment by lodging a tort action.

48. As regards an appeal to a higher prosecutor, the Court has already held on several occasions that an appeal to a higher prosecutor does not give the person employing it a personal right to the exercise by the State of its supervisory powers, and that such an appeal does not therefore constitute an effective remedy within the meaning of Article 35 of the Convention (see *Slyusarev v. Russia* (dec.), no. 60333/00, 9 November 2006).

49. The position is, however, different 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 already found 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).

50. The applicant did not use the formal procedure to challenge the decision of 3 July 2001 before a court as was required by the RSFSR Code of Criminal Procedure (see paragraph 41 above). Instead, he lodged an action against the Ministry of Justice, alleging that the assistant prosecutor had erred in his findings. He sought compensation for damage caused by the alleged ill-treatment and the refusal to punish the perpetrators. In this connection, the Court observes that the rule of exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism. The Court has already held on a number of occasions that the rule of exhaustion is neither absolute nor capable of being applied automatically; for the purposes of reviewing whether it has been observed, it is essential to have regard to the circumstances of the individual case (see *Akdivar and Others*, cited above, p. 1211, § 69, and *Aksoy*, cited above, p. 2276, §§ 53-54).

51. The Court observes that the domestic courts accepted the applicant's complaint of alleged ill-treatment and inadequacy of the prosecutor's investigation of the events in question. Both the District and Regional Courts took cognisance of the merits of the applicant's claims, examined the reasonableness of the prosecutor's decision of 3 July 2001 and based their conclusions on the findings made in that decision, considering that the assistant prosecutor's views could not be said to be wrong. The courts' reasoning was not confined to the compatibility of the applicant's complaint with the formal requirements (see paragraph 32 above).

52. 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 forms prescribed by law, the competent authority has nevertheless examined the substance of the claim (see *Dzhavadov v. Russia*, no. 30160/04, § 27, 27 September 2007; *Skalka 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 that since the domestic courts have examined the substance of the applicant's complaint by which he challenged the decision of the assistant prosecutor, he cannot be said to have failed to exhaust domestic remedies. The Court also notes that the Government did not argue that, in pursuing this avenue of judicial review, the applicant had removed from the courts the option of examining the relevant issues. On the contrary, the Government stressed that the applicant had availed himself of judicial protection. It is also not apparent that a challenge to the assistant prosecutor's decision through the avenue of a separate criminal procedure would have been any more successful, or would have been decided on the basis of any other issues. By raising, alongside the tort action, a complaint about the decision not to institute criminal proceedings, the applicant provided the domestic authorities with the opportunity to put right the alleged violation. It follows that the application cannot be declared inadmissible for non-exhaustion of domestic remedies.

(b) Victim status

53. The Court considers that the question whether the applicant may still claim to be a victim of a violation of Article 3 of the Convention in respect of his alleged ill-treatment in detention facility no. IZ-37/1 is closely linked to the questions as to whether the investigation of the events in question was effective and whether the compensation which the applicants received was also effective. However, these issues link to the merits of the applicant's complaints under Article 3 of the Convention. The Court therefore decides to join this issue to the merits.

(c) The Court's decision on the admissibility of the complaint

54. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) General principles

55. As the Court has stated on many occasions, Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct (see *Labita v. Italy* [GC], no. 26772/95, § 119, ECHR 2000-IV, and *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports* 1996-V, p. 1855, § 79). Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 of the Convention even in the event of a public emergency threatening the life of the nation (see *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999-V, and *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, p. 3288, § 93).

56. The Court has consistently stressed that the suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. Measures depriving a person of his liberty may often involve such an element. In accordance with Article 3 of the Convention the State must ensure that a person is detained under conditions which are compatible with respect for his human dignity and that the manner and method of the execution of the measure do not subject him to distress or hardship exceeding the unavoidable level of suffering inherent in detention (see *Kudla v. Poland* [GC], no. 30210/96, §§ 92-94, ECHR 2000-XI).

57. In the context of detainees, the Court has emphasised that persons in custody are in a vulnerable position and that the authorities are under a duty to protect their physical well-being (see *Tarariyeva v. Russia*, no. 4353/03, § 73, ECHR 2006-... (extracts); *Sarban v. Moldova*, no. 3456/05, § 77, 4 October 2005; and *Mouisel v. France*, no. 67263/01, § 40, ECHR 2002-IX). In respect of a person deprived of his liberty, any 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 of the Convention (see *Sheydayev v. Russia*, no. 65859/01, § 59, 7 December 2006; *Ribitsch v. Austria*, judgment of 4 December 1995, Series A no. 336, § 38; and *Krastanov v. Bulgaria*, no. 50222/99, § 53, 30 September 2004).

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

i. Establishment of facts and assessment of the severity of ill-treatment

58. The Court reiterates that allegations of ill-treatment must be supported by appropriate evidence. In assessing evidence, the Court has

generally applied the standard of proof “beyond reasonable doubt” (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, pp. 64-65, § 161). However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during such detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII).

59. Where domestic proceedings have taken place, 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 *Klaas v. Germany*, judgment of 22 September 1993, Series A no. 269, p. 17, § 29). 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 (see *Matko v. Slovenia*, no. 43393/98, § 100, 2 November 2006). Where allegations are made under Article 3 of the Convention, however, the Court must apply a particularly thorough scrutiny (see, *mutatis mutandis*, *Ribitsch*, cited above, p. 24, § 32).

60. It was not disputed between the parties that the applicant’s injuries, as shown by the medical reports (see paragraphs 27, 28 and 30 above), were caused by the use of force by warders on 22 June 2001. In particular, the prison dermatologist who examined the applicant immediately after the events in question recorded at least four linear bruises on his legs and back. According to the medical record drawn up in the surgical division of the prison hospital, the applicant also sustained a chest injury caused by a blunt object, and a spleen rupture. Another medical report, which was not presented to the Court but is mentioned in the assistant prosecutor’s decision of 3 July 2001, indicated that in addition the applicant had injuries to his feet and knees. It was likewise uncontested that the warders had used rubber truncheons on the applicant. It has therefore been established “beyond reasonable doubt” that the applicant was hit at least four times with rubber truncheons by the warders.

61. Against this background, given the serious nature of the applicant’s injuries, the burden rests on the Government to demonstrate with convincing arguments that the use of force was not excessive (see *Zelilof v. Greece*, no. 17060/03, § 47, 24 May 2007).

62. The Court observes that the exact circumstances and the intensity of the use of force against the applicant were disputed by the parties and were subject to somewhat conflicting evaluations by the prosecution and judicial authorities. It is clear that the acts of violence against the applicant were

committed by the warders in the performance of their duties. The Court notes the Government's argument that the force was used lawfully in response to the unruly conduct of detainees, including the applicant.

63. The Court is mindful of the potential for violence that exists in penitentiary institutions and of the fact that disobedience by detainees may quickly degenerate into a riot (see *Gömi and Others v. Turkey*, no. 35962/97, § 77, 21 December 2006). The Court accepts that the use of force may be necessary on occasion to ensure prison security, to maintain order or prevent crime in penitentiary facilities. Nevertheless, as noted above, such force may be used only if indispensable and must not be excessive (see *Ivan Vasilev v. Bulgaria*, no. 48130/99, § 63, 12 April 2007, with further references). Recourse to physical force which has not been made strictly necessary by the detainee's own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention.

64. Turning to the facts of the present case, the Court accepts the Government's argument that the use of rubber truncheons had a legal basis. It observes that the Penitentiary Institutions Act (see paragraph 37 above) and the Custody Act (see paragraph 38 above) contain an exhaustive list of situations permitting rubber truncheons to be used. The Government submitted that the force had been used to repress a collective violation of the detention regime and to force the applicant to comply with a lawful order of the facility administration. As regards the first ground, the Court observes that truncheon blows were administered selectively and mostly for individual transgression. The Court is therefore not convinced that the first ground is applicable. At the same time it agrees, and this conclusion is supported by the findings of the domestic courts, that the warders resorted to these means to put an end to the detainees' refusal to comply with their orders. However, the manner in which the domestic law regulates the use of force against detainees does not absolve Russia from its responsibilities under the Convention (see, *mutatis mutandis*, *Ribitsch*, cited above, § 34; and *Ivan Vasilev v. Bulgaria*, no. 48130/99, § 64, 12 April 2007). The Court must scrutinise the alleged breach of Article 3 with heightened vigilance, irrespective of the applicant's conduct (see *Ribitsch*, cited above, § 32).

65. The Court does not discern any necessity which might have prompted the use of rubber truncheons against the applicant. On the contrary, the actions by the warders were grossly disproportionate to the applicant's imputed transgressions and manifestly inconsistent with the goals they sought to achieve. Thus, it follows from the report on the use of rubber truncheons (see paragraph 26 above) that inmates in cell no. 81, where the applicant was detained, banged on the cell door. After warders had entered the cell, the banging stopped but the inmates refused to leave the cell and climbed on to the upper bunks. The Court accepts that in these circumstances the officers may have needed to resort to physical force in

order to take inmates out of the cell. However, the Court is not convinced that hitting a detainee with a truncheon was conducive to the desired result.

66. Furthermore, the Court does not consider it established that the applicant had actively resisted the order by urging other detainees not to comply and pushing warders away. The Court finds it peculiar that none of the documents drawn up in the detention facility, including written statements by Mr Ye., the warder who had hit the applicant several times, listed the applicant among the instigators of or active participants in the events in question (see paragraph 26 above). Those documents merely mentioned that the applicant had sustained injuries as a result of the “selective” application of special measures. Mention of an active role by the applicant was first made in the assistant prosecutor’s decision of 3 July 2001. However, there is no explanation of these significant discrepancies between the facility administration’s and the assistant prosecutor’s versions of events. Furthermore, while assessing the facts of the case the Oktyabrskiy District and Ivanovo Regional Courts did not confirm the assistant prosecutor’s findings on the extent of the applicant’s participation in the events.

67. The Court is also mindful of the applicant’s complaint that the beatings continued in the corridor even after he had complied with the order and had left the cell. He argued that warders had hit him even after he had fallen on the floor, trying to avoid blows (see paragraph 25 above). In this respect, the Court notes that if the Government considered these allegations untrue, it was open to them to refute them by way of, for instance, witness testimony or other evidence. Nevertheless, at no point in the proceedings before the Court did the Government challenge that aspect of the applicant’s factual submissions. Furthermore, the Court finds that medical evidence, recording injuries to the applicant’s feet, supports his submission that warders continued hitting him while he was lying on the floor. The Government did not provide any plausible explanation as to how those injuries had been sustained.

68. In the Court’s eyes, in that situation truncheon blows were merely a form of reprisal or corporal punishment. The punitive nature of such treatment was even more salient in the situation where the applicant was beaten after he had already complied with the order and left the cell.

69. As to the seriousness of the acts of ill-treatment, the Court reiterates that in order to determine whether a particular form of ill-treatment should be qualified as torture, it must have regard to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. It appears that it was the intention that the Convention should, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering. The Court has previously had before it cases in which it has found that there has been treatment which could only be described as torture (see *Aksoy v. Turkey*, judgment of

18 December 1996, *Reports* 1996-VI, p. 2279, § 64; *Aydın v. Turkey*, judgment of 25 September 1997, *Reports* 1997-VI, pp. 1891-92, §§ 83-84 and 86; *Selmouni v. France* [GC], no. 25803/94, § 105, ECHR 1999-V; *Dikme v. Turkey*, no. 20869/92, §§ 94-96, ECHR 2000-VIII; and, in respect of Russia, *Menesheva v. Russia*, no. 59261/00, §§ 60-62, ECHR 2006-...; and *Mikheyev v. Russia*, no. 77617/01, § 135, 26 January 2006).

70. As noted above, the use of rubber truncheons on the applicant was retaliatory in nature. It was not conducive to facilitating execution of the tasks the warders had set out to achieve. The Court attributes particular weight in this respect to the fact that the beatings continued after the applicant had complied with the orders. The beatings did not stop even after he had fallen on the floor. The punitive violence to which the warders deliberately resorted was intended to arouse in the applicant feelings of fear and humiliation and to break his physical or moral resistance. The purpose of that treatment was to debase the applicant and drive him into submission. In addition, the Court finds that the injuries which the applicant sustained establish the existence of serious physical pain and intense mental suffering. Moreover, they resulted in long-term damage to his health (see paragraph 28 above). In these circumstances the Court finds that the applicant was subjected to treatment which can be described as torture.

ii. The issue of victim status: adequacy of the judicial proceedings and the prosecution's inquiry

71. In the paragraph 53 above the Court found that the question whether the applicant may still claim to be a victim in respect of the treatment sustained in the detention facility was closely linked to the questions as to whether the investigation of the events at hand was effective and whether the compensation received by the applicant amounted to sufficient redress for it. It thus decided to join the issue of the applicant's victim status to the merits and will examine it now.

72. The Court reiterates that Article 34 of the Convention provides, as relevant:

"The Court may receive applications from any person ... claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto."

(a) Principles established under the Court's case-law

73. The Court summarised the principles governing the assessment of an applicant's victim status in paragraphs 178-192 of its judgment in the case of *Scordino v. Italy (no. 1)* ([GC], no. 36813/97, ECHR 2006-...). In so far as relevant to the case under consideration, they are:

(a) Under the subsidiarity principle, it falls first to the national authorities to redress any alleged violation of the Convention. In this regard,

the question whether an applicant can claim to be a victim of the violation alleged is relevant at all stages of the proceedings under the Convention;

(b) A decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a “victim” unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention;

(c) The applicant’s ability to claim to be a victim will depend on the redress which the domestic remedy will have given him or her;

(d) The principle of subsidiarity does not mean renouncing all supervision of the result obtained from using domestic remedies, otherwise the rights guaranteed by the Convention would be devoid of any substance. In that connection, it should be reiterated that the Convention is intended to guarantee, not theoretical or illusory rights but rights that are practical and effective.

(β) Application of the foregoing principles

74. It follows from the foregoing principles that the Court must verify whether the authorities acknowledged, at least in substance, that there had been a violation of a right protected by the Convention and whether the redress can be considered appropriate and sufficient (see *Scordino (no. 1)*, cited above, § 193).

The finding of a violation

75. The Court does not lose sight of the fact that the prosecutor’s office refused to institute criminal proceedings against the warders, considering their actions to be lawful (see paragraph 30 above). Furthermore, the Court is not convinced that the judgments awarding compensation to the applicant (see paragraphs 32 and 33 above) amounted to an acknowledgment in substance that the treatment the applicant had sustained at the hands of the warders had been in breach of Article 3 of the Convention. However, for the time being the Court will proceed on the assumption that by awarding the applicant compensation the Russian courts in substance acknowledged that the applicant had been subjected to ill-treatment contrary to guarantees of Article 3 of the Convention.

The characteristics of the redress

76. The first issue which needs to be determined by the Court is whether the compensation awarded to the applicant amounted to sufficient redress.

77. On this point, the Court notes that the applicant’s claims against the warders were allowed in part. The domestic courts found that the use of force against the applicant had been lawful but the warders should have minimised the damage to his health. The District Court’s award of RUB 10,000 was increased by three times by the Regional Court, acting on

appeal. It may thus be concluded that the applicant received at least partial compensation for the ill-treatment he had suffered.

78. However, the Court observes that in cases of wilful ill-treatment the breach of Article 3 cannot be remedied exclusively through an award of compensation to the victim. This is so because, if the authorities could confine their reaction to incidents of wilful ill-treatment by State agents to the mere payment of compensation, while not doing enough to prosecute and punish those responsible, it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity, and the general legal prohibition of torture and inhuman and degrading treatment, despite its fundamental importance, would be ineffective in practice (see, among many other authorities, *Krastanov v. Bulgaria*, no. 50222/99, § 60, 30 September 2004, and *mutatis mutandis*, *Yaşa v. Turkey*, judgment of 2 September 1998, *Reports of Judgments and Decisions* 1998-VI, p. 2431, § 74; *Tanrikulu v. Turkey* [GC], no. 23763/94, § 79, ECHR 1999-IV; *Velikova v. Bulgaria*, no. 41488/98, § 89, ECHR 2000-VI; *Salman v. Turkey* [GC], no. 21986/93, § 83, ECHR 2000-VII; *Gül v. Turkey*, no. 22676/93, § 57, 14 December 2000; *Kelly and Others v. the United Kingdom*, no. 30054/96, § 105, 4 May 2001; *Avşar v. Turkey* [GC], no. 25657/94, § 377, ECHR 2001-VII).

79. It is apparent from the above that the judicial award of compensation to the applicant represents only one part of the group of measures necessary to provide redress for ill-treatment by State agents (see, *mutatis mutandis*, *Nikolova and Velichkova v. Bulgaria*, no. 7888/03, § 56, 20 December 2007). The Court must then also examine the effectiveness of the inquiry carried out by the Ivanovo Regional prosecutor's office.

80. Before embarking on an analysis of how the inquiry unfolded, the Court considers it necessary to reiterate the principles which govern the authorities' duty to investigate ill-treatment occurring as a result of the use of force by State agents.

81. The Court reiterates that where an individual raises an arguable claim that he has been seriously ill-treated 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. 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. Thus, the investigation of 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 of their decisions. They must take all reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence, and so on. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard (see, among many authorities, *Mikheyev*, cited above, § 107 et seq., and *Asenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports* 1998-VIII, § 102 et seq.).

82. The Court will now examine the effectiveness of the investigation of the warders' actions in the light of these principles.

83. The Court notes that the events of which the applicant complained had unfolded under the control of the authorities and with their full knowledge. Moreover, the facility administration reported the incident to the Ivanovo Regional Prosecutor's Office (see paragraph 29 above). Under these circumstances, the applicant had an arguable claim that he had been ill-treated and that the State officials were under an obligation to carry out an effective investigation.

84. The Court notes that the prosecution authorities who were made aware of the applicant's beating carried out an inquiry which did not result in criminal prosecutions against the perpetrators of the beating. In the Court's opinion, the issue is consequently not so much whether there was an inquiry, since the parties did not dispute that there was one, as whether it was conducted diligently, whether the authorities were determined to identify and prosecute those responsible and, accordingly, whether the inquiry was "effective".

85. The Court will therefore first assess the promptness of the investigation, viewed as a gauge of the authorities' determination to prosecute those responsible for the applicant's ill-treatment (see *Selmouni v. France* [GC], no. 25803/94, §§ 78 and 79, ECHR 1999-V). In the present case it took the facility administration three days to inform the prosecution authorities about the incident. In this connection the Court notes that this delay could have resulted in the loss of possibilities for collecting evidence of the alleged ill-treatment. At the same time it appears that the Ivanovo Regional prosecutor's office launched the inquiry immediately after being notified of the beatings.

86. However, with regard to the thoroughness of the inquiry, the Court notes some discrepancies capable of undermining its reliability and effectiveness. Firstly, no evaluation was carried out with respect to the quantity and nature of the applicant's injuries in the view of the different versions of what had occurred during the relevant incident. In delivering his decision of 3 July 2001, the assistant prosecutor limited himself to the three medical reports which listed injuries sustained by the applicant. The Court reiterates in this connection that proper medical examinations are an

essential safeguard against ill-treatment. The forensic doctor must enjoy formal and *de facto* independence, have been provided with specialised training and been allocated a mandate which is broad in scope (see *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, § 55 and § 118, ECHR 2000-X). In the instant case, the three medical reports, drafted by a prison dermatologist or a group of doctors in the prison hospital, provided limited medical information and did not include any explanation by the applicant as regards his complaints.

87. Secondly, the Court observes a selective and somewhat inconsistent approach to the assessment of evidence by the investigating authority. In particular, the Court notes that the assistant prosecutor's inquiry included excerpts from the testimonies given by several inmates allegedly present at the scene who stated that they had not seen the beatings. The Court finds it peculiar that the investigator had been unable to identify inmates who had been eyewitnesses to the beatings and who could have provided relevant information on the incident. It is further apparent from the decision of 3 July 2001 that the assistant prosecutor based his conclusions mainly on the testimonies given by the warders involved in the incident. Although the excerpt of the applicant's testimony was included in the decision of 3 July 2001, the investigator did not consider his testimony to be credible, apparently, because it reflected a personal opinion and constituted an accusatory tactic by the applicant. However, the assistant prosecutor's inquiry did accept as such the credibility of the warders' testimonies, despite the fact that their statements could have constituted defence tactics and have been aimed at damaging the applicant's credibility. In the Court's view, the prosecution inquiry applied different standards when assessing the testimonies, as those given by the applicant were deemed to be subjective, but not those given by the warders. However, the credibility of the latter testimonies should also have been questioned, as the prosecution inquiry had also sought to establish whether the warders were liable on disciplinary or criminal charges (see *Ognyanova and Choban v. Bulgaria*, no. 46317/99, § 99, 23 February 2006).

88. The Court also does not lose sight of the fact that the prosecuting authority did not embark on an assessment of the proportionality of the force used against the applicant. Without any evidence from independent sources the assistant prosecutor nevertheless established that the applicant had, *inter alia*, physically resisted the warders. At no point during the inquiry did he endeavour to analyse the degree of force used by the warders and whether it was necessary and proportionate in the circumstances. Without subjecting the warders' testimonies to doubt, the investigator held that the warders had lawfully assaulted the applicant to put an end to his disruptive behaviour. In doing so, he disregarded a number of other factors – that medical evidence supported the applicant's allegations that the violence against him had continued after he had capitulated, that the beating

had been wilful, and so on, all of which were material to the determination of whether the act complained of amounted to a breach of Article 3 of the Convention.

89. Finally, despite the fact that it has already ruled on the relevance of the judicial proceedings to the issue of the applicant's victim status (see paragraph 79 above), the Court also considers it noteworthy to mention that the domestic courts in their conclusions relied heavily on the findings made by the assistant prosecutor in his decision of 3 July 2001. Neither the Oktyabrskiy District Court nor the Ivanovo Regional Court questioned personally the eyewitnesses mentioned in the decision or the applicant or the warders who were the protagonists in the incident. Furthermore, the Court is struck by the fact that the domestic courts awarded the applicant compensation by relying on the mere lack of sufficient control on the part of the detention facility over the warders who "should have performed their duties safely".

90. Having regard to the above failings of the Russian authorities, the Court is of the view that their reaction to a grave instance of a deliberate ill-treatment by State agents which resulted in serious damage to the applicant cannot be considered adequate or efficient. The Court therefore finds that the measures taken by the authorities failed to provide the appropriate redress to the applicant (see *Okkaly v. Turkey*, no. 52067/99, § 78, ECHR 2006, and *Nikolova and Velichkova*, cited above, § 64). The applicant may therefore still claim to be a victim within the meaning of Article 34 of the Convention.

C. Conclusion

91. The Court reiterates its findings that on 22 June 2001 the warders in detention facility no. IZ-37/1 subjected the applicant to treatment which can be described as torture and that the investigation into the applicant's complaints fell short, for various reasons, of the requirements of Article 3 of the Convention (see paragraphs 70 and 90 above). There has therefore been a violation of Article 3 of the Convention under its substantive and procedural limbs.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION ON ACCOUNT OF INABILITY TO CONFRONT WITNESSES

92. The applicant complained, under Article 6 §§ 1 and 3 (d) of the Convention, that he had been denied a fair hearing in that he had not been given an adequate opportunity to put questions to witnesses against him, namely Mr I., the victim of the robbery, and Mr T., before the domestic courts.

Article 6 reads, in so far as relevant:

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

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;”

A. Submissions by the parties

93. The Government, supporting their submissions with written statements from a District Court secretary and a lay assessor (see paragraph 16 above), argued that the domestic courts had sought to respect the rights of the defendant. Witnesses were properly summonsed to the trial hearings. However, Mr I. did not attend the trial for a valid reason: he was in another country. The Frunzenskiy District Court read out Mr I.’s depositions made during the pre-trial investigation. The Government further noted that neither the applicant nor his lawyer “insisted” on Mr I.’s presence at the hearings. At the same time the applicant had been afforded an opportunity to challenge Mr I.’s submissions during the confrontation interview on 2 November 2000. He did not ask any questions however and did not dispute the victim’s statements.

94. The applicant maintained his complaints.

B. The Court’s assessment

1. Admissibility

95. The Court notes that these 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.

2. Merits

96. Given that the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial set forth in paragraph 1, it is appropriate to examine these complaints under the two provisions taken together (see *Asch v. Austria*, judgment of 26 April 1991, Series A no. 203, p. 10, § 25).

(a) The reading out of Mr I.'s depositions

97. Mr I., the victim, in this case should for the purposes of Article 6 § 3 (d) be regarded as a “witness”, a term to be given an autonomous interpretation (see *Asch*, cited above, p. 10, § 25), because his written depositions made during the pre-trial investigation were read out in court and used as evidence against the applicant.

98. The first question to be decided is whether by failing to insist, as the Government put it, on Mr I.'s presence at the trial the applicant had waived his right to have him examined. On this point, the Court reiterates that the waiver of a right guaranteed by the Convention, in so far as permissible, must be established in an unequivocal manner (see *Bocos-Cuesta v. the Netherlands*, no. 54789/00, § 65, 10 November 2005). In the instant case, the Court notes that as it appears from the court record the District Court did not ask the applicant or his lawyer whether they agreed to the reading out of the depositions. It merely mentioned that Mr I.'s absence was for a good reason and proceeded to the reading out (see paragraph 17 above). It does not seem that the applicant or his lawyer was cautioned of the necessity of insisting on Mr I.'s presence. The Government did not indicate any domestic legal provision which required an accused to explicitly ask for a presence of a witness testifying against him. There is also no indication that both the applicant and his counsel stated that they had no objections to the reading out (see, by contrast, *Vozhigov v. Russia*, no. 5953/02, § 57, 26 April 2007 and *Andandonskiy v. Russia*, no. 24015/02, § 54, 28 September 2006). Furthermore, in their appeal statements lodged before the Ivanovo Regional Court, they complained that Mr I.'s absence had infringed the applicant's rights of a defendant (see paragraph 22 above). The Regional Court did not reject that complaint on the basis that the applicant had not asked for Mr I.'s presence, but assessed and accepted as correct the reasons given by the District Court for its decision to read out Mr I.'s depositions (see paragraph 23 above). Thus, the Court cannot find that the applicant may be regarded as having waived his rights under Article 6 as to the opportunity to examine the witness against him (see *Bonev v. Bulgaria*, no. 60018/00, § 40, 8 June 2006, with further references, and *Bocos-Cuesta*, cited above, § 66).

99. The Court must thus further establish whether the use of Mr I.'s statements made during the pre-trial investigation, coupled with the fact that the applicant was not able to confront him in court, amounted to a violation of the applicant's right to a fair trial.

100. According to the Court's case-law, this right presupposes that all the evidence must normally be produced at a public hearing, in the presence of an accused, with a view to adversarial argument. However, the use in evidence of statements obtained at the stage of the police inquiry and the judicial investigation is not in itself inconsistent with paragraphs 1 and 3 (d) of Article 6, provided that the rights of the defence have been respected. As

a rule, these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him or her either when the statements were made or at a later stage of the proceedings (see *Saïdi v. France*, judgment of 20 September 1993, Series A no. 261-C, p. 56, § 43, and *A.M. v. Italy*, no. 37019/97, § 25, ECHR 1999-IX). In the event that the witnesses cannot be examined and that this is due to the fact that they are missing, the authorities must make a reasonable effort to secure their presence (see *Artner v. Austria*, judgment of 28 August 1992, Series A no. 242-A, p. 10, § 21 *in fine*; *Delta v. France*, judgment of 19 December 1990, Series A no. 191-A, p. 16, § 37; and *Rachdad v. France*, no. 71846/01, § 25, 13 November 2003). Article 6 does not grant the accused an unlimited right to secure the appearance of witnesses in court. It is normally for the national courts to decide whether it is necessary or advisable to hear a witness (see, among other authorities, *Bricmont v. Belgium*, judgment of 7 July 1989, Series A no. 158, p. 31, § 89). The Court is only exercising its supervisory role. Finally, the conviction must not rest solely or decisively on the depositions of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial (see *Artner*, p. 10, § 22; *Delta*, p. 16, § 37, both cited above; *Isgrò v. Italy*, judgment of 19 February 1991, Series A no. 194-A, p. 13, § 35 *in fine*; *Solakov v. the former Yugoslav Republic of Macedonia*, no. 47023/99, § 57 *in fine*, ECHR 2001-X; and *Rachdad*, cited above, § 23 *in fine*).

101. Turning to the facts of the present case, the Court reiterates that when convicting the applicant the domestic courts relied on the statements by three witnesses, the confession statements by the co-defendants and depositions by Mr I. made during the pre-trial investigation (see paragraph 20 above). It is also true that the applicant admitted to having been present at the crime scene with the intention of beating Mr I. up and that the courts relied on that admission, but under Russian law a conviction cannot rest solely on the admission of the accused (see paragraph 42 above). The Court is not convinced that the applicant's avowal that he had intended to beat the victim up amounted to an admission that he had wanted to rob him too (see, *mutatis mutandis*, *Bonev*, cited above, § 43).

102. As to the three witnesses, they had made no observations on the alleged acts and gave evidence only on the fact that they had seen some four men running from the crime scene. Furthermore, the witnesses were unable to identify those men (see paragraph 18 above). As regards the confessions, the Court notes that the co-defendants retracted them at the trial, alleging coercion on the part of the investigator. Leaving aside the investigation techniques and the alleged interrogation of the co-defendants in a state of drug intoxication, the Court reiterates that a higher degree of scrutiny should be applied to assessment of statements by co-defendants, because the position in which the accomplices find themselves while testifying is different from that of ordinary witnesses. They do not testify under oath,

that is, without any affirmation of the truth of their statements which could have rendered them punishable for perjury for wilfully making untrue statements. In particular, in the case of *M. H. v. the United Kingdom* (no. 28572/95, Commission decision of 17 January 1997) a test was developed for the purpose of determining whether the admissibility of a guilty plea of a co-accused as evidence at the applicant's trial had rendered the proceedings unfair. For the guarantees of Article 6 of the Convention to be respected on account of the admissibility of a guilty plea from a co-accused, such a plea should only be admitted to establish the fact of a commission of a crime by a pleading person, and not the applicant, and a judge should make it clear to the jury that the guilty plea by itself did not prove that the applicant was involved in that crime.

103. Having regard to the above-mentioned principles and taking into account the evidential value of the witnesses' statements, the applicant's admission and the co-defendants' confessions, the Court considers that Mr I.'s depositions made on 23 April and 8 May 2001 during the pre-trial investigation and read out by the District Court constituted virtually the sole direct and objective evidence on which the courts' findings of guilt were based.

104. The Court further observes that Mr I. did not appear at the trial because he had left Russia and was unable to return before 3 December 2001 (see paragraph 16 above). The District Court read out his depositions at the trial hearing on 29 November 2001, that is just a few days before Mr I.'s presence at the trial could be ensured. While the Court is not unmindful of the domestic courts' obligation to secure the proper conduct of the trial and avoid undue delays in the criminal proceedings, it does not consider that a five-day stay in the proceedings for the purpose of obtaining Mr I.'s testimony at the trial, in which the applicant stood accused of a very serious offence and was risking a long term of imprisonment, would have constituted an insuperable hindrance to the expediency of the proceedings at hand (see *Artner*, cited above, p. 10, § 21; *Berisha v. the Netherlands* (dec.), no. 42965/98, 4 May 2000; and *Haas v. Germany* (dec.), no. 73047/01, 17 November 2005). The authorities chose to eschew that stay. As a result, Mr I. never appeared to testify before a court in the presence of the applicant.

105. The Court notes the Government's argument that the applicant was afforded an opportunity to confront Mr I. during a pre-trial investigation interview on 2 November 2000. In this connection, the Court recalls that as a general rule the requirements of paragraphs 3 (d) and 1 of Article 6 will be satisfied if the defendant was given an adequate and proper opportunity to challenge and question a witness against him at a certain stage of the proceedings (see, among other authorities, *Isgrò v. Italy*, judgment of 19 February 1991, Series A no. 194-A, p. 12, § 34, and *Lucà v. Italy*, no. 33354/96, §§ 40-43, ECHR 2001-II). The Court does not lose sight of the

fact that the applicant had a confrontation interview with Mr I. on 2 November 2000. However, it considers that the rights of the defence were not respected for the following reasons. At that interview Mr I. stated that four men in balaclava masks had attempted to rob him. He did not identify the applicant as an attacker, merely noting that he was of the same height as one of the perpetrators, and did not provide any further details pertaining to the crime or offenders which could have pointed to the applicant's participation in the robbery. Therefore, the Court does not find it peculiar that the applicant did not ask any questions and did not dispute Mr I.'s submissions (see paragraph 11 above). Furthermore, the Court reiterates that the domestic courts based the applicant's conviction on the depositions made on 23 April and 8 May 2001, when Mr I. had amended his previous statements, had identified the applicant as an attacker and had described his role in the robbery (see paragraph 17 above). The applicant was neither provided with an opportunity to follow the manner in which Mr I. was interrogated by the investigator on those occasions nor he was then or later provided with an opportunity to have questions put to Mr I. Furthermore, as Mr I.'s statements to the investigator were not recorded on video, neither the applicant nor the judges were able to observe his demeanour under questioning and thus form their own impression of his reliability (see, *a contrario*, *Accardi and Others v. Italy* (dec.), no. 30598/02, ECHR 2005-...). The Court does not doubt that the domestic courts undertook a careful examination of Mr I.'s statements and gave the applicant an opportunity to contest them at the trial, but this can scarcely be regarded as a proper substitute for a personal observation of the leading witness giving oral evidence (see *Bocos-Cuesta*, cited above, § 71).

106. In these circumstances, the Court finds that the applicant cannot be regarded as having had a proper and adequate opportunity to challenge Mr I.'s statements, which were of decisive importance for his conviction and consequently he did not have a fair trial. There has thus been a violation of Article 6 § 1 taken together with Article 6 § 3 (d) on that account.

(b) The reading out of Mr T.'s depositions

107. The applicant, in addition, complained that he had been unable to challenge in open court statements by another prosecution witness, Mr T.. In this connection the Court reiterates its finding that the fairness of the criminal proceedings against the applicant was undermined by the limitations imposed on the rights of the defence due to the absence of an opportunity to confront the victim. It therefore considers it unnecessary to examine separately whether the fairness of the proceedings was also breached because the applicant was unable to confront Mr T. (see *Komanický v. Slovakia*, no. 32106/96, § 56, 4 June 2002).

III. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

108. The applicant further complained under Article 5 §§ 1, 2 and 3 of the Convention that there had been no grounds for his arrest and subsequent detention and that the record of his arrest had indicated that he had been arrested for disorderly acts. Article 5, in so far as relevant, reads as follows:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

...

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

109. The Court observes that it is not required to decide whether or not the applicant's complaints concerning his detention disclose an appearance of a violation of Article 5 of the Convention. It reiterates that, according to Article 35 of the Convention, the Court may only deal with the matter within a period of six months from the date on which the final decision was taken. It observes that the applicant's pre-trial detention ended on 9 January 2002 when the Frunzenskiy District Court of Ivanovo convicted him (see *Labita v. Italy* [GC], no. 26772/95, § 147, ECHR 2000-IV). After that date his detention no longer fell within the ambit of Article 5 § 1 (c), but within the scope of Article 5 § 1 (a) of the Convention (see, for instance, *B. v. Austria*, judgment of 28 March 1990, Series A no. 175, pp. 14-16, §§ 36-39). The applicant lodged his application with the Court on 21 October 2002, which is more than six months after his pre-trial detention had ended.

110. It follows that this part of the application was lodged out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

111. The applicant complained under Articles 3, 6, 7, 13, 17 and 53 of the Convention that his co-defendants had been interviewed in a state of drug withdrawal syndrome, that the domestic courts had not assessed evidence correctly, and that they had misapplied the law and misinterpreted the facts and had based their findings on assumptions.

112. However, having regard to all the material in its possession, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

113. 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

114. The applicant claimed compensation in respect of pecuniary and non-pecuniary damage, leaving the determination of the amount of the compensation to the Court.

115. The Government pointed out that the “physical damage caused to the applicant’s health” had been reimbursed by performing surgery on him. He was also awarded compensation of 30,000 Russian roubles (RUB) by the Ivanovo Regional Court. As to the non-pecuniary damage, the Government submitted that the applicant’s claim was manifestly ill-founded. In any event, a finding of a violation would constitute sufficient redress.

116. As regards the alleged pecuniary damage sustained by the applicant, the Court observes that the applicant did not indicate the amount of the compensation claimed and did not provide any vouchers, receipts or other documents to corroborate his claim. The Court therefore considers that he has failed to properly substantiate his claim for pecuniary damage and accordingly dismisses it (see *Necdet Bulut v. Turkey*, no. 77092/01, § 33, 20 November 2007).

117. However, the Court considers that the applicant must have suffered pain and distress on account of the ill-treatment inflicted on him. His suffering cannot be sufficiently compensated by a finding of a violation. In addition, he did not benefit from an adequate and effective investigation of

his complaints and the domestic award of compensation did not constitute sufficient redress. Making its assessment on an equitable basis, the Court awards the applicant 20,000 euros (EUR) in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

118. The Court further notes that in the present case, apart from finding a violation of Article 3 of the Convention, it has also found a violation of Article 6 § 3 (d) in conjunction with Article 6 § 1 of the Convention. Inasmuch as the applicant's claim relates to the finding of that violation, the Court reiterates that when an applicant has been convicted despite a potential infringement of his rights as guaranteed by Article 6 of the Convention, he should, as far as possible, be put in the position in which he would have been had the requirements of that provision not been disregarded, and that the most appropriate form of redress would, in principle, be trial *de novo* or the reopening of the proceedings, if requested (see *Öcalan v. Turkey* [GC], no. 46221/99, § 210 *in fine*, ECHR 2005-IV, and *Popov v. Russia*, no. 26853/04, § 264, 13 July 2006). The Court notes, in this connection, that Article 413 of the Russian Code of Criminal Procedure provides that criminal proceedings may be reopened if the Court finds a violation of the Convention.

B. Costs and expenses

119. The applicant did not claim any amount for the costs and expenses incurred before the domestic courts and before the Court. Consequently, the Court does not make any award under this head.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to join to the merits the issue of the applicant's victim status in respect of the alleged violation of Article 3 of the Convention and *holds* that he may still claim to be a victim for the purpose of Article 34 of the Convention;
2. *Declares* the complaints concerning the ill-treatment of the applicant in the detention facility, the ineffectiveness of the investigation into the

incident and the inability to confront witnesses in open court admissible and the remainder of the application inadmissible;

3. *Holds* that there has been a violation of Article 3 of the Convention on account of the treatment to which the applicant was subjected on 22 June 2001 in detention facility no. IZ-37/1;
4. *Holds* that there has been a violation of Article 3 of the Convention on account of the authorities' failure to investigate effectively the applicant's complaints about the ill-treatment to which he was subjected in detention facility no. IZ-37/1;
5. *Holds* that there has been a violation of Article 6 § 1 taken together with Article 6 § 3 (d) on account of an absence of a proper and adequate opportunity to challenge Mr I.'s statements;
6. *Holds* that it is not necessary to examine separately the applicant's complaint under Article 6 § 1 taken together with Article 6 § 3 (d) pertaining to inability to confront Mr T. at the trial;
7. *Holds*
 - (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, EUR 20,000 (twenty thousand euros) in respect of non-pecuniary damage, to be converted into Russian roubles at the rate applicable at the date of settlement, plus any tax that may be chargeable on the that amount;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
8. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 24 July 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
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) joint concurring opinion of Judges Spielmann and Malinverni;
- (b) concurring opinion of Judge Malinverni joined by Judge Kovler.

C.L.R.
S.N.

JOINT CONCURRING OPINION OF JUDGES SPIELMANN
AND MALINVERNI

(Translation)

1. We agree in all respects with the Court's conclusions as to the violation of Article 6 § 3 (d) taken together with Article 6 § 1 of the Convention.

2. We would, however, have liked the reasoning set out in paragraph 118 of the judgment, on account of its importance, to have been included in the operative provisions as well, for the following reasons.

3. Firstly, it is common knowledge that while the reasoning of a judgment allows the Contracting States to ascertain the grounds on which the Court reached a finding of a violation or no violation of the Convention, and is of decisive importance on that account for the interpretation of the Convention, it is the operative provisions that are binding on the parties for the purposes of Article 46 § 1 of the Convention. It is therefore a matter of some significance, from a legal standpoint, for part of the Court's reasoning to appear also in the operative provisions.

4. And indeed, what the Court says in paragraph 118 of the judgment is in our view of the utmost importance. It reiterates that when a person has been convicted in breach of the procedural safeguards afforded by Article 6, he should, as far as possible, be put in the position in which he would have been had the requirements of that Article not been disregarded (the principle of *restitutio in integrum*). In the present case, the best means of achieving this is the reopening of the proceedings and the commencement of a new trial at which all the guarantees of a fair trial would be observed, provided, of course, that the applicant requests this option and it is available in the domestic law of the respondent State.

5. The reason why we wish to stress this point is that it must not be overlooked that the amounts which the Court orders to be paid to victims of a violation of the Convention are, according to the terms and the spirit of Article 41, of a subsidiary nature. Wherever possible, the Court should therefore seek to restore the *status quo ante* for the victim. It should even, in cases such as the present one, reserve its decision on just satisfaction and examine this issue, where necessary, only at a later stage, should the parties fail to settle their dispute satisfactorily.

6. Admittedly, States are not required by the Convention to introduce procedures in their domestic legal systems whereby judgments of their Supreme Courts constituting *res judicata* may be reviewed. However, they are strongly encouraged to do so, especially in criminal matters. We believe that where, as in the present case, the respondent State has equipped itself with such a procedure (Article 413 of the Russian Code of Criminal Procedure), it is the Court's duty not only to note the existence of the

procedure, as paragraph 118 of the judgment does, but also to urge the authorities to make use of it, provided, of course, that the applicant so wishes. However, this is not legally possible unless such an exhortation appears in the operative provisions of the judgment.

7. Moreover, the Court has already included directions of this nature in the operative provisions of judgments. For example, in *Claes and Others v. Belgium* (nos. 46825/99, 47132/99, 47502/99, 49010/99, 49104/99, 49195/99 and 49716/99, 2 June 2005) it held in point 5 (a) of the operative provisions of its judgment that “*unless it grants a request by [the] applicants for a retrial or for the proceedings to be reopened, the respondent State is to pay, within three months from the date on which the applicant in question indicates that he does not wish to submit such a request or it appears that he does not intend to do so, or from the date on which such a request is refused*”, sums in respect of non-pecuniary damage and costs and expenses. Similarly, in *Lungoci v. Romania* (no. 62710/00, 26 January 2006) the Court held in point 3 (a) of the operative provisions of its judgment that “*the respondent State is to ensure that, within six months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the proceedings are reopened if the applicant so desires, and at the same time is to pay her EUR 5,000 (five thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount, to be converted into Romanian lei at the rate applicable at the date of settlement*”.

8. By virtue of Article 46 § 2 of the Convention, supervision of the execution of the Court’s judgments is the responsibility of the Committee of Ministers. That does not mean, however, that the Court should not play any part in the matter and should not take measures designed to facilitate the Committee of Ministers’ task in discharging these functions.

9. To that end, it is essential that in its judgments the Court should not merely give as precise a description as possible of the nature of the Convention violation found but should also, in the operative provisions, indicate to the State concerned the measures it considers the most appropriate to redress the violation.

CONCURRING OPINION OF JUDGE MALINVERNI
JOINED BY JUDGE KOVLER

(Translation)

1. I voted in favour of finding that there had been a violation of Article 3. However, I wish to distance myself from the majority's conclusion that the ill-treatment suffered by the applicant should be described as torture.

2. While I am aware that the distinction between degrading treatment, inhuman treatment and torture is not always easy to establish, I consider that, to avoid trivialising the term, findings of torture should be reserved for the most serious violations of Article 3.

3. Article 1 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person by or at the instigation of a public official for a specified purpose (for example, a confession, punishment or intimidation). This definition lays down the three constituent elements of torture: intensity of suffering, deliberate intention and specific aim.

4. The Court has elaborated on the three concepts referred to in Article 3 by focusing chiefly on the intensity of the suffering inflicted on the victims, so that a distinction can be made between the types of treatment falling within the scope of that Article. According to its case-law, the category of torture should be reserved for "deliberate inhuman treatment causing very serious and cruel suffering", to which it attaches "a special stigma" (see *Selmouni v. France* [GC], no. 25803/94, § 36, ECHR 1999-V).

5. The criteria it uses in its assessment of ill-treatment also enable the Court to classify instances of such treatment in concrete terms. Its assessment is based on "all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc." (*ibid.*, § 100).

6. Admittedly, in recent years the concept of "torture" has been interpreted in an evolutive manner and acts previously classified as inhuman and degrading treatment are now in some cases described as torture (see *Selmouni*, cited above, §§ 101 and 105; *Dikme v. Turkey*, no. 20869/92, ECHR 2000-VIII; and *Ilhan v. Turkey* [GC], no. 22277/93, ECHR 2000-VII).

7. In the present case, as is clear from the judgment (see paragraphs 27, 28, 30 and 60), the applicant received violent blows to several parts of his body from prison warders using rubber truncheons. As a result he sustained serious injuries necessitating his admission to the prison hospital.

8. However, the prison warders' use of force was intended to prevent the outbreak of a riot. It should not be overlooked in this context that in most prisons there is generally a latent presence of violence, which may at any

time degenerate into a riot. It is also important to take into account the warders' duty to maintain order in the prison.

9. In this context, I find it difficult to accept the Court's assertion in paragraph 64 of the judgment that the truncheon blows – which, moreover, had a basis in law in the event of a riot – were administered selectively to certain prisoners although the aim had been to repress a collective breach of the detention regime, quite simply because such an assertion is impossible to prove.

10. Admittedly, the blows received by the applicant were extremely violent, requiring hospital treatment, and were probably not necessary. I am not persuaded, however, that the present case involved gratuitous and premeditated violence, contrary to the position in *Dedovskiy v. Russia* (no. 7178/03, §§ 81-85, 15 May 2008), where the Court found that acts of torture had been committed since blows had been administered to the prisoners according to a predefined, calculated plan by a special-purpose squad, and where the use of rubber truncheons was retaliatory in nature.

11. In conclusion, without wishing in any way to downplay the acts of violence for which the prison warders were responsible, I consider that such acts should be described as inhuman treatment and not torture.

12. Once again, I am emphasising this point because I believe that, if it is not to be trivialised, the term "torture" must be reserved for the most serious instances of ill-treatment.