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

FIRST SECTION

CASE OF REHBOCK v. SLOVENIA

(*Application no. 29462/95*)

JUDGMENT

STRASBOURG

28 November 2000

In the case of Rehbock v. Slovenia,

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

Mrs E. PALM, *President*,
Mr L. FERRARI BRAVO,
Mr GAUKUR JÖRUNDSSON,
Mr R. TÜRMEN,
Mr B. ZUPANČIČ,
Mr T. PANŢÎRU,
Mr R. MARUSTE, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 16 May and 7 November 2000,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court in accordance with the provisions applicable prior to the entry into force of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by the European Commission of Human Rights ("the Commission") on 11 September 1999 (Article 5 § 4 of Protocol No. 11 and former Article 48 of the Convention).

2. The case originated in an application (no. 29462/95) against the Republic of Slovenia lodged under former Article 25 of the Convention by a German national, Mr Ernst Rehbock ("the applicant"), on 17 September 1995.

3. The applicant alleged, in particular, that he had been subjected to treatment incompatible with Article 3 of the Convention, that he had not been able to take proceedings by which the lawfulness of his detention could be decided speedily as required by Article 5 § 4 of the Convention, that his right to compensation as guaranteed by Article 5 § 5 of the Convention had not been respected and that his correspondence had been interfered with in violation of Article 8 of the Convention.

4. The application was declared partly admissible by the Commission on 20 May 1998. In its decision on admissibility the Commission noted that the Slovenian Government ("the Government") had made no comments concerning the applicant's compliance with the requirement of exhaustion of domestic remedies laid down in former Article 26 of the Convention. The Commission therefore held that the relevant parts of the application could not be rejected for non-exhaustion of domestic remedies.

5. In its report of 23 April 1999 (former Article 31 of the Convention) [*Note by the Registry*. The report is obtainable from the Registry.], the Commission expressed the opinion that there had been a violation of Articles 3, 5 §§ 4 and 5, and of Article 8 of the Convention (as regards the screening of the applicant's correspondence with the Commission). The Commission further found that there had been no violation of Article 8 of the Convention as regards the screening of the applicant's other correspondence.

6. The applicant had been granted legal aid.

7. On 20 September 1999 a panel of the Grand Chamber determined that the case should be decided by a Chamber constituted within one of the Sections of the Court (Article 5 § 4 of Protocol No. 11 taken together with Rules 100 § 1 and 24 § 6 of the Rules of Court). Subsequently the application was allocated to the First Section (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

8. The applicant and the Government each filed a memorial.

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 16 May 2000 (Rule 59 § 2).

There appeared before the Court:

(a) *for the Government*
Mr L. BEMBIČ, State Attorney-General, *Agent*,
Mrs M. REMIC, State Attorney, *Co-Agent*,
Mrs M. ŠMIT, Deputy to the Permanent Representative of Slovenia to the Council of Europe,
Mr M. GRANDA, Senior Expert Adviser to the Government, *Advisers*;

(b) *for the applicant*
Mr F.X. BREM, of the Rottenburg Bar (Germany), *Counsel*,
Mr E. HIPPEL, *Interpreter*.

The Court heard addresses by Mr Brem, Mrs Remic and Mr Bembič.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Treatment of the applicant during his arrest and subsequent detention

1. Treatment of the applicant during his arrest

10. On 8 September 1995 at about 2 p.m. the applicant crossed the border between Austria and Slovenia near Šentilj in a car belonging to his partner. In the car he had a package of pills which he had been asked to bring to Slovenia by an acquaintance of Slovenian origin. He did not declare this fact to the customs officers. At 4.55 p.m. on the same day the applicant was arrested by the Slovenian police in Dolič, some 70 km from the border crossing, where he was expected to hand over the pills to another person.

11. The circumstances of the arrest are in dispute between the parties.

12. According to the applicant's version of the facts, he found himself encircled by six men who had a sawn-off shotgun and pistols. They were dressed in black and wore black masks. They attacked the applicant without any prior warning. Several other men were standing nearby. The applicant was held fast and made no attempt to resist. Despite his shouting in both German and English that he was not resisting, he was dragged brutally to the bonnet of a car. Two men held him fast and pushed the upper part of his body against the bonnet. His hands were pulled behind his back and he was handcuffed. At the same time four other men kept hitting him on the head with cudgels and fists. His face was seriously injured and he suffered severe pain.

13. In their memorial of 25 November 1999 the Government explained that the applicant had been arrested in the context of an action which had been planned by the competent authorities on the basis of their operational data. When constituting the arrest team the authorities bore in mind the fact that the applicant, whom they suspected of being a drug dealer, was extremely strong as he had won the German body-building championship on several occasions.

14. In their oral submissions to the Court, the Government relied on the conclusions reached by a three-member commission established upon an order issued by the head of the Slovenj Gradec Police Administration on 9 February 1996 with a view to determining whether the use of force during the applicant's arrest had been justified. The report was adopted on 8 March 1996 and the Government submitted a copy to the Court on 23 May 2000 following the hearing on the merits of the case. The relevant parts read as follows:

"... Four criminal investigators were designated with a view to apprehending the dealers ... They had standard equipment – identification jackets and personal weapons. They also carried equipment for handcuffing and restraining the suspects ...

At the parking area [the suspects] were approached by the criminal investigators who shouted 'Stop! Police!' and instructed the suspects to stand still ... Criminal investigators B. and K. approached [the applicant] and attempted to search him ... [The applicant] disobeyed their command to remain still and tried to escape. Criminal investigators B. and K. prevented him from doing so by taking hold of him. They attempted to apply the 'elbow lock' grip [on the applicant] ... Being physically strong, [the applicant] tried to release himself. The investigators continued applying the grip with a view to preventing [the applicant] from escaping. Because of [the applicant's] strength they were unable to complete the grip in a standing position and therefore agreed to push [the applicant] down to the ground. As [the applicant] again tried to free himself, the criminal investigators had to bring him to the ground on the spot where they were standing. Since [the applicant] resisted and since there was a risk that he would attempt to escape, they were unable to choose a better location where there would be no danger of sustaining injuries. They pushed [the applicant] down to the ground between parked cars. In the course of the action [the applicant] hit his face on the mudguard of a parked car and on the tar-paved surface of the parking area. The investigators handcuffed [the applicant] while he was lying on the ground.

All [three] suspects were then taken to the police station in Slovenj Gradec. At the time of the arrest [the applicant] did not complain of any pain or injury ...

On 8 September at 4.55 p.m. [the three suspects] were taken into detention ... and on 10 September 1995 they were brought before the investigating judge of the Slovenj Gradec District Court who issued a detention order ...

On 9 September 1995 [the applicant] complained of pain in his jaw ... He was taken to the medical centre in Slovenj Gradec where it was established that his lower jaw was broken and that he had suffered a serious bodily injury ...

On the basis of the carefully collected information the commission concluded that criminal investigators K. and B. had acted correctly and in accordance with the law. The injury sustained [by the applicant] had occurred exclusively at the site of the arrest while he was being pushed down to the ground ...

While arresting [the applicant], the criminal investigators used the mildest forms of coercion – physical force and handcuffing. They thereby prevented a person apprehended at the scene of a criminal offence from escaping. The injury occurred because [the applicant] was resisting his arrest and the investigators were therefore unable to push him to the ground at a different place with the use of less force.

The commission concludes that, regardless of its consequences, the use of force was justified and in conformity with section 54 of the Internal Affairs Act and also with sections 9 and 12 of the Instruction on the Use of Coercive Measures ..."

15. By a letter of 23 May 2000 the Government also informed the Court, at its request, that there had been thirteen police officers involved in the operation and that two of them had been designated to handcuff the applicant.

2. Treatment of the applicant during his detention

16. After his arrest the applicant was detained by the police in Slovenj Gradec. He submitted before the Court that he had been suffering from headaches and had problems with his vision and that he had been examined by a doctor for the first time in the morning of 9 September 1995. On 9 September 1995 at 2.50 p.m. the applicant wrote and signed a statement, according to him upon the instructions of the police, indicating that he had fallen and hit his face against the edge of a car the day before.

17. The Government submitted that the applicant had complained for the first time about pains in his jaw to the duty officer in the morning of 9 September 1995 and that a doctor had immediately been called. The doctor had recommended that the applicant be examined at the Slovenj Gradec Health Centre, from where he was transferred to Maribor General Hospital.

18. The documents before the Court indicate that the applicant was examined meticulously by a doctor at the cervico-facial surgery department of Maribor General Hospital on 9 September 1995. The report states that he was brought to the hospital by the police and that his jaw was injured. The applicant told the doctor that he had been injured by the police. The latter stated that the applicant had hit the edge of a car during his arrest.

19. The doctor found that the applicant's temporo-mandibular joint was sensitive to pressure and that he could not open his mouth properly. The report further stated that the applicant's occlusion was irregular as the teeth on the left side had been displaced. The doctor X-rayed the applicant and diagnosed a double fracture of the jaw and facial contusions.

20. The doctor concluded that surgery under general anaesthesia was necessary and made arrangements for it to be carried out the next day. He allowed the police to keep the applicant in custody in the meantime.

21. On 10 September 1995 the applicant was brought to the hospital, but he did not consent to the operation as he considered that he would be released soon and that he would be operated on in Germany. It was agreed that the applicant would be examined again on 12 September 1995.

22. On 12 September 1995 the applicant was re-examined and stated that he felt sick and that he had vomited. He did not consent to the surgery recommended by the doctor. The latter ordered that mashed food should be served to the applicant. Another examination was fixed for 18 September 1995.

23. The medical report of 18 September 1995 indicates that the applicant felt better. His pain was less severe but still present when he was chewing and eating.

24. On 25 September 1995 the applicant refused to undergo a further examination in a hospital.

25. The applicant was again examined at Maribor General Hospital on 3 October and on 25 and 27 November 1995. He admitted a slight

improvement of his problems with the jaw, but complained of pain in his abdomen and blood in his excrement. He refused a rectal examination. His abdomen and urine were examined but no abnormalities were found. The doctors prescribed a special diet and, if need be, a further examination.

26. On 4 December 1995 the applicant was examined at Maribor General Hospital. The report states that his dental occlusion was altered and that he had pain in his jaw.

27. On 7 December 1995 the applicant was treated in the hospital for two superficial cuts on his left wrist, which he had caused himself, while in a state of depression, on 3 December 1995.

28. In a letter of 17 December 1995 addressed to the Ministry of Justice the applicant complained that he had been brutally beaten up and that he had suffered a double fracture of his jaw. He stated that he had not been provided with appropriate medical care and claimed damages of 1,000,000 German marks (DEM).

29. A further medical examination was carried out on 16 January 1996. The doctor prescribed pain-killers to the applicant and noted that a specialist should be consulted as regards the treatment of his jaw.

30. On 23 January 1996 a specialist concluded that the applicant's jaw required prothetic rehabilitation or even surgery. As the applicant had stated that he wished to undergo treatment in Germany, the doctor recommended that he should be sent there as soon as possible.

31. On 5 March 1996 the applicant complained to the prison governor that he was suffering pain due to an inflammation in his middle ear and requested treatment in a hospital.

32. On 7 March 1996 the applicant complained to a doctor about severe pain in his head and that he had not been provided with appropriate medical care in the prison. In particular, he complained that the medication prescribed for him had not been given to him regularly.

33. On 10 June 1996 the applicant complained to the Maribor prison governor that on 8 and 9 June the guards had not provided him with the pain-killers prescribed by the doctor and that, as a result, he was suffering severe pain and was depressed.

34. On 20 June 1996 the applicant complained to the prison governor that on 18 and 19 June he had not been provided with the medication which had been prescribed for him. On 30 June and 3 July 1996 he complained again that medication had been refused him. In his complaints the applicant stated that he wished to bring criminal proceedings against the staff of the prison and requested that he should be allowed to file a criminal complaint with the police.

35. On 4 July 1996 the applicant complained to a judge of the Maribor Higher Court (*Višje sodišče*) that he suffered severe pain and that he had been provided with pain-killers only irregularly.

B. Relevant decisions concerning the applicant's detention on remand

36. On 10 September 1995 an investigating judge of the Slovenj Gradec Regional Court (*Okrožno sodišče*) remanded the applicant in custody.

37. On 3 October 1995 the applicant lodged, through his lawyer, a request for release. He submitted that he would not abscond and offered a security of DEM 50,000. The applicant further claimed that his detention was no longer necessary as all witnesses in the criminal proceedings which had been brought against him had already been heard and that all relevant evidence had been taken.

38. On 6 October 1995 the Slovenj Gradec Regional Court extended the applicant's detention on remand until 8 December 1995 pursuant to Article 205 § 2 of the Code of Criminal Procedure. The court noted that the investigation into the applicant's case could not be completed within a month.

39. The applicant lodged a complaint. He claimed that there was no reason for his detention and that the Regional Court had not ruled on his request for release of 3 October 1995.

40. On 19 October 1995 the Maribor Higher Court dismissed the complaint. It noted that the applicant was a foreign national who had no links in Slovenia. It therefore held that there was a risk that he might abscond. As to the applicant's request for release on bail, the Higher Court held that it had to be examined by the Regional Court first.

41. On 26 October 1995 the Slovenj Gradec Regional Court dismissed the applicant's request for release of 3 October 1995. The court did not consider the security offered by the applicant as a sufficient guarantee that he would attend the proceedings before it.

42. On 27 November 1995 the Slovenj Gradec Regional Court extended the applicant's detention on remand pursuant to Article 272 § 2 of the Code of Criminal Procedure.

43. On 13 December 1995 the Maribor Higher Court dismissed an appeal by the applicant against the above decision.

44. On 29 November 1995 the applicant lodged, through his lawyer, another request for release. He claimed that there were no relevant reasons for his detention and offered a security of DEM 50,000.

45. The Slovenj Gradec Regional Court dismissed the request on 22 December 1995.

C. Monitoring of the applicant's correspondence with the Commission

46. During his detention in Slovenia the applicant's correspondence, including the correspondence with the Commission, was monitored.

D. Criminal proceedings against the applicant

47. On 8 January 1996 the Slovenj Gradec Regional Court convicted the applicant of unauthorised production of and dealing in narcotics and of smuggling. The applicant was sentenced to one year's imprisonment.

48. On 17 April 1996 the Maribor Higher Court dismissed an appeal by the applicant and, allowing an appeal by the public prosecutor, increased the sentence imposed to seventeen months' imprisonment.

49. On 1 September 1996 the applicant was released conditionally.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution

50. Article 26 guarantees to everyone the right to compensation for any damage resulting from unlawful official acts committed by individuals or bodies carrying out tasks vested in State organs.

B. Internal Affairs Act of 1980 and Instruction on the Use of Coercive Measures of 1981

51. Section 54 of the Internal Affairs Act (*Zakon o notranjih zadevah*) of 25 November 1980, as amended, entitles authorised officials to have recourse to physical force in the exercise of their duties when, *inter alia*, they cannot otherwise overcome the resistance of a person who refuses to comply with lawful orders or who is to be arrested.

52. Section 9 of the Instruction on the Use of Coercive Measures (*Navodilo o uporabi prisilnih sredstev*) of 1 September 1981, as amended, provides, *inter alia*, that recourse to physical force in the cases enumerated in section 54 of the Internal Affairs Act of 1980 should normally be restricted to special holds. When the authorised officials consider that such means are not sufficient, they may have recourse to blows or a rubber truncheon. In any event, physical force and rubber truncheons may only be used to the extent that is strictly necessary to overcome resistance or to prevent an attack, and the use of force should never result in ill-treatment of the person concerned.

53. Section 12 of the Instruction on the Use of Coercive Measures permits authorised officials to handcuff a person or to restrain him or her by other means if it can reasonably be expected that the person concerned will actively resist or attempt to escape.

C. Code of Criminal Procedure

54. Article 205 § 1 provides that an investigating judge may remand an accused person in custody for no longer than a month from the moment when he or she was arrested. After the expiry of this period, a person may be detained only on the basis of a decision to extend his or her detention.

55. Under Article 205 § 2, such a decision must be delivered by a court and the detention may thereby be extended for no longer than two months.

56. Article 211 § 3 provides that a detainee may correspond with or establish other contacts with persons outside the prison with the consent and under the supervision of the investigating judge dealing with his or her case. The latter may prohibit the detainee from sending or receiving letters or from having other contacts where these could affect the criminal proceedings pending against him or her. However, it is not permissible to prevent a detained person from lodging applications or appeals.

57. Article 213b was enacted on 23 October 1998. Paragraph 3 empowers the Ombudsman and his deputies to visit detained persons and to communicate with them in writing without previous notification of the investigating judge and free of any supervision by the latter or by any other official. This provision has also been applied, by analogy, to correspondence between detained persons and the European Court of Human Rights.

58. According to Article 272 § 2, when an indictment is filed against a person detained on remand and provided that it does not contain a proposal that such a person should be released, a court must examine, of its own motion and within three days after the filing of the indictment, whether there are relevant reasons for the further detention of the accused, and issue a decision by which either the detention on remand is extended or the person concerned is released.

59. Article 542 § 1 gives rise to a right to compensation for detained persons who were not committed for trial, or were acquitted or discharged after standing trial, for persons who served a prison sentence which was subsequently reduced or quashed and also for those who were arrested or detained as a result of an error or unlawful act, or whose detention on remand exceeded the term of imprisonment to which they were sentenced.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

A. Exhaustion of domestic remedies

60. The Government maintained that the applicant had failed to seek compensation under Article 26 of the Constitution before the Constitutional Court (*Ustavno sodišče*) by means of a constitutional complaint. They concluded that he had not exhausted domestic remedies as required by Article 35 (former Article 26) of the Convention.

61. The Court observes that the Government's objection was not raised, as it could have been, when the admissibility of the application was being considered by the Commission (see paragraph 4 above). There is therefore estoppel (see, among other authorities, *Nikolova v. Bulgaria* [GC], no. 31195/96, § 44, ECHR 1999-II).

B. Examination of complaints not raised by the applicant

62. The Government further objected that the Commission had examined the facts of the case under Article 5 §§ 4 and 5 of the Convention notwithstanding the fact that the applicant had not relied on these provisions in his application.

63. The Court recalls that the Convention organs have jurisdiction to review in the light of the entirety of the Convention's requirements circumstances complained of by an applicant. In the performance of their task, they are free to attribute to the facts of the case, as found to be established on the evidence before them, a characterisation in law different from that given by the applicant or, if need be, to view the facts in a different manner (see, *inter alia*, the Camenzind v. Switzerland judgment of 16 December 1997, *Reports of Judgments and Decisions* 1997-VIII, pp. 2895-96, § 50).

64. The scope of the Court's jurisdiction in cases the merits of which were examined by the Commission is determined by the Commission's decision declaring the originating application admissible (see *Thlimmenos v. Greece* [GC], no. 34369/97, § 28, ECHR 2000-IV). Furthermore, in the proceedings before the Court the applicant alleged a violation of Article 5 §§ 4 and 5 of the Convention. It follows that the Court has jurisdiction to entertain these complaints.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

65. The applicant alleged a violation of Article 3 of the Convention, which provides as follows:

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

66. In the proceedings before the Court the applicant alleged that the Slovenian police had caused him serious bodily injury during his arrest and that he had not been provided with adequate health care during his subsequent detention.

67. The Government contended that the police had had recourse to force during the arrest only to the extent that had been made necessary by the applicant's conduct. They further contested the applicant's allegations about insufficient health care during his detention. The Government pointed out, in particular, that the applicant had refused to undergo surgery as recommended by doctors.

1. Alleged ill-treatment of the applicant during his arrest

68. The Court notes that the parties did not dispute the fact that the injury of the applicant as shown by medical evidence had arisen in the course of the arrest. However, differing versions of how the applicant actually sustained the injury were put forward by the applicant and the Government (see paragraphs 12-15 above).

69. Under the Court's settled case-law, the establishment and verification of the facts in cases originally examined by the Commission are primarily a matter for the latter. While the Court is not bound by the Commission's findings of fact and remains free to make its own appreciation in the light of all the material before it, it is only in exceptional circumstances that it will exercise its powers in this area (see the Kaya v. Turkey judgment of 19 February 1998, *Reports* 1998-I, p. 321, § 75).

70. The Commission was unable to draw a complete picture of the factual circumstances in which the applicant had been injured. In its final report it noted that, despite several requests, the Government had in no way substantiated their submission that the applicant's injury had been accidentally sustained. In finding a violation of Article 3 the Commission essentially relied, with reference to the case of Ribitsch v. Austria (judgment of 4 December 1995, Series A no. 336, p. 26, § 38) on the Government's failure to provide a plausible explanation of how the injury had been caused and to produce appropriate evidence showing facts that would cast doubt on the account given by the applicant.

71. The Court notes that the alleged ill-treatment resulting in injury took place in the course of the applicant's arrest and not after he had been brought into custody. The case thus falls to be distinguished from that of

Ribitsch where the applicant's injuries were sustained in the course of his detention. On the other hand, it must also be distinguished from the case of Klaas v. Germany (judgment of 22 September 1993, Series A no. 269, pp. 16-18, §§ 26-30), which concerned less serious injuries sustained in the course of an arrest operation, but where the national courts had established the facts after having had the opportunity of hearing witnesses at first hand and of evaluating their credibility.

72. In the instant case the applicant was not arrested in the course of a random operation which might have given rise to unexpected developments to which the police might have been called upon to react without prior preparation. The documents before the Court indicate that the police planned the arrest operation in advance and that they had sufficient time to evaluate the possible risks and to take all necessary measures for carrying out the arrest. There were thirteen policemen involved and they clearly outnumbered the three suspects to be arrested. Furthermore, the applicant did not threaten the police officers arresting him, for example, by openly carrying a weapon or by attacking them. Against this background, given the particularly serious nature of the applicant's injury and seeing that the facts of the dispute have not been the subject of any determination by a national court, the burden rests on the Government to demonstrate with convincing arguments that the use of force was not excessive.

73. On 23 May 2000, following the hearing on the merits of the case, the Government submitted to the Court a report dated 8 March 1996 on the conduct of the police during the applicant's arrest. This report had not been submitted to the Commission when it examined the case. It concluded that the criminal investigators involved had acted in accordance with the law and that the use of force had been made necessary by the applicant's resisting the arrest (see paragraph 14 above).

74. The Court notes that the order to carry out an investigation was given five months after the incident, which had occurred on 8 September 1995. The investigation was carried out within the Slovenj Gradec Police Administration the members of which had been involved in the applicant's arrest. The report does not specify on which information and evidence it is based. In particular, it does not appear from the report that its authors heard the applicant, the other persons arrested together with him or any witnesses other than the policemen involved. Furthermore, the Government have not explained why the report was made available at a late stage of the proceedings only.

75. In the proceedings before the Commission the Government maintained that the applicant had sustained the injury when he had hit his head on the bumper of a car (see paragraph 21 of the Commission's report of 23 April 1999). However, the police report of 8 March 1996 indicates that the applicant hit his face on the mudguard of a parked car and on the

tar-paved surface of the parking area (see paragraph 14 above). The Government have not explained this inconsistency.

76. The Court recalls that the applicant suffered a double fracture of the jaw as well as facial contusions. Having regard to the serious nature of the injuries and notwithstanding the conclusions set out in the aforementioned report, the Court considers that the Government have not furnished convincing or credible arguments which would provide a basis to explain or justify the degree of force used during the arrest operation. Accordingly, the force used was excessive and unjustified in the circumstances.

77. Such use of force had as a consequence injuries which undoubtedly caused serious suffering to the applicant, of a nature amounting to inhuman treatment.

78. There has therefore been a violation of Article 3 of the Convention on account of the treatment to which the applicant was subjected during his arrest.

2. *Alleged ill-treatment of the applicant during his detention*

79. The applicant did not contest before the Court the Government's submission that a doctor had been summoned immediately after he had asked for a medical check-up in the morning of 9 September 1995. Furthermore, the documents submitted indicate that from that date the applicant was regularly examined by doctors and that he himself refused to undergo surgery as recommended by the specialists. The Court therefore finds that no issue arises under Article 3 of the Convention in this respect.

80. In the Court's view, the treatment to which the applicant was subjected in prison, namely the prison staff's failure to provide him with pain-killing medication on several occasions, did not attain a degree of severity warranting the conclusion that his right under Article 3 was thereby infringed.

81. Accordingly, there has been no violation of Article 3 of the Convention on account of the applicant's treatment during his detention.

III. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

82. The applicant complained that at the initial stage of his detention on remand the Slovenian courts had not decided on his applications for release speedily. He alleged a violation of Article 5 § 4 of the Convention, which provides:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

83. The Government maintained that between 6 and 19 October 1995 courts at two levels of jurisdiction had examined whether the applicant's detention on remand should be extended pursuant to Article 205 of the Code of Criminal Procedure. The determination of this issue had the same factual and legal background as the examination of the application for release lodged by the applicant on 3 October 1995. In the Government's view, there was, therefore, no need to decide separately on the application for release prior to determining whether or not the applicant's detention on remand should be extended. In any event, the requirement of a "speedy" review had been respected.

84. The Court reiterates that Article 5 § 4, in guaranteeing to detained persons a right to institute proceedings to challenge the lawfulness of their deprivation of liberty, also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of detention and ordering its termination if it proves unlawful (see *Musiał v. Poland* [GC], no. 24557/94, § 43, ECHR 1999-II). The question whether a person's right under Article 5 § 4 has been respected has to be determined in the light of the circumstances of each case (see, *mutatis mutandis*, the R.M.D. v. Switzerland judgment of 26 September 1997, *Reports* 1997-VI, p. 2013, § 42).

85. In the present case the applicant lodged his first application for release on 3 October 1995. The Slovenj Gradec Regional Court dismissed it on 26 October 1995, that is, after twenty-three days. On 29 November 1995 the applicant filed another application for release. It was dismissed by the Slovenj Gradec Regional Court twenty-three days later on 22 December 1995.

86. The Court finds that the applications for release introduced by the applicant on 3 October and 29 November 1995 respectively were not examined "speedily" as required by Article 5 § 4.

87. The fact that at the relevant time the Maribor Higher Court was seised with the applicant's complaints against the first-instance decisions on the extension of his detention on remand delivered on 6 October and 27 November 1995 respectively does not affect this conclusion. In fact, in its decision of 19 October 1995 the Maribor Higher Court expressly stated, in reply to the applicant's complaint, that his application for release of 3 October 1995 had to be examined by the Slovenj Gradec Regional Court first (see paragraph 40 above). Thus, the proceedings concerning the applications for release introduced by the applicant were independent from the proceedings concerning the extension of his detention on remand, which the Slovenian authorities brought on their own initiative.

88. There has consequently been a violation of Article 5 § 4 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 5 § 5 OF THE CONVENTION

89. The applicant complained that he had no enforceable right to compensation in respect of the violation of Article 5 § 4 found above. He alleged a violation of Article 5 § 5 of the Convention, which provides:

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

90. The Government contended that the case raised no issue under Article 5 § 5 as the applicant's rights under Article 5 § 4 of the Convention had been respected.

91. The Court notes that Article 26 of the Constitution taken together with the relevant parts of Article 542 § 1 of the Code of Criminal Procedure reserves the right to compensation to cases where the deprivation of liberty was unlawful or resulted from an error. There is, however, no indication that the applicant's continued detention – in particular the dismissal of his applications for release – was unlawful or based on an error for the purposes of Slovenian law.

92. In these circumstances, the Court finds that the applicant's right to compensation in respect of the violation of Article 5 § 4 of the Convention was not ensured with a sufficient degree of certainty (see the Sakık and Others v. Turkey judgment of 26 November 1997, *Reports* 1997-VII, p. 2626, § 60).

93. Accordingly, there has been a violation of Article 5 § 5 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

94. Before the Court the applicant complained that his correspondence with the Commission had been monitored without any justification. He alleged a violation of Article 8 of the Convention, which provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

95. The Government contended that the monitoring of the applicant's correspondence with the Commission had been in accordance with Article 211 of the Code of Criminal Procedure. They further submitted, with reference to Article 213b § 3 of the Code of Criminal Procedure enacted on

23 October 1998, that correspondence between detainees and the European Court of Human Rights had ceased to be monitored in Slovenia.

96. The Court finds that the monitoring of the applicant's correspondence with the Commission amounted to an interference with his rights under Article 8 § 1.

97. If it is not to contravene Article 8, such interference must have been "in accordance with the law", have pursued a legitimate aim under paragraph 2 and have been "necessary in a democratic society" in order to achieve that aim (see the Silver and Others v. the United Kingdom judgment of 25 March 1983, Series A no. 61, p. 32 § 84; and the Petra v. Romania judgment of 23 September 1998, *Reports* 1998-VII, p. 2853, § 36).

98. The interference had a legal basis, namely Article 211 § 3 of the Code of Criminal Procedure, and it may be assumed that it pursued the legitimate aim of "the prevention of disorder or crime".

99. As regards the necessity of the interference, the Court finds no compelling reasons for the monitoring of the relevant correspondence, whose confidentiality it was important to respect (see the Campbell v. the United Kingdom judgment of 25 March 1992, Series A no. 233, p. 22, § 62). Accordingly, the interference complained of was not necessary in a democratic society within the meaning of Article 8 § 2.

100. The Court has noted that since the enactment of Article 213b of the Code of Criminal Procedure on 23 October 1998 the correspondence between detained persons and the Court has ceased to be monitored. This cannot, however, affect the position in the present case.

101. There has consequently been a violation of Article 8 of the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

102. 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. Pecuniary damage

103. The applicant claimed 174,897 German marks (DEM), mainly referring to loss of earnings and costs incurred by his partner while looking after him in Slovenia, to the retention of his partner's car by the Slovenian authorities and to the depreciation of shares owned by him during his detention in Slovenia.

104. The Government objected to this claim, which they considered unsubstantiated.

105. The Court sees no direct causal link between the identified breaches of the applicant's rights under the Convention and the claimed pecuniary losses. There is, therefore, no ground for any award under this head.

B. Non-pecuniary damage

106. The applicant claimed DEM 1,000,000 as compensation for pain and suffering resulting from the treatment to which he had been subjected by the Slovenian authorities.

107. The Government considered that sum excessive. They contended that the applicant was himself responsible for the jaw injury he had sustained and that he had refused to undergo surgery.

108. The Court considers that the infliction of the injury on the applicant must have involved considerable pain. However, in assessing damage under this head the Court must take into account the fact that the applicant had not been willing to undergo the appropriate treatment for his injury in Slovenia notwithstanding the view of medical specialists that surgery was necessary (see paragraphs 20-30 above). Making an assessment on an equitable basis, the Court awards the applicant DEM 25,000.

C. Costs and expenses

109. The applicant sought reimbursement of DEM 23,700, which he broke down as follows:

(a) DEM 16,500 corresponding to the fees of the lawyers who had represented him in the criminal proceedings in Slovenia;

(b) DEM 7,200 corresponding to the cost of the telephone calls made by his partner while arranging for the protection of the applicant's rights both in Slovenia and before the Commission.

110. The Government stated that the costs claimed were unjustified.

111. The Court reiterates that in order for costs and expenses to be included in an award under Article 41 of the Convention, it must be established that they were actually and necessarily incurred and reasonable as to quantum (see, among other authorities, *Jėčius v. Lithuania*, no. 34578/97, § 112, ECHR 2000-IX).

The Court is not satisfied that the expenses of the applicant's partner may be regarded as necessarily incurred with a view to preventing or remedying the violations of the Convention as established.

As to the lawyers' fees claimed, they mainly concerned the applicant's defence to the criminal charges against him before the Slovenian authorities, which was not the subject matter of the proceedings before the Court.

The Court further notes that the Council of Europe paid Mr Rehbock the sum of 17,098.12 French francs (FRF) by way of legal aid.

Making its assessment on an equitable basis, the Court considers it reasonable to award the applicant DEM 7,000, together with any value-added tax that may be chargeable, less the FRF 17,098.12 received by way of legal aid from the Council of Europe.

D. Default interest

112. According to the information available to the Court, the statutory rate of interest applicable in Germany at the date of adoption of the present judgment is 4% per annum.

FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the Government's preliminary objections;

2. *Holds* by six votes to one that there has been a violation of Article 3 of the Convention on account of the treatment to which the applicant was subjected during his arrest;

3. *Holds* unanimously that there has been no violation of Article 3 of the Convention on account of the treatment to which the applicant was subjected during his detention;

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

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

6. *Holds* unanimously that there has been a violation of Article 8 of the Convention;

7. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months, the following amounts: DEM 25,000 (twenty-five thousand German marks) in respect of non-pecuniary damage and DEM 7,000 (seven thousand German marks) for costs and expenses, together with any value-added tax that may be chargeable, less FRF 17,098.12 (seventeen thousand and ninety-eight French francs twelve centimes) to be converted into German marks at the rate applicable at the date of delivery of this judgment;

(b) that simple interest at an annual rate of 4% shall be payable from the expiry of the above-mentioned three months until settlement;

8. *Dismisses* unanimously the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on 28 November 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE Elisabeth PALM
Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Mr Zupančič is annexed to this judgment.

E.P.
M.O'B.

PARTLY DISSENTING OPINION OF JUDGE ZUPANČIČ

I

At least in procedural terms, this is an unusual case. The applicant never raised the question of his injury before the investigating judge or before the trial judge(s) although he had, at those stages, only a burden of allegation (*onus proferrendi*). Had he only *alleged* the abuses, the courts would have been obliged to take judicial notice, and the prosecutor would likewise have been required to commence proceedings against the suspected police officers. If unsuccessful, the applicant would have had a number of remedies, after exhaustion of which he would have been able to file a constitutional complaint. It is factually relevant in this case that the applicant never availed himself of any of these normal procedures which would have resulted in the judicial investigation of the injury sustained by him. The Government, in turn, did not plead the non-exhaustion of domestic remedies at the appropriate stage of the proceedings. The case thus reached the Court with some of its crucial factual elements essentially unexplored. Since there was no domestic *judicial* investigation, these facts only became relevant later, in the light of the allegation of a violation of Article 3 of the Convention.

In fact, the crucial circumstances of this arrest had never before been directly determined, in accordance with the principle of *immediacy*, by any judicial authority, domestic or international. The central issue of the use of allegedly excessive force in effecting what was otherwise a lawful arrest of the applicant was thus first presented to the European Court of Human Rights. By default, we were, therefore, put in the position of a first-instance fact-finding court.

Moreover, in the future, owing to the impact of Protocol No. 11, such cases are going to recur. There is now no Commission to perform the essential fact-finding function for the Court.

It follows logically that the Court will have to adapt to this new situation. It will have to allow for situations in which, as in this case, its own hearings will be akin to first-instance hearings before the national courts. The Court will have to hear witnesses, permit the cross-examination of hostile witnesses, directly examine and evaluate material evidence, etc. The Court will have to establish its own evidentiary rules pertaining to the burden of proof, the risk of non-persuasion, the principle *in dubio pro reo*, etc. These rules are already present in our jurisprudence, albeit in a rudimentary form. Needless to say, in establishing these procedural precepts we must above all strictly follow the guarantees of Article 6, as we require of all the signatories of the Convention.

This will apply to all cases where, through the lens of the Convention, certain facts become legally relevant *only because* the case has reached the European Court of Human Rights and *only after it has done so*.

It is generally true, of course, that what we call “facts” or “legally relevant facts” are not something purely and simply “objective”. Out of the countless “facts” of a particular case only selected aspects come into judicial focus. This only happens once a specific legal qualification of the case is applied to the given fact pattern by the court in question. In turn, of course, the norm applied in order to give a legal qualification to a particular case is itself chosen with respect to perceived facts. There is thus a dynamic and dialectical relationship between the facts and the norm. Depending on the choice of the applicable norm, different facts come into judicial focus – as if they were seen with a different set of glasses.

It follows that facts which might be relevant and decisive before the domestic courts will often not be relevant and decisive before the European Court of Human Rights. And vice versa. In Strasbourg we use a different set of principles, doctrines and rules, i.e. those based on the norms of the Convention and elaborated during the fifty years of the Court's jurisprudence. The identical factual pattern may thus have been scrutinised from an entirely different legal perspective or, as in this case, not subjected to judicial scrutiny at all.

The problem is not new. The Court has always applied its own criteria of what is *factually* relevant under the Convention. To maintain otherwise would put us in the role of Monsieur Jourdain [Monsieur Jourdain is the main character in Molière's play *The Imaginary Invalid*).] surprised to find out that he had been speaking in “prose” all along. To apply the specific factual scrutiny relevant under the Convention is in the end, of course, the mission of the European Court of Human Rights.

There is nothing unusual in this unless one is to remain attached to the unenlightened strict separation of facts and law, *questiones juris et questiones facti*. Modern legal philosophy has long transcended this artificial distinction. The case before us amply illustrates the need to do so. This, however, has negative implications for the frequently used incantatory formula according to which “we are not a fourth-instance court” and that, consequently, we leave exploration of facts to the *national* courts. In some cases, where the applicant complains of purely evidentiary defects on the part of the national courts this may be the right approach. It is clearly not the right approach in those cases where the national courts have not had the opportunity to consider the applicability of the Convention.

The doctrine requiring the exhaustion of domestic remedies is only partly based on former Article 26, now Article 35, of the Convention. According to this provision, however, the case can be dismissed *at any time*, i.e. the objection by the respondent Government is not limited in time to the period

before the admissibility stage of the case. This was simply a convenient practice of the Commission, i.e. not a weighty doctrine in the usual sense of the word. Teleological analysis of the provision discloses that it is concerned with something more than fact-finding alone. Its purpose, in terms of international law, is simply to permit the national courts of the High Contracting Party to abide by the minimal legal and procedural standards required by the Convention and our Court. The perceived delegation of fact-finding to national courts is simply a by-product of this basic international legal courtesy based on the assumption that all member States will abide by their obligations under the Convention.

This implies that the case before us could be dismissed even after the hearing. In my opinion this would have been the wisest thing to do unless we were willing to plunge into direct fact-finding.

II

The actual fact pattern under consideration is legally qualified as an allegation of *excessive force used in performing a lawful arrest* of a drug smuggler crossing the border from Austria into Slovenia.

The procedural legal issue of reasonable suspicion (probable cause) antecedent to arrest and of its articulable, concrete and specific nature, the legitimacy of its sources, etc. has never been raised by the applicant. Since the legality of the arrest has not been challenged we do not know how the Slovenian police arrived at the information concerning the applicant's attempt to smuggle the ecstasy pills and other contraband into the country. We are, therefore, to assume that the basis for the arrest was lawful both in terms of domestic law and for the purposes of the Convention.

The next question is whether the applicant knew he was being arrested, i.e. whether his alleged resistance to arrest could have been the consequence of a justifiable mistake of fact (*error facti*) on his part. The Government maintained all along that the police officers performing the arrest were clearly identifiable because the word "POLICIJA" was clearly inscribed on their anoraks. The applicant maintained that the officers were not wearing these anoraks and that they appeared to him as "Ninjas" attacking him for no reason connected with his contraband. While this is difficult to believe, since the applicant must have been nervous due to the contraband in his car, his claim makes sense only in the context of his presumed resistance to arrest. In any event, even if the police officers did not wear clearly discernible police insignia, it is difficult to believe that a drug smuggler facing a uniformed crowd of "Ninjas" would assume he was being attacked, such as for the purpose of robbery, etc.

Consequently, if we assume that the applicant knew that he was being arrested and for a reason having to do with the drugs in the glove compartment of his car, his resistance to the lawful arrest in progress cannot be attributed to a mistake of fact on his part. And if there was no mistake on

his part as to what was going on, there was no justification for his resistance to arrest.

The remaining question, therefore, is whether this force was *excessive* for the purposes of effecting the arrest.

The proportionality of the use of force in such situations clearly depends on the behaviour of the person being deprived of his or her liberty.

However, it is well established in criminal law that the use of force in arresting suspected violent criminals cannot be considered only *ex post facto*. Violent struggles, altercations, etc., are typical of such situations. The fine judicial balancing of factors leading to the use of force must take into account the agitated state of mind of those participating in self-defence, defence of another and other necessity and duress situations. In terms of substantive criminal law such situations are akin to justifiable use of force in self-defence. The use of force in self-defence must be contemporaneous with the attack, proportionate in order to cancel out the unjustified attack, which itself must be unprovoked, etc. The logic here is similar to the logic of extreme emotional distress situations in which the actor is greatly provoked. Most criminal codes have provisions to this effect. The permissible margin of tolerance is, therefore, considerable as long as other criteria of justification (simultaneity of force and counter-force, the legality of the arrest itself, knowledge on the part of the person that he or she is being arrested, good faith and reasonably perceived danger on the part of the police effecting the arrest, etc.) are satisfied.

When this logic is applied to executing a lawful arrest, it means that the use of force will not be excessive if it was, *in the view of the actor*, (absolutely) necessary to accomplish the legitimate deprivation of liberty. If the person being arrested resists, additional contemporaneous force is justified in order for the police to accomplish their justified aim. This test is both subjective and objective.

I refer to Article 2 § 2 (b) of the Convention, where even the deprivation of life is not regarded as being in contravention of the Convention if it results from the use of force which is no more than absolutely necessary "*in order to effect a lawful arrest or to prevent the escape of a person lawfully detained*".

It is interesting that this provision subsists despite the abolition of the death penalty in Article 1 of Protocol No. 6. The State is, in other words, authorised to use deadly force in effecting a lawful arrest – although it is not authorised to impose or execute a death penalty. This exception has to do precisely with the extreme circumstances in self-defence, defence of another, etc., i.e. with the established criminal-law doctrines concerning emergency situations. In these situations the actor (perpetrator) cannot be expected to arrive at an even-handed, reasonable, premeditated and entirely rational decision concerning the question what force is "no more than absolutely necessary". It is taken for granted that in altercations of this kind

– including the effecting of an arrest – overreaction on both sides is to be expected. There is plenty of specific case-law to support this.

At least superficially, it would seem, nevertheless, that there is a contradiction between the very existence of the exception (permitting the State to use deadly force in effecting a lawful arrest) on the one hand and the requirement that this use of deadly force, at least in retrospect, be found to be "*absolutely necessary*" on the other hand. This contradiction can only be explained teleologically. We must bear in mind that the framers of the Convention did not want to open the door to the liberal use of deadly force in effecting lawful arrests. They could not, however, have intended in such emergency situations to impose the strict and absolute reasonableness standard.

If the use of *deadly* force is explicitly permitted under the Convention to effect a lawful arrest, then use of force – if perceived as necessary – is *a fortiori* permitted if it does not result in death but in bodily injury.

III

Finally, the question arises as to the liability for an *injury* sustained during and due to the use of this additional force applied by the police.

The unintended injury, here, is clearly what substantive criminal law calls a "preterintentional" consequence (one going beyond what was intended). The liability for the consequences going beyond the actor's direct intent is imputed if they are at least the result of the actor's recklessness (conscious negligence) or (unconscious) negligence – but only if the act itself is punishable in its negligent form. In such cases the actor, even if he did not know exactly what the consequences of his act would be, but could have and should have known that such consequences may occur, is liable for the unintended result of his act also.

Theoretically, at least, the applicant's broken jaw in this case could have been the result of direct intent (*dolus directus*) of the police officers. Everybody is presumed to intend the natural consequences of his or her acts. The burden would in principle be on the police to show that they did not intend to cause the injury the applicant complains of. This, however, would imply that in this case the *natural* result of the actions of the police officers was a broken jaw. This in turn would imply that the police officers had intended to injure the applicant and that they accomplished exactly what they had intended.

In terms of *Selmouni v. France* ([GC], no. 25803/94, ECHR 1999-V), a judgment which brought the United Nations Convention against Torture ("the CAT") definition of torture into our own jurisprudence, this could amount to torture. The question would then be: was the applicant's pain and suffering severe and did the police have the specific intent (*dolus specialis*), for example, to discriminate against or punish the applicant? If we considered the pain and suffering undergone by the applicant to be less than

"severe" then, in terms of the CAT, we would be speaking of "inhuman and degrading treatment".

Here it is important to emphasise again that both torture and inhuman and degrading treatment do require direct intent (*dolus directus*) on the part of the police officers. Only in exceptional circumstances, for example, where the applicant is neglected in a prison, will negligence suffice. This is clearly not such an exceptional situation.

The police behaviour here, unlike the position in the *Selmouni* case, where the abuses were sadistic and where they occurred *after* the applicant had been deprived of his liberty, was, at worst, an overreaction to the applicant's attempted escape. The injury caused by this combative overreaction was not directly intended, i.e. it was a "preterintentional" consequence of the legitimate use of force. In the worst scenario, therefore, the injury could be attributed to police officers' recklessness (conscious negligence), but not to their intent. Since inhuman and degrading treatment does require direct intent, the injury here could not, in my opinion, be described as either "torture" or as "inhuman and degrading treatment."

Under the less extreme, but far more likely scenario, however, we would consider the injury sustained by the applicant to have been an unintended consequence of the *intentional* use of force by the police officers. According to the police officers' story, the applicant, once apprehended, attempted to escape. This in turn resulted in two officers throwing themselves upon him, knocking him over and pulling him to the ground. In this scenario the intentional use of force was *provoked* by the applicant's attempt to escape. The consequent injury may be seen as entirely foreseeable or not. However, even if foreseeable, it would in the worst possible case only be attributable to police officers' conscious negligence. Since conscious negligence does not legally result in inhuman and degrading treatment, we could not here speak, even in the worst possible scenario, of a violation of Article 3 of the Convention.

The nature of the injury, the jawbone broken in two places, is consistent with this story, i.e. with the applicant's hitting a *hard object* – allegedly the bumper on a nearby car –, whereas such injury is clearly not consistent with simple "punching" as contended by the applicant.

Given the police's internal disciplinary rules in Slovenia, it is highly unlikely that the officers would have directly intended (*dolus directus*) to break the jaw. Such bodily injury is bound to be reported by the aggrieved person and bring upon the officers at least internal disciplinary action by the police authorities. As a member of the United Nations Committee against Torture, I have had the opportunity to acquaint myself with the persistent attempts by undisciplined police forces from all over the world to *hide* the effects of torture or inhuman and degrading treatment of their victims. It is not likely that officers bent on inhuman and degrading treatment would

intend to cause an injury such as would clearly necessitate medical assistance and the inevitable medical reporting of the injury.

The personal handwritten statement by the applicant to the effect that the injury was not the fault of the police is on the record. Its probative value would have been less, had it merely been signed by the applicant, were it written in Slovenian and not in the applicant's native German language, and were the applicant not an individual extremely distrustful of the foreign environment in which he found himself. It is difficult to believe that such an individual could be bullied into writing and signing an explicit statement exonerating the police. The applicant alleges "psychological terror" but does not specifically demonstrate what kind of threats could persuade a multiple body-building champion to write a statement saying: "*I fell, hitting my face against the wing of the car and injuring my jaw. [Signature] This happened yesterday between 5 and 6 p.m.*" (translation).

I therefore tend to believe that the applicant had attempted to escape, that the two officers had knocked him down in order to prevent his escaping and that he struck his chin against the bumper of a nearby car.

IV

The Commission's report makes much of insufficient investigation on the part of the respondent State, who was required by the burden of proof to show that the applicant, whom the Slovenian police apprehended in good health, was not injured through the excessive force used by the police.

But to make the respondent State bear the international legal consequences of the lack of judicial investigation is to put it in a catch-22 situation. The absence of judicial investigation here is clearly the consequence of the non-exhaustion of domestic remedies. The non-exhaustion of domestic remedies on the part of the applicant complaining he could not reach the Constitutional Court with his constitutional complaint is in turn the simple consequence of the fact that the applicant never complained of police abuse.

Before he issued the so-called investigation order, which marks the official beginning of criminal procedure under Slovenian law, the investigating magistrate duly questioned the applicant. The applicant did not complain. At his trial too, he had an opportunity to allege ill-treatment by the police. He did not complain. The only burden he had at these and later stages of the criminal proceedings was the so-called burden of allegation (*onus proferrendi*). Mere allegation at any of these stages would have automatically triggered an official investigation into the alleged use of excessive force by the police. On the basis of the record of these allegations it would have been for the prosecutor to request *ex officio* a judicial inquiry against the suspected police officers. That could have resulted in a criminal trial of the police officers.

There is nothing in the record that would suggest that the applicant ever made such an allegation. His constitutional complaint under domestic law would likewise have been declared inadmissible for the same reason his application in Strasbourg would have been inadmissible, were it not for the Government's omission to plead the non-exhaustion of domestic remedies in good time.

For these reasons, I voted against a violation of Article 3.