Ministerium des Innern
des Landes Nordrhein-Westfalen

Der Minister

Ministerium des Innern NRW, 40190 Düsseldorf

Präsident des Landtags
Nordrhein-Westfalen
Platz des Landtags 1
40221 Düsseldorf

16. November 2017

Telefon 0211 871-3226
Telefax 0211 871-

für die Mitglieder
des Innenausschusses

60-fach

Sitzung des Innenausschusses am 23.11.2017
Antrag der Fraktion Bündnis 90/Die Grünen vom 13.11.2017
" Entscheidung des Europäischen Gerichtshofs für Menschenrechte stellt die Abschaffung der Kennzeichnungspflicht in Frage"

Sehr geehrter Herr Landtagspräsident,

zur Information der Mitglieder des Innenausschusses des Landtags übersende ich 60 Exemplare des schriftlichen Berichtes zum TOP „Entscheidung des Europäischen Gerichtshofs für Menschenrechte stellt die Abschaffung der Kennzeichnungspflicht in Frage".

Mit freundlichen Grüßen

Herbert Reul

Dienstgebäude:
Friedrichstr. 62-80
40217 Düsseldorf

Lieferanschrift:
Fürstenwall 129
40217 Düsseldorf

Telefon 0211 871-01
Telefax 0211 871-3355
poststelle@im.nrw.de
www.im.nrw

Öffentliche Verkehrsmittel:
Rheinbahnlinien 732, 736, 835, 836, U71, U72, U73, U83
Haltestelle: Kirchplatz

Ministerium des Innern
des Landes Nordrhein-Westfalen

Der Minister

Schriftlicher Bericht
des Ministers des Innern
für die Sitzung des Innenausschusses am 23.11.2017
zu dem Tagesordnungspunkt
" Entscheidung des Europäischen Gerichtshofs für Menschenrechte stellt die Abschaffung der Kennzeichnungspflicht in Frage"
Antrag der Fraktion Bündnis 90/Die Grünen vom 13.11.2017

Der Europäische Gerichtshof für Menschenrechte hat in seinem Urteil vom 9. November 2017 (s. Anlage) die Bundesrepublik Deutschland zu einer Entschädigung von jeweils 2.000 Euro zu (Az.: 47274/15) verurteilt.

Gegenstand der Verhandlung waren mutmaßliche Polizeiübergriffe gegen Fußballfans nach einem Spiel in München am 09.12.2007.

Hinsichtlich der Kennzeichnung von Polizeibeamten wird keineswegs eine Entscheidung getroffen. Es wird nur auf Seite 2 des Urteils im Rahmen der Sachverhaltsdarstellung dargestellt, dass beide Uniformen keine Namensschilder oder andere Schilder zur Identifizierung der einzelnen Polizeibeamten, sondern lediglich eine Identifikationsnummer auf der Rückseite des Helms enthielten: „ *Both uniforms did not include any name tags or other signs identifying the individual officers. However, on the back of the helmets an identification number of the squad was displayed."*
Der Vorwurf der Beschwerdeführer richtete sich keineswegs gegen möglicherweise fehlende individualisierende Kennzeichen, sondern gegen die lückenhaften Ermittlungen der zuständigen Staatsanwaltschaft. Dieser Kritik sind die Straßburger Richter gefolgt, indem Sie auf Seite 25, 2. und 3. Absatz des Urteils feststellen, dass dieser "Einsatz von

behelmten Polizisten ohne identifizierende Merkmale und die daraus resultierenden Schwierigkeiten" während der Ermittlungen nicht ausreichend ausgeglichen worden seien.“ In Ermangelung individueller Erkennungszeichen für behelmte Offiziere kämen den Ermittlungsmaßnahmen, um die Identität der Verantwortlichen für die angebliche übermäßige Gewaltanwendung festzustellen, besondere Bedeutung zu. So sei Videomaterial nur teilweise ausgewertet worden, zudem seien nicht alle Beamte befragt worden.
“ Therefore, the employment of helmeted officers with no identifying individual insignia could not - by itself - render the subsequent investigation ineffective. However, in the absence of such identifying insignia for helmeted officers, the investigative measures open to the authorities to establish the identities of the persons responsible for the alleged use of excessive force causing ill-treatment became increasingly important.”

Die im Dezember 2016 von der Vorgängerregierung eingeführte individualisierte Kennzeichnungspflicht wurde mit dem Fünften Gesetz zur Änderung des Polizeigesetzes des Landes Nordrhein-Westfalen, veröffentlicht im Gesetz- und Verordnungsblatt (GV. NRW.) Ausgabe 2017, Nr. 31 vom 23.10.2017, aufgehoben. Dieses Gesetz ist am 24.10.2017 in Kraft getreten.

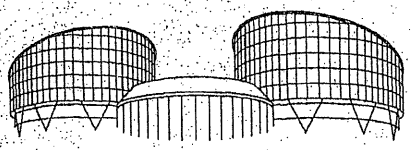
Damit ist aber nicht jegliche Kennzeichnung entfallen. Vielmehr besteht eine sogenannte 'taktische Kennzeichnung'. Diese beinhaltet eine Nummernkombination auf dem Rücken der Schutzanzüge, welche eine Zuordnung zu einer der landesweit achtzehn Hundertschaften und der jeweiligen Gruppe ermöglicht. Sie entspricht dem bundesweiten Standard.

Bewertung

a) Da das Urteil nicht die fehlende Kennzeichnung, sondern die lückenhafte Aufklärung des Sachverhalts moniert, zeigt es keine Auswirkungen auf eine durch den Gesetzgeber zu verantwortende Kennzeichnungspflicht.

b) Der Verpflichtung zur ausreichenden Kennzeichnung der Alarmeinheiten und Einheiten der Bereitschaftspolizei ist auch unter Anlegung des im Urteil vom 9.11.2017 zum Ausdruck kommenden rechtlichen Maßstabs durch die in Nordrhein-Westfalen nunmehr existierende 'taktische Kennzeichnung' ausreichend Rechnung getragen.

Anlage



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

FIFTH SECTION

CASE OF HENTSCHEL AND STARK v. GERMANY

(Application no. 47274/15)

JUDGMENT

STRASBOURG

9 November 2017

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

In the case of Hentschel and Stark v. Germany,

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

Nona Tsotsoria, *President,*
Angelika Nußberger,
Yonko Grozev,
Síofra O'Leary,
Carlo Ranzoni,
Mārtiņš Mits,
Lətif Hüseynov, *judges,*

and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on 26 September 2017,

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

PROCEDURE

1. The case originated in an application (no. 47274/15) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two German nationals, Mr Ingo Hentschel and Mr Matthias Stark ("the applicants"), on 22 September 2015.

2. The applicants were represented by Mr M. Noli, a lawyer practising in Munich, and Ms A. Luczak, a lawyer practising in Berlin. The German Government ("the Government") were represented by their Agents, Mr H.-J. Behrens and Ms K. Behr, of the Federal Ministry of Justice and Consumer Protection.

3. The applicants alleged, under Article 3 of the Convention, that they had been beaten and that pepper spray had been used on them by police officers who, owing to an inadequate investigation, had been neither identified nor punished. They further complained under Article 13 that they had had no judicial remedy at their disposal to challenge the discontinuation and the ineffectiveness of the investigation.

4. On 26 February 2016 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The first applicant was born in 1969 and lives in Illertissen. The second applicant was born in 1989 and lives in Harburg.

A. Police operation

6. On 9 December 2007 both applicants went to a football match in Munich.

7. The police had predicted an increased risk of clashes between rival football supporters owing to confrontations at previous matches between the two teams. Therefore a total of 227 police officers were deployed, including two squads – comprising eight to ten police officers each – of the 3rd platoon of the Munich riot control unit (*Unterstützungskommando*), one squad of the 2nd platoon of the Munich riot control unit and the 23rd platoon of the 6th Dachau public-order support force battalion (*Bereitschaftspolizei*). The deployed officers of the Munich riot control unit also included "video officers", who carried handheld video cameras and recorded videos of incidents that might be relevant under criminal law. The officers of the Munich riot control unit were dressed in black/dark blue uniforms and wore black helmets with visors. The officers of the Dachau public-order support force battalion wore green uniforms and white helmets with visors. Both uniforms did not include any name tags or other signs identifying the individual officers. However, on the back of the helmets an identification number of the squad was displayed.

8. After the match had ended the police cordoned off the stands of the supporters of one of the teams, including both applicants, to prevent them from leaving the stadium and encountering supporters of the other team. The cordon was lifted after around fifteen minutes.

1. The applicants' version of the subsequent events

9. According to the first applicant, he left the stands after the blockade had been lifted. While walking between the exit of the stands and the exit of the football stadium a group of police officers dressed in black uniforms came running towards the exiting spectators with their truncheons raised above their heads. Some of these officers started hitting the spectators with their truncheons without any prior warning as soon as they reached them. The first applicant himself was hit with a truncheon on the head, which resulted in a bleeding laceration of 3 cm behind his ear. After having reached the exit of the stadium he was treated by a paramedic in an ambulance that was parked close to the ground. Subsequently, he returned

to his home town, where he was treated in the emergency unit of the local hospital.

10. The second applicant also exited the stands after the blockade had been lifted. Before exiting the stadium he was grabbed by the shoulder and, after turning round, had pepper spray doused in the face at close range. He lay down on the ground and was subsequently struck on his left upper arm with a truncheon. He suffered swelling and redness of his face and pain in his arm.

11. Both applicants were able to identify their attackers as police officers, but were not able to distinguish them further, owing to their identical uniforms and the lack of identifying signs or name tags.

2. The Government's version of the subsequent events

12. According to the Government the blockade was lifted due to the aggressive behaviour of some of the spectators and the pressure applied to the police cordon. When the supporters streamed from the stands towards the exit, they came upon police units which had been called in to provide backup for the police cordon. Subsequently some of the supporters continued their aggressive behaviour towards these officers and provoked them. The supporters' conduct resulted in the arrest of one supporter and two police officers sustained minor injuries. After a few minutes the police pacified the situation and got the exiting supporters under control.

13. The Government furthermore challenged the accounts of the applicants and submitted that there was no credible evidence that the applicants had deliberately been hit or harmed by police officers and that the injuries had been a result of the police operation.

B. Investigation

14. As of 15 December 2007 the press reported about the police operation in the aftermath of the football match, *inter alia* quoting football supporters describing arbitrary attacks by police officers of the riot control unit with truncheons and pepper-spray. In an article of 18 December 2007 a spokesperson of the police commented on the operation and stated that the alleged assaults by police officers would be investigated. On 2 January 2008, the Munich public prosecutor's office instigated a preliminary investigation. On 21 January 2008 the second applicant reported the alleged police violence and submitted a medical certificate concerning the effects of the pepper spray on his face from the same day. He filed a formal criminal complaint on 7 March 2008. The first applicant filed a criminal complaint against an unidentified police officer on 25 April 2008. He also submitted a medical certificate confirming a bleeding laceration on his head. The certificate was issued at 12.05 a.m. on 10 December 2007. Several other

spectators at the match had also lodged criminal complaints against unidentified police officers.

15. The investigation was conducted by the unit of the Munich police responsible for offences perpetrated by public officials under the responsibility of the Munich public prosecutor's office. The officer in charge interviewed a total of twenty witnesses, including the applicants, the officer in charge of the Munich riot control unit and the squad leaders of the deployed squads of the 2nd and 3rd Munich riot control units.

16. The investigating division was also provided with a DVD showing excerpts of the video surveillance recorded by the riot control police at the football match. The DVDs were compiled by the "video officers" of the Munich riot control unit. In line with their usual procedure the entire recorded video material was reviewed by the respective video officer after his or her deployment and the parts which were deemed relevant under criminal law and of sufficient quality to serve as evidence were copied to a DVD.

17. On 10 September 2008 the competent public prosecutor discontinued the investigation. He found that the investigation had produced evidence that some of the police officers had used truncheons against spectators, including women and children, in a disproportionate way and without an official order or approval. However, he concluded that the investigation had not led to a situation where concrete acts of violence could be related to specific police officers and it could not be ascertained either whether the use of force had been justified. In sum, the public prosecutor had been able neither to establish whether the applicants' injuries had been inflicted by police officers nor to identify the suspects who had allegedly struck and used pepper spray on the applicants.

18. The applicants appealed against the decision to discontinue the investigation and argued, in particular, that the public prosecutor had only questioned the squad leaders, but had not identified all the officers involved in the operation and deployed in the area of the stadium at issue.

19. On 14 October 2008 the public prosecutor reopened the investigation and ordered further enquiries. On 20 October 2008 the head of the investigation unit met with the platoon leaders of the Munich riot control unit and other division heads of the Munich police to discuss the investigation. Neither the public prosecutor nor the applicants' representative attended the internal police meeting. Subsequently, a further twenty-two witnesses were interviewed including fourteen platoon leaders, squad leaders and video officers of the deployed police units. The individual squad members of the three squads of the Munich riot control unit were not interviewed. The applicants had requested that they be interviewed, as the evidence had suggested that the alleged perpetrators had belonged to one of these three squads.

20. The investigating police unit was also provided with video surveillance recorded by the 23rd platoon of the 6th Dachau public-order support force battalion. Upon the request of the applicants to secure the entire video material of the police operation, and not only the already submitted video excerpts, it was established that the original video tapes and possible digital copies had already been deleted and that only the excerpts were still available.

21. On 4 August 2009 the public prosecutor discontinued the investigation again. In a detailed fifteen-page decision he first summarised the investigative measures taken, referring in particular to the interviews of several witnesses, including police officers and the alleged victims, the review of video material from the police and from the internet, the assessment of the applicants' written observations and of the submitted documents, *inter alia*, medical certificates, as well as gathered information and reports on past events and applicable guidelines. After assessing all the available evidence, the public prosecutor concluded that the enquiries had shown that several supporters had aggressively approached, insulted and provoked the deployed police officers and that therefore a situation had existed in which the officers could have been justified in using their truncheons. Besides this general conclusion he held that the applicants had neither been able to identify a particular suspect nor to determine whether the suspected police officers had been male or female and that the investigation had not produced other persons who had witnessed the alleged acts against the applicants. Furthermore, he outlined in detail certain "considerable discrepancies" in the witness statements of the first applicant and referred to "unspecific" statements of the second applicant. Consequently, according to the public prosecutor, there was insufficient evidence to establish criminal conduct by specific police officers to the detriment of both applicants. He concluded that the investigation had to be discontinued again, since the considerable additional investigative measures had not revealed disproportionate conduct on the part of individual police officers, in particular truncheon strikes against innocent bystanders, which would require criminal prosecution of the respective officers.

22. On 20 August 2009 the applicants appealed and pointed out that the members of the deployed squads had still not been questioned and that the inspected videos were fragmentary, but nonetheless contradicted certain parts of the statements made by the squad leaders.

23. On 3 February 2011 the Munich general public prosecutor confirmed the decision of the public prosecutor's office of 4 August 2009 to discontinue the investigation. The instructions on available legal remedies attached to the decision informed the applicants that they could request a judicial decision in the framework of proceedings to force criminal proceedings (*Klageerzwingungsverfahren*).

C. Court proceedings

24. On 19 September 2011 the Munich Court of Appeal declared the applicants' application to force further enquiries inadmissible. The court interpreted the applicants' request as an application to force criminal proceedings (*Klageerzwingungsantrag*) and held that these proceedings were only admissible if the prosecution of one or more identified accused had been requested. An application to force criminal proceedings against an unidentified accused had to be declared inadmissible, since the proceedings were not supposed to identify the accused or replace investigations. Only in a case where a public prosecutor's office had entirely refrained from investigating a crime had a court the possibility to order an investigation. Under Article 173 § 3 of the Code of Criminal Procedure (*Strafprozessordnung* – hereinafter "the CCP"; see paragraph 37 below) a court was only allowed to conduct minor enquiries to fill in remaining gaps in an investigation. Moreover, the applicants had not submitted specific facts or evidence that would have allowed the court to identify an accused.

25. On 25 October 2011 the applicants lodged a constitutional complaint, relying on Articles 2 § 2, 19 § 4 and 103 § 1 of the German Basic Law (*Grundgesetz*) (see paragraphs 29-31 below). Besides referring to articles of the Basic Law, the applicants also referred in their complaint to Articles 2, 3, and 13 of the Convention. In essence they complained that the investigation had not been effective and that the Court of Appeal had not evaluated the effectiveness of the investigation.

26. On 23 March 2015 the Federal Constitutional Court (hereinafter "the Constitutional Court") refused, in a reasoned decision (2 BvR 1304/12), to admit the applicants' constitutional complaint. The court held that the investigations had been conducted diligently, but had not established sufficient suspicion of criminal conduct on the part of specific police officers. Moreover, the remaining gaps and factual uncertainties could not be attributed to omissions in the investigation. The court also found that it had not been necessary to question all the squad members who had possibly been involved. In its decision the Constitutional Court referred to the Court's case-law concerning the procedural obligation of Article 2 of the Convention and, in particular, to the cases of *McCann and Others v. the United Kingdom* (27 September 1995, Series A no. 324) and *Grams v. Germany* ((dec.), no. 33677/96, ECHR 1999-VII). The court also emphasised that the public prosecutor's office had been the responsible authority for the investigation and thereby "master of the proceedings" (*Herr des Verfahrens*).

D. Other investigations

27. During the investigation the applicants also filed criminal complaints in respect of assistance given in an official capacity in avoiding prosecution or punishment (*Strafvereitelung im Amt*) and suppression of evidence (*Beweismittelunterdrückung*). The applicants alleged that several relevant parts of the video material, showing disproportionate police violence, had been deleted. The investigation against the five police officers was discontinued by the Munich public prosecutor's office.

28. A subsequent appeal before the Munich general public prosecutor was to no avail.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The German Basic Law

29. Article 2 § 2 of the Basic Law reads:

"Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law."

30. Article 19 § 4 of the Basic Law, in so far as relevant, reads:

"Should any person's rights be violated by public authority, he may have recourse to the courts. ..."

31. Article 103 § 1 of the Basic Law, in so far as relevant, reads:

"In the courts every person shall be entitled to a hearing in accordance with the law. ..."

B. Criminal Investigations

32. The relevant provisions of the Code of Criminal Procedure regulating criminal investigations, in so far as relevant, read:

Article 152

"(1) The public prosecutor's office shall have the authority to bring public charges.

(2) Except as otherwise provided by law, the public prosecutor's office shall be obliged to take action in relation to all prosecutable criminal offences, provided there are sufficient factual indications."

Article 160

"(1) As soon as a public prosecutor's office obtains knowledge of a suspected criminal offence either through a criminal complaint or by other means it shall investigate the facts to decide whether to bring public charges. ..."

Article 170

"(1) If an investigation provides sufficient reasons for bringing public charges, the public prosecutor's office shall bring charges by submitting a bill of indictment to the competent court.

(2) In all other cases a public prosecutor's office shall terminate the proceedings. The public prosecutor shall notify the accused thereof if he was examined as such or a warrant of arrest was issued against him; the same shall apply if he has requested such notice or if there is a particular interest in the notification."

Article 171

"If the public prosecution office does not grant an application for preferring public charges, or after conclusion of the investigation it orders the proceedings to be terminated, it shall notify the applicant, indicating the reasons. ..."

Article 200

"(1) The bill of indictment shall indicate the indicted accused, the criminal offence with which he is charged, the time and place of its commission, its statutory elements and the penal provisions which are to be applied (the charges). ..."

C. Organisation of the public prosecutor's office

33. The organisation of the public prosecutor's office is governed in the Courts Act (*Gerichtsverfassungsgesetz*). The relevant provisions, in so far as relevant, read:

Section 142 of the Courts Act

"(1) The official duties of the public prosecutor's office shall be discharged:

...

2. at the Courts of Appeal and the Regional Courts by one or more public prosecutors;

3. at the District Courts by one or more public prosecutors or officials of the public prosecutor's office with a right of audience before the District Courts. ..."

Section 146 of the Courts Act

"The officials of the public prosecutor's office must comply with the official instructions of their superiors."

Section 147 of the Courts Act

"The right of supervision and direction shall lie with:

...

2. the *Land* agency for the administration of justice in respect of all the officials of the public prosecutor's office of the *Land* concerned;

3. the highest-ranking official of the public prosecutor's office at the Courts of Appeal and the Regional Courts in respect of all the officials of the public prosecutor's office of the given court's district."

34. The highest-ranking official of the public prosecutor's office at the Courts of Appeal bears the title general public prosecutor. The Munich general public prosecutor supervises, *inter alia*, the public prosecutors at the Munich Regional Court.

D. Relationship between the police and the public prosecutor's office

35. The hierarchical order and relations between the public prosecutor's office and the police are regulated by the CCP and the Courts Act. The relevant provisions, in so far as relevant, read:

Article 161 of the CCP

"(1) For the purpose indicated in Article 160 § 1 to § 3 [of the CCP], the public prosecutor's office shall be entitled to request information from all authorities and to initiate investigations of any kind, either itself or through the authorities and officials in the police force provided there are no other statutory provisions specifically regulating their powers. The authorities and officials in the police force shall be obliged to comply with such a request or order of the public prosecutor's office and shall be entitled, in such cases, to request information from all authorities."

Article 163 of the CCP

"(1) The authorities and officials in the police force shall investigate criminal offences and shall take all measures that may not be deferred, in order to prevent concealment of facts. To this end they shall be entitled to request, and in exigent circumstances to demand, information from all authorities, as well as to conduct investigations of any kind in so far as there are no other statutory provisions specifically regulating their powers.

(2) The authorities and officials in the police force shall transmit their records to the public prosecutor's office without delay. Where it appears necessary that a judicial investigation be performed promptly, transmission directly to the Local Court shall be possible. ..."

Section 152 of the Courts Act

"(1) The investigating personnel of the public prosecutor's office shall be obliged in this capacity to comply with the orders of the public prosecutor's office of their district and the orders of the officials' superior thereto. ..."

E. Proceedings to force criminal proceedings

36. The possibilities for an aggrieved person to challenge a decision to discontinue a criminal investigation are regulated in Article 172 of the CCP, which, in so far as relevant, reads:

"(1) Where the applicant is also the aggrieved person, he shall be entitled to lodge a complaint against the notification made in accordance with Article 171 [of the CCP, see paragraph 32 above] to the official superior of the public prosecutor's office within two weeks of receipt of such notification. ...

(2) The applicant may, within one month of receipt of notification, apply for a court decision in respect of the dismissal of the complaint by the official superior of the public prosecutor's office. He shall be instructed as to this right and as to the form such an application shall take; the time-limit shall not run if no instruction has been given. ...

(3) The application for a court decision must indicate the facts which are intended to substantiate the bringing of public charges, as well as the evidence. The application must be signed by a lawyer; legal aid shall be governed by the same provisions as in civil litigation. The application shall be submitted to the court competent to decide.

(4) The Court of Appeal shall be competent to decide on the application. ..."

37. The CCP provisions regulating the proceedings to force criminal proceedings read:

Article 173

"(1) Upon the request of a court a public prosecutor's office shall submit to the court the records of the hearings conducted so far.

(2) The court may inform the accused of the application, setting him a time-limit for making a statement in reply.

(3) The court may order an investigation to prepare its decision and may entrust such investigations to a commissioned or requested judge."

Article 175

"If after hearing the accused, the court considers the application to be well-founded, it shall order that public charges be brought. This order shall be carried out by the public prosecutor's office."

F. Proceedings before the Constitutional Court

38. Section 31 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – hereinafter "the Constitutional Court Act") declares the decisions of the Constitutional Court binding upon all constitutional organs, courts and administrative authorities. It reads:

"(1) The decisions of the Constitutional Court shall be binding upon the constitutional organs of the Federation and of the *Länder*, as well as on all courts and those with public authority."

39. Under section 32 of the Constitutional Court Act, the Constitutional Court is empowered to issue preliminary injunctions and under section 35 of the Constitutional Court Act it may specify who is to execute its decisions and the method of execution. These provisions read, as far as relevant, as follows:

Section 32

"(1) In a dispute, the Constitutional Court may provisionally decide a matter by way of a preliminary injunction if this is urgently required to avert severe

disadvantage, to prevent imminent violence or for another important reason in the interest of the common good. ..."

Section 35

"The Constitutional Court may specify in its decision who is to execute it; in individual cases it may also specify the method of execution."

40. The relevant provisions regulating constitutional-complaint proceedings read:

Section 90

"(1) Any individual claiming a violation of one of his or her fundamental rights or of one of his or her rights under Article 20 § 4, Articles 33, 38, 101, 103, or 104 of the Basic Law by a public authority may lodge a constitutional complaint with the Constitutional Court.

(2) If legal recourse to other courts exists, the constitutional complaint may only be lodged after all remedies have been exhausted. However, the Constitutional Court may decide on a constitutional complaint that was lodged before all remedies were exhausted if the complaint is of general relevance or if prior recourse to other courts were to the complainant's severe and unavoidable disadvantage."

Section 95

"(1) If the Court allows a constitutional complaint, the decision shall declare which provision of the Basic Law was violated and by which act or omission. The Constitutional Court may simultaneously declare that any repetition of the contested act or omission would violate the Basic Law.

(2) If the Court allows a constitutional complaint that challenges a decision, the Constitutional Court shall reverse the decision; in the cases referred to in § 90 sec. 2 sentence 1, it shall remit the matter to a competent court. ..."

41. In accordance with the jurisdiction of the Constitutional Court the term "decision" in section 95(2) of the Constitutional Court Act is not limited to court decisions, but understood in a way that it entails every act of a public authority violating the fundamental rights of a plaintiff (1 BvR 289/56, 7 May 1957). In line with this understanding the Constitutional Court set aside, in the case 2 BvR 878/05 (17 November 2005), the reasoning of a decision to discontinue criminal proceedings, as it violated the presumption of innocence of the plaintiff.

III. RELEVANT INTERNATIONAL LAW AND PRACTICE

42. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) stated in its report to the German Government published on 1 June 2017 on the visit to Germany from 25 November to 7 December 2015 (CPT/Inf (2017) 13) with reference to the Court's judgments in *Kummer v. the Czech Republic* (no. 32133/11,

§§ 85-87, 25 July 2013) and *Eremiášová and Pechová v. the Czech Republic* (no. 23944/04, 16 February 2012) that it:

> "has some doubts as to whether investigations carried out by investigators of the central investigation units – and even more so those carried out by criminal police officers of regional or local police headquarters – against other police officers can be seen to be fully independent and impartial." (CPT/Inf (2017) 13, § 18)

43. The CPT further reiterated its recommendation that the police authorities should take the necessary steps to ensure that police officers wearing masks or other equipment that may hamper their identification be obliged to wear a clearly visible means of identification (for example a number on the uniform and/or helmet). It held that:

> "... the CPT has repeatedly stressed that appropriate safeguards must be in place in order to ensure that police officers wearing masks or other equipment that may hamper their identification can be held accountable for their actions (e.g. by means of a clearly visible number on the uniform). Such a requirement is also likely to have a preventive effect and significantly reduce the risk of excessive use of force and other forms of ill-treatment." (ibid., § 21)

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

44. The applicants alleged under Article 3 of the Convention that they had been beaten and had had pepper spray used on them by police officers who, owing to an inadequate investigation, had been neither identified nor punished. They also complained that the German legal system did not provide them with an effective judicial remedy to complain about the alleged ineffectiveness of the investigation. In this connection, the applicants relied on Article 13 of the Convention taken in conjunction with Article 3.

45. The Court, as master of the characterisation to be given in law to the facts of the case (see *Bouyid v. Belgium* [GC], no. 23380/09, § 55, ECHR 2015), finds it appropriate to examine the complaints solely under Article 3 of the Convention, which reads as follows:

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

A. The parties' submissions

1. The applicants

(a) Substantive aspect of the complaint

46. The applicants argued that based on their statements to the Court and to the national authorities, which had been corroborated by the provided medical certificates, it had been established that they had been beaten and had had pepper spray used on them by police officers. Moreover, the investigation had not shown that the applicants had been behaving aggressively or had provoked the use of force in any way. Consequently, the attack they had endured had been unjustified and constituted ill-treatment in violation of Article 3 of the Convention.

(b) Procedural aspect of the complaint

(i) Effective official investigation

47. The applicants submitted that from the beginning there had been an arguable claim of excessive use of force by the police. Besides their own testimonies, the statements of other spectators at the match and several reports in the press had confirmed their account of events. Consequently, the national authorities had been obliged to conduct an investigation capable of leading to the identification and punishment of the responsible police officers.

48. The Government had, nevertheless, failed to do so, since the investigation had suffered from several deficiencies which had made it ineffective. Firstly, the investigation had never produced the identity of the deployed police officers and thereby of the possible suspects. Even though the authorities had deployed helmeted officers without any identifying insignia, the investigating unit had refused to identify and question the officers at issue. Secondly, the investigation had not been conducted by a sufficiently independent authority. The public prosecutor's office had not been practically independent, owing to the proximity between the local police force and the local public prosecutor's office and the fact that the latter had to rely on the local police force for the investigation in every single case. Moreover, for all practical purposes the investigation had been conducted by the Munich police and the Munich public prosecutor had only been informed of the status of the investigation. The investigating unit, however, had been part of the same police force as the officers they had been investigating. Therefore the investigating and the investigated unit had been under the command of the Munich Chief of Police and the investigation could not be considered to have been independent or impartial. Thirdly, the investigation had been neither prompt nor thorough. The investigator had failed to secure the entire video material before it had been

deleted, had questioned witnesses only after a considerable time and had never questioned all the deployed police officers, or the paramedic who had treated the first applicant at the stadium.

49. These deficiencies had prevented the identification of the suspected perpetrators and the collection of further evidence, in particular witness statements of the colleagues of the suspected perpetrators confirming the applicants' accounts. In sum the deployment of helmeted officers without any identifying insignia in conjunction with the deficient investigation had led to the impunity of the perpetrators.

(ii) Remedy to complain of the alleged ineffectiveness of the investigation

50. The applicants submitted that the German legal system had not provided them with an effective remedy to review the effectiveness of the investigation. At the outset they submitted that, given the hierarchical structure of the public prosecutor's office, the general public prosecutor had not been sufficiently independent. Consequently, the complaint before the general public prosecutor under Article 172 § 1 of the CCP could not be considered an effective remedy in the meaning of Article 13 of the Convention. As regards judicial remedies at their disposal they referred to the Court's judgment in *Kaverzin v. Ukraine* (no. 23893/03, § 93, 15 May 2012) and argued that an effective remedy would have required that the domestic courts had had the power to examine all relevant evidence, to overturn the prosecutor's decision to discontinue, and to initiate enquiries. This, however, had not been the case for them.

51. Their application to force further enquiries had been interpreted by the Court of Appeal as an application to force criminal proceedings and had been declared inadmissible. The Court of Appeal had only assessed whether the public prosecutor's office had entirely refrained from investigating a criminal offence but not whether the investigation had been effective within the meaning of Article 3 of the Convention. Moreover, the court had had the power only to bring charges, but not to reopen the investigation.

52. As regards the proceedings before the Constitutional Court, the applicants argued that the court had confined itself to assessing whether the decision of the Court of Appeal had been legitimate. It had not examined whether the investigation had been effective. Furthermore, the Constitutional Court had not had the power to initiate an investigation or to order specific investigative measures. In accordance with the Constitutional Court Act, the Constitutional Court could only declare which provision of the German Basic Law had been violated (section 95(1)) and refer the case back to the competent court (sections 95(2) and 90(1)). The competent court, however, would have been the Court of Appeal again, which had previously decided that it had not had the legal power to reopen the investigation and had declared the application to force further enquiries inadmissible. The applicants further submitted that up until that point there

had never been a successful constitutional complaint challenging a decision that upheld the discontinuation of investigations in cases of alleged police violence in which the perpetrator had not been identified.

2. *The Government*

(a) Admissibility

53. The Government submitted that the applicants' argument that the police had suppressed video material during the investigation should be dismissed owing to non-exhaustion of domestic remedies. After the investigation into this allegation had been discontinued, the applicants had not initiated court proceedings to force criminal proceedings. Moreover, the applicants had not raised this issue in their constitutional complaint. Similarly, the applicants had not complained about the promptness of the investigation before the Constitutional Court either. Lastly, the applicants had also failed to challenge the lack of a judicial remedy, in particular the alleged ineffectiveness of the proceedings to force criminal proceedings, before the Constitutional Court.

(b) Substantive aspect of the complaint

54. The Government argued that it had not been established beyond reasonable doubt that the applicants had been subjected to treatment contrary to Article 3 of the Convention or that the authorities had had recourse to physical force which had not been rendered strictly necessary by the applicants' behaviour.

55. As regards the police operation as a whole the Government submitted that the police had been confronted with aggressive behaviour on the part of some supporters and had justifiably used their truncheons as a defensive weapon. However, there had been no indication that any police officer had intentionally struck or used pepper spray on the first or second applicant. The accounts of the applicants themselves had neither been credible nor supported by any evidence.

(c) Procedural aspect of the complaint

(i) Effective official investigation

56. As regards the obligation to effectively investigate the allegations of police violence, the Government submitted that, owing to the lack of a credible allegation, no such obligation had arisen. The German authorities had nonetheless conducted an effective investigation into the police operation and the applicants' allegations.

57. During the investigation thirty-nine witnesses had been questioned, including the video officers and the leaders of the relevant units. Moreover, all available video material had been analysed. An investigation into

allegations of suppression and intentional destruction of the video material had not confirmed those allegations, but had shown that the material had been handled in accordance with the generally applicable policies. The investigation had been conducted by an independent authority, namely the public prosecutor's office. As this office had not had their own investigators, they had instructed and supervised officers from the general police force. Lastly, the investigation had been sufficiently prompt and the applicants had been sufficiently involved therein.

58. Moreover, under Article 170 § 2 of the CCP the public prosecutor's office could only bring public charges if the investigation had unearthed sufficient reasons to do so. This had not been so in the present case. Furthermore, the public prosecutor's office had not been obliged to carry out unorthodox investigative measures. It was permissible to omit such measures if weighing up the effort and the anticipated outcome did not justify their taking. Therefore, the public prosecutor's office had justifiably refrained from questioning the individual police officers involved, as it had already questioned their commanders.

59. In sum the investigation had not led to the punishment of a suspect because the allegations of the applicants had not been confirmed and not because the suspected police officers had not or could not have been identified.

(ii) Remedy to complain about the alleged ineffectiveness of the investigation

60. The Government submitted that Article 3 of the Convention did not require a judicial remedy and that the possibility to challenge a decision to discontinue an investigation before the general public prosecutor under Article 172 § 1 of the CCP had fulfilled the requirements stemming from the Convention. Even though the general public prosecutor had been the superior of each public prosecutor in the respective court district, he or she had been provided with his or her own staff and therefore had been sufficiently independent from subordinate public prosecutors.

61. Moreover, the applicants had had judicial possibilities to challenge the effectiveness of the investigation at their disposal. Firstly proceedings to force criminal proceedings, a remedy they had also made use of. The Court of Appeal had adopted the most favourable interpretation of the law for the applicants, in accordance with which it could have ordered further investigations if the public prosecutor's office had conducted an entirely inadequate investigation. As the court had found that this had not been the case and that the applicants had not shown that further enquiries would have been fruitful, the applicants' request had been declared inadmissible. The Government argued that the Court of Appeal's assessment had been in line with the requirements for an effective investigation under Article 3 of the Convention.

62. Lastly, the applicants had also challenged the effectiveness of the investigation before the Constitutional Court. The Constitutional Court had directly referred to the jurisdiction of the Strasbourg Court regarding the obligation to investigate allegations of police violence and concluded that the investigation had been effective. Moreover, the Constitutional Court had also been competent to initiate or reopen an investigation. Under section 35 of the Constitutional Court Act, the Constitutional Court could have specified the method of execution and the competent authority to execute its decision, and under section 32 of the Constitutional Court Act it could have issued a preliminary injunction. Under section 95(2) of the Constitutional Court Act the court could also have set the public prosecutor's decision to discontinue the investigation aside. The Constitutional Court had already done so in its judgment in the case 2 BvR 878/05.

B. The Court's assessment

1. Admissibility

63. The Court notes that the Government argued that the applicants had not lodged an application to force criminal proceedings in respect of the alleged suppression of evidence and video material. In that connection it observes that these proceedings would have concerned a different investigation. While the applicants unsuccessfully lodged an application to force criminal proceedings concerning the investigation into alleged police violence, they did not do so in respect of the investigation into alleged suppression of evidence. As the applicants' present application to the Court concerns the allegation of police violence the Court considers it unnecessary for the applicants' present complaint to have exhausted domestic remedies regarding a second, separate investigation.

64. Moreover, the Government raised the objection of non-exhaustion regarding two of the applicants' arguments (see paragraph 53 above), because the applicants had not made these arguments in their constitutional complaint. The Court notes that it is not in dispute between the parties that the applicants challenged the effectiveness of the investigation before the Constitutional Court. Furthermore, the applicants referred in their constitutional complaint to the Court's jurisdiction concerning States' obligations under the procedural head of Articles 2 and 3 of the Convention, pursuant to which investigations had to be prompt, thorough and independent. It also notices that the applicants described in detail the course and duration of the investigation and the subsequent court proceedings. Consequently, the Court finds that the applicants provided the Constitutional Court with all relevant information to assess the effectiveness of the investigation, which they challenged in their constitutional complaint.

65. Lastly, in so far as the Government raised the objection of non-exhaustion in regards to the lack of a possibility to challenge the effectiveness of the investigation, the Court observes that the applicants complained under Articles 19 § 4 and 103 § 1 of the Basic Law that the Court of Appeal had not evaluated the effectiveness of the investigation and that it had not responded in detail to the several alleged flaws therein, as outlined in the applicants' application to force further enquiries. In the light of the applicants' submission to the Constitutional Court in the constitutional-complaint proceedings the Court considers that the applicants raised this complaint explicitly and in substance.

66. Having regard to the above the Court holds that the application cannot be rejected for the applicants' failure to exhaust domestic remedies. It also finds that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and also not inadmissible on any other grounds. Therefore, the applicants' complaint under the substantive and procedural limbs of Article 3 must be declared admissible.

2. Merits

(a) Substantive aspect of the complaint

67. The Court observes that it is confronted with a dispute over the exact events after the football match on 9 December 2007 and the acts that led to the applicants' injuries.

68. The Court reiterates that it is sensitive to the subsidiary nature of its role and recognises that it must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case. Nonetheless, where allegations are made under Article 3 of the Convention the Court must apply a "particularly thorough scrutiny", even if certain domestic proceedings and investigations have already taken place (see *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 155, ECHR 2012, with further references).

69. In cases in which there are conflicting accounts of events, the Court is inevitably confronted with the same difficulties as those faced by any first-instance court when establishing the facts and must reach its decision on the basis of the evidence submitted by the parties. In the proceedings before it, there are no procedural barriers to the admissibility of evidence or predetermined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 147, ECHR 2005-VII). While in general the Court has adopted the standard of proof "beyond reasonable doubt" in assessing evidence, according to its established case-law, the level of persuasion necessary for reaching a

particular conclusion and, in this connection, the distribution of the burden of proof, are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake (ibid.).

70. It is to be reiterated that Convention proceedings do not in all cases lend themselves to a strict application of the principle *affirmanti incumbit probatio* (he or she who alleges something must prove that allegation) (see *El-Masri*, cited above, § 152). Under certain circumstances the Court has borne in mind the difficulties associated with obtaining evidence and the fact that often little evidence can be submitted by the applicants in support of their applications (see *Saydulkhanova v. Russia*, no. 25521/10, § 56, 25 June 2015). In particular 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. The burden of proof is then on the Government to provide a satisfactory and convincing explanation by producing evidence establishing facts which cast doubt on the account of events given by the victim (see *Bouyid*, cited above, § 83, with further references).

71. These principles also apply to all cases in which a person is under the control of the police or a similar authority, such as an identity check in a police station (ibid., § 84).

72. Assessing the present case, the Court firstly notes that the applicants voluntarily attended the football match, but were involuntarily kept by the police in the stands for about fifteen minutes. However, the Court also notes that the blockade was maintained only by cordoning the exits off and that the supporters were still able to freely move within the stands themselves. In addition, the alleged police violence occured – according to the applicants – after the blockade was lifted and the applicants had left the stands. The Court therefore concludes that the applicants were not 'under the control of the police' – in the meaning of the Court's jurisprudence (see *Bouyid*, cited above, §§ 83, 84) – and that the burden of proof could not be shifted to the Government. Consequently, it was for the applicants to substantiate their factual arguments by providing the Court with the necessary evidence.

73. The Court notes that the applicants submitted parts of the investigation file, including their and other witnesses' statements, medical certificates concerning their injuries and different press articles concerning the police operation at the football match. They also submitted their correspondence with the public prosecutor's office and their appeals to the chief public prosecutor and the domestic courts.

74. The Court has previously emphasised the strong evidential value of medical certificates attesting evidence of ill-treatment and issued shortly after the alleged ill-treatment (see *Bouyid*, cited above, § 92). In that regard the Court observes that the first applicant's medical certificate was issued the night after the football match and attested to a bleeding laceration 3 cm

in length behind his right ear. The certificate also stated that according to the account of the patient, that is to say the first applicant, the laceration was caused by a strike with a truncheon. The second applicant's medical certificate noted redness in his face, possibly stemming from pepper spray. However, that certificate was issued only on 21 January 2008 and based upon the second applicant's account and pictures taken, according to him, after the football match. The Court considers that both certificates attest to possible consequences of ill-treatment, namely being beaten with a truncheon on the head and having pepper spray applied to the face from a close distance. However, while confirming the injuries, the certificates do not attest to the specific cause of the injuries. Moreover, the second applicant's medical certificate was only issued six weeks after the alleged ill-treatment and was not based on an examination of the actual injuries.

75. Regarding the other documents submitted, the Court observes that some of the witnesses and the press reports described the police operation in terms similar to the accounts of the applicants. Furthermore, the accounts of the applicants before the police and before the Court were in essence the same. However, the applicants did not submit to the Court any witness statements or other evidence confirming their accounts and none of the persons interviewed in the domestic investigation witnessed the alleged acts against them.

76. Lastly, the Court notes that the second applicant reported the alleged police violence only on 21 January 2008 and filed a formal criminal complaint only on 7 March 2008. The first applicant did not file his criminal complaint until 25 April 2008.

77. Having regard to the evidence before it, the Court acknowledges that some of the evidence confirms the applicants' accounts. In sum, however, it finds itself unable to establish beyond reasonable doubt that the first applicant was hit by a police officer with a truncheon on his head and that the second applicant had pepper spray doused in his face at close range and subsequently had been struck on his left upper arm with a truncheon by a police officer.

78. Accordingly, the Court finds that there has been no violation of Article 3 of the Convention under its substantive head.

(b) Procedural aspect of the complaint

(i) General principles

79. The Court has recently summarised its general principles regarding States' procedural obligation to effectively investigate allegations of police violence under Article 3 of the Convention in the case of *Bouyid* (cited above, §§ 115-23). While the principles relate to the manner of application of Article 3 to allegations of ill-treatment made by persons in detention or

otherwise under the control of State agents they can be also transposed to cases concerning the use of force for crowd control purposes:

"115. Those principles indicate that the general prohibition of torture and inhuman or degrading treatment or punishment by agents of the State in particular would be ineffective in practice if no procedure existed for the investigation of allegations of ill-treatment of persons held by them.

116. Thus, having regard to the general duty on the State under Article 1 of the Convention to 'secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention', the provisions of Article 3 require by implication that there should be some form of effective official investigation where an individual makes a credible assertion that he has suffered treatment infringing Article 3 at the hands of, inter alia, the police or other similar authorities.

117. The essential purpose of such an investigation is to secure the effective implementation of the domestic laws prohibiting torture and inhuman or degrading treatment or punishment in cases involving State agents or bodies, and to ensure their accountability for ill-treatment occurring under their responsibility.

118. Generally speaking, for an investigation to be effective, the institutions and persons responsible for carrying it out must be independent from those targeted by it. This means not only a lack of any hierarchical or institutional connection but also practical independence.

119. Whatever mode is employed, the authorities must act of their own motion. In addition, in order to be effective the investigation must be capable of leading to the identification and punishment of those responsible. It should also be broad enough to permit the investigating authorities to take into consideration not only the actions of the State agents who directly used force but also all the surrounding circumstances.

120. Although this is not an obligation of results to be achieved but of means to be employed, 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 the required standard of effectiveness.

121. A requirement of promptness and reasonable expedition is implicit in this context. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating allegations of ill-treatment may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.

122. The victim should be able to participate effectively in the investigation.

123. Lastly, the investigation must be thorough, which 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."

(ii) Application of these principles to the present case

(α) Arguable claim

80. At the outset the Court notes that the parties' disagreement regarding the facts (see paragraphs 9-13 above) also affects the question of whether the applicants raised an "arguable claim" that they had been ill-treated by

the police and thereby whether an effective official investigation had been required under Article 3 of the Convention.

81. While the Government argued that there had not been a credible allegation of police violence, the applicants submitted that, from the start, there had been sufficient indications of unjustified and excessive use of force by the police. The Court notes that the public prosecutor's office had initiated an investigation into the police operation, which under Article 160 of the CCP presupposed a suspicion of a criminal offence. It also observes that in the first decision to discontinue the investigation the public prosecutor had held that the investigations had produced evidence that some police officers had used truncheons against spectators, including women and children, in a disproportionate way and without an official order or approval. However, the Court reiterates that it was unable to establish beyond reasonable doubt that the first applicant had been hit by a police officer with a truncheon on his head and that the second applicant had been doused with pepper spray in the face at close range and subsequently struck on his left upper arm with a truncheon by a police officer (see paragraphs 72 77 above).

82. In that regard the Court reiterates that the term "arguable claim" cannot be equated to finding a violation of Article 3 under its substantive head. An arguable claim only requires that there is a reasonable suspicion that applicants were ill-treated by the police or another national authority (compare *Assenov and Others v. Bulgaria*, 28 October 1998, §§ 101 and 102, *Reports of Judgments and Decisions* 1998-VIII, and *Đurđević v. Croatia*, no. 52442/09, § 86, ECHR 2011 (extracts)). Given the statements made by the applicants to the police – which, it must be stressed, were made with a certain delay and were not free of contradictions –, the press reports that corroborated their accounts and the medical certificates confirming the applicants' injuries, the Court finds that there was an arguable claim of ill-treatment by the police which had to be effectively investigated by an independent national authority.

83. The Court acknowledges the difficulties which may be encountered in policing large groups of people during mass events where the police have not only the duty of maintaining public order and protecting the public, but also of maintaining confidence in their adherence to the rule of law.

(β) Adequacy of the investigation

84. Concerning the adequacy of the investigation, the Court observes, at the outset, that the public prosecutor's office was, according to the Constitutional Court, "master of the proceedings" (see paragraph 26 above) and responsible for the investigation of criminal offences as well as the bringing of charges. However, based on the documents in its possession the Court finds that, in particular during the first phase of the investigation, before the first decision to discontinue, the investigation had been, in fact,

primarily conducted by the police and that the public prosecutor only had a supervisory role.

85. As regards the second phase of the investigation, the investigating unit was again drawn from the Munich police and was again under the supervision of the public prosecutor. Where investigations are for all practical purposes conducted by the police, the supervision of the police by an independent authority has not been found to provide a sufficient safeguard (see *Kelly and Others v. the United Kingdom*, no. 30054/96, § 114, 4 May 2001; *Kummer*, cited above, § 87, and *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, § 337, ECHR 2007-II, with further references). Therefore, the Court has to assess whether the unit investigating the alleged police violence was sufficiently independent from the officers of the riot control unit whose operation was under investigation. In that regard the Court notes that the investigation was not conducted by a separate police force but by a division of the Munich police which specialised in offences perpetrated by public officials under the supervision of the public prosecutor's office. It also observes that the investigating officer was not a direct colleague of the officers of the riot control unit (contrast *Ramsahai*, cited above, §§ 335-37) and that the only link between these two divisions was their common Chief of Police and the fact that they belonged to the Munich police. While the Court considers it desirable that investigations into the use of force by the police, if possible, be conducted by independent and detached units (see, for example, *Oğur v. Turkey* [GC], no. 21594/93, § 91, ECHR 1999-III and *Eremiášová and Pechová*, cited above, §§ 135-39), it finds no sufficient hierarchical, institutional or practical connection between the investigating division and the riot control unit which, by itself, would render the investigation unreliable or ineffective.

86. The Court further notes that on 20 October 2008 there had been an internal meeting concerning the investigation between the head of the investigation unit and different heads of divisions of the Munich police, including the platoon leaders of riot control units, which the competent public prosecutor did not attend (see paragraph 19 above). Where, as in the present case, the investigation is conducted by a unit of the same police force and only under the supervision of an independent authority, it is of increased importance that the manner in which it is conducted also gives an appearance of independence so as to preserve public confidence (see *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 123, 4 May 2001, *Đurđević*, cited above, § 89, *Mihhailov v. Estonia*, no. 64418/10, § 128, 30 August 2016).

87. As far as the promptness of the investigation is concerned, the Court has consistently emphasised that a prompt response by the authorities in investigating allegations of ill-treatment may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of

unlawful acts (*Bouyid*, cited above, § 133). In this respect, the Court observes that the Munich police commenced a preliminary investigation on 2 January 2008, after they had been alerted by press reports to allegations of police violence in the context of the football match on 9 December 2007. The investigation lasted for nineteen months and was eventually discontinued by the public prosecutor on 4 August 2009. Based on all the documents in its possession the Court detects no particularly long periods of inactivity in the conduct of the investigation. In sum, around forty witnesses were interviewed, video material was reviewed, medical certificates were examined, and further investigative steps were taken. The investigation, therefore, appears to have been adequately prompt and expedient.

88. In the context of the expedience of the investigation, the Court also observes that the applicants only lodged official complaints on 7 March and 25 April 2008. Consequently, their specific complaints could only be investigated after the respective dates. Moreover, the delay in lodging official complaints prevented the competent authorities to promptly order a forensic examination of the applicants' injuries and thereby contributed to the difficulties in the investigation. The Court would reiterate in that regard that a prompt forensic examination is crucial as signs of injury may often disappear rather quickly and certain injuries may heal within weeks or even a few days (see *Rizvanov v. Azerbaijan*, no. 31805/06, §§ 46 and 47, 17 April 2012).

89. Moreover, the Court notes that the applicants, who were assisted by a lawyer during the investigation, had access to the investigation file, were able to request certain investigative measures and were informed of the progress of the investigation. Even though not all the requested measures were implemented and the applicants were not involved in the meeting of 20 October 2008, the Court considers that they were able to effectively participate in the investigation.

90. As regards the investigative measures actually undertaken, the Court observes that the deployed police officers of the riot control unit did not wear any name tags or other individually identifying signs, but only identification numbers of the squad on the back of the helmets (see paragraph 7 above).

91. The Court reiterates that where the competent national authorities deploy masked police officers to maintain law and order or to make an arrest, those officers should be required to visibly display some distinctive insignia, such as a warrant number. The display of such insignia would ensure their anonymity, while enabling their identification and questioning in the event of challenges to the manner in which the operation was conducted (see *Ataykaya v. Turkey*, no. 50275/08, § 53, 22 July 2014, with further references; *Özalp Ulusoy v. Turkey*, no. 9049/06, § 54, 4 June 2013; and the CPT recommendation in paragraph 43 above). The consequent inability of eyewitnesses and victims to identify officers alleged to have

committed ill-treatment can lead to virtual impunity for a certain category of police officers (compare *Atakaya*, cited above, § 53, and *Hristovi v. Bulgaria*, no. 42697/05, §§ 92 and 93, 11 October 2011).

92. In the Court's previous cases concerning the effectiveness of investigations against masked police officers the acts of ill-treatment had been clearly attributable to one of the deployed officers. In the present case, however, the Court was, based on the evidence before it, unable to reach a different conclusion than the national authorities and establish that the applicants' injuries were a direct result of the conduct of one or more of the deployed police officers. Therefore, the deployment of helmeted officers with no identifying individual insignia could not – by itself – render the subsequent investigation ineffective (contrast, *Hristovi*, cited above, § 93).

93. However, in the absence of such identifying insignia for helmeted officers, the investigative measures open to the authorities to establish the identities of the persons responsible for the alleged use of excessive force causing ill-treatment became increasingly important.

94. According to the Court's well-established case-law, the authorities must take all reasonable steps available to them to secure the evidence concerning the incident at issue. The investigation's conclusions must be based on thorough, objective and impartial analysis of all relevant elements. Failing to follow an obvious line of inquiry undermines to a decisive extent the investigation's ability to establish the circumstances of the case and the identity of those responsible. Nevertheless, the nature and degree of scrutiny which satisfy the minimum threshold of the investigation's effectiveness depend on the circumstances of the particular case, and it must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work (see *Armani da Silva v. the United Kingdom* [GC], no. 5878/08, §§ 233 and 234, ECHR 2016, with further references).

95. Securing and analysing the original video material, recorded by the deployed riot units constituted one of the obvious lines of inquiry into the circumstances surrounding the break-out of violence and the alleged disproportionate use of force first reported in the press and then complained of by the applicants. The Court considers that the treatment, securing and analysis of the original video material was a crucial investigative measure which was capable of shedding light on what occurred, whether the alleged force used by the police was disproportionate and specifically whether the applicants had in fact been beaten and doused with pepper spray by police officers in circumstances which did not warrant such an intervention (see, as regards the importance of video evidence in an investigation, *Ciorap v. the Republic of Moldova* (n° 5), no. 7232/07, §§ 66-67). In that regard, it observes that the investigating unit had only been provided with excerpts of the original video material, which it analysed together with other videos of the football match and of the subsequent events found online. However, the Government did not clearly explain whether the entire video material was

analysed by an independent unit, why only excerpts of the video material were provided to the investigating unit, or when the video material was deleted and by whom.

96. To the extent that the Government referred to the procedure according to which the entire recorded video material was reviewed by the respective video officer (see paragraph 16 above) as standard, the Court concludes that the video officers cannot be considered independent in the context of investigations into allegations of police violence by members of his or her own squad.

97. In addition, the timing of deletion of parts of the video material was of particular importance, as the Court notes that from 15 December 2007 onwards, according to press reports relating to the events on match day, the Munich police had been aware that allegations of police violence existed. Furthermore, it is clear from the material in the case file that by the latest on 18 December 2007 the Munich police envisaged an investigation into the conduct of the deployed riot control unit (see paragraph 14 above).

98. The Court accepts that the failure to secure all the video footage and to have it analysed by independent investigating units could, in principle, be counter-balanced by other investigative measures. As indicated previously, the effectiveness of a given investigation will depend on the circumstances of a particular case and must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work (see paragraph 94 above). One such measure could have been the questioning of more of the deployed riot police officers. The Court acknowledges that around forty witnesses were questioned and that these included the squad leaders of the deployed riot control units. It nevertheless observes that not all officers deployed in the area where the applicants had allegedly been ill-treated were interviewed. Moreover, the video officers were interviewed only after the investigation had been reopened on 14 October 2008, and no efforts were undertaken to identify and question the paramedic who had allegedly treated the first applicant at the stadium.

99. Having regard to the above considerations, the Court concludes that the deployment of helmeted officers with no identifying individual insignia and the consequent inability of eyewitnesses and victims to directly identify the officers alleged to have committed the ill-treatment complained of had the capacity to hamper the effectiveness of the investigation from the outset. Such a situation required particular investigative efforts by the investigating authorities to establish the cause of the victims' injuries, the identities of the persons responsible, whether police officers used force and, if so, whether such force was proportionate to the security situation which confronted the deployed units. The Court reiterates that any deficiency in an investigation which undermines its ability to establish the facts or the identity of persons responsible will risk falling foul of the standard of effectiveness required under the procedural limb of Article 3 (see *Hristovi*, cited above, § 86). In

the present case, it considers that, for example, the securing and analysis of the original video footage by an independent authority or interviewing other members of the deployed riot control units or other witnesses, such as the paramedic who had allegedly treated the first applicant at the stadium, could possibly have clarified the events after the football match of 9 December 2007 in Munich, the cause of the applicants' injuries and the alleged ill-treatment by police officers. Since these obvious lines of inquiry were not comprehensively followed, the Court finds that the lack of insignia of helmeted police officers and any difficulties resulting from it were not sufficiently counter-balanced during the subsequent investigation.

(γ) Review of the prosecutorial decision

100. In so far as the applicants complained about the lack of an effective judicial remedy to complain about the alleged ineffectiveness of an investigation, the Court has already held that the procedural obligation in Article 2 does not necessarily require a judicial review of investigative decisions as such (see *Armani da Silva*, cited above, §§ 278 and 279, with further references). The Court also established that in at least twelve member States, the decision of a prosecutor not to prosecute could only be contested before a hierarchical superior (ibid, § 279).

101. The Government indicated one non-judicial and two judicial remedies open to the applicants to challenge the effectiveness of the investigation, as protected under Article 3 of the Convention. Upon the applicants' complaint about the decision of the public prosecutor to discontinue the investigation under Article 172 § 1 of the CCP (see paragraph 36 above) the Munich general public prosecutor, in its decision of 3 February 2011, reviewed the decision of the public prosecutor and the underlying investigation in detail and responded to the specific complaints submitted by the applicants. However, the Court notes that the Munich general public prosecutor was the superior of the Munich public prosecutor's office.

102. As far as judicial remedies are concerned, the Court notes that the applicants' application to force further enquiries was declared inadmissible, since the Court of Appeal found that these proceedings were not supposed to identify the accused or replace investigations. Nonetheless, upon the applicants' constitutional complaint, the Constitutional Court assessed the investigation in detail and referred to the Court's case-law concerning the procedural obligation of Article 2 and 3 of the Convention. Moreover, based on the case-law of the Constitutional Court and the relevant provisions of the Constitutional Court Act (see paragraphs 38-41 above), the Constitutional Court appears, in principle, to be able to set aside a decision to discontinue a criminal investigation and to initiate or reopen an investigation. Therefore, the applicants had at their disposal a remedy to challenge the ineffectiveness of an investigation.

(δ) Conclusion

103. After having assessed all relevant elements and circumstances of the investigation in this particular case, the Court concludes that there has not been an effective investigation, since the deployment of helmeted police officers without identifying insignia and any difficulties for the investigation resulting from it were not sufficiently counter-balanced by thorough investigative measures. Consequently, the Court holds that there has been a violation of Article 3 of the Convention under its procedural head.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

104. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

105. The applicants claimed the sum of 3,500 euros (EUR) each in respect of non-pecuniary damage.

106. The Government considered the amount of EUR 3,500 excessive, but left it to the discretion of the Court.

107. For the Court, the applicants undeniably sustained non-pecuniary damage on account of the violation of the procedural head of Article 3 of the Convention of which they were the victims. Making its assessment on an equitable basis as required by Article 41 of the Convention, it awards each of them EUR 2,000 in respect of non-pecuniary damage.

B. Costs and expenses

108. The applicants also claimed the sum of EUR 2,588.91 each in respect of costs and expenses for the domestic proceedings and EUR 5,176.50 each for costs and expenses relating to the proceedings before the Court. The claimed costs and expenses before the Court consisted of EUR 3,986.50 for Mr Noli and EUR 1,190 for Ms Luczak's contribution to the applicants' reply to the Government's observations.

109. The Government did not object to the amount claimed in respect to expenses for the domestic proceedings, but regarded the costs and expenses relating to the proceedings before the Court excessive. It considered attorney fees, comparable to the ones occurred before the Federal Constitutional Court, in the amount of EUR 614 sufficient and reasonable.

110. According to the Court's established case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. Having regard to the documents in its possession and the above criteria, the Court finds it reasonable to award each applicant EUR 2,588.91 in respect of costs and expenses for the domestic proceedings and EUR 3,986.50 for costs and expenses relating to the proceedings before the Court.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 3 of the Convention under its substantive aspect;

3. *Holds* that there has been a violation of Article 3 of the Convention under its procedural aspect;

4. *Holds*
   (a) that the respondent State is to pay each applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 6,575.41 (six thousand five hundred and seventy-five euros and forty-one cents), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicants' claims for just satisfaction.

Done in English, and notified in writing on 9 November 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Deputy Registrar

Nona Tsotsoria
President

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

N.T.
M.B.

CONCURRING OPINION OF JUDGE HÜSEYNOV

I share the Court's conclusion that there was a procedural violation of Article 3 of the Convention in the present case. Indeed, the investigation into the applicants' allegations of police violence was marred by a number of shortcomings. However, I am of the view that the Court's findings have omitted one important deficiency, namely the lack of independence of the investigation. I agree with the applicants that the investigation was not conducted by an independent authority.

As noted by the Court, the investigation into the alleged misconduct of the riot control unit was carried out by a division of the Munich police responsible for offences perpetrated by public officials under the supervision of the Munich public prosecutor's office (§ 15). The investigating division was thus part of the same police service as the police officers whose alleged misconduct they were investigating. Both the investigating unit and those subject to investigation were under the command of the Munich Chief of Police. Having acknowledged this fact, the Court nevertheless emphasised that "the investigating officer was not a direct colleague of the officers of the riot control unit", and went on to conclude that "it finds no sufficient hierarchical, institutional or practical connection between the investigating division and the riot control unit which, by itself, would render the investigation unreliable or ineffective" (§ 85).

I respectfully disagree. In my view, the "direct colleagues" criterion referred to by the Court appears to have been broadened in its recent case-law. The case of *Kulyk v. Ukraine* (no. 30760/06, § 107, 23 June 2016), is worthy of particular mention here. In that case, the criminal inquiry conducted by an entity within the Ministry of Interior *vis-à-vis* employees of that same Ministry was found to have lacked independence. The Court, in particular, noted that "...on several occasions the police bodies were asked by the prosecutor's office to conduct certain investigative steps, in particular to find witnesses. Although those requests were addressed to an entity different from the one where the police officers L. and P. were employed, the fact that an entity within the Ministry of Interior was involved in an investigation concerning employees of that same Ministry is capable of undermining the independence of such an investigation. In this respect the Court also refers to the findings of the CPT, which has long been urging the Ukrainian authorities to create an independent investigative agency specialised in the investigation of complaints against public officials ..."

Accordingly, I am of the opinion that there was a sufficient institutional connection between the investigating unit of the Munich police and the police officers under investigation, and that the criminal inquiry in question failed to present an appearance of independence.

Interestingly, in the present case the Court has also referred to the CPT's findings (§ 42). In particular, in the report on its visit to Germany from 25 November to 7 December 2015, the CPT expressed its doubts "as to whether investigations carried out by investigators of the central investigations units – and even more so those carried out by criminal police officers of regional or local headquarters – against other police officers can be seen as fully independent and impartial" (see CPT/Inf (2017) 13, § 18).

On a more general note, the Court's finding that the investigation in question fulfilled the requirements of independence and impartiality seems to me regrettable in the light of the longstanding criticisms raised by various international and regional human rights institutions, specifically the UN Human Rights Committee, the UN Committee against Torture, the CPT and the Commissioner for Human Rights, with regard to the lack of independent police investigations in Germany (see CCPR/C/DEU/CO/6 (2012), § 10; CAT/C/DEU/CO/5, § 19; CPT/Inf (2017) 13, cited above; and CommDH(2015)20, § 38-39). Similarly, the German National Agency for the Prevention of Torture (Nationale Stelle zur Verhütung von Folter) established as a national preventive mechanism under the Option Protocol to the UN Convention against Torture has also advocated the establishment of independent bodies dealing with allegations of police violence in the German Federal States (Länder) (see Annual report 2016 of the National Agency for the Prevention of Torture).