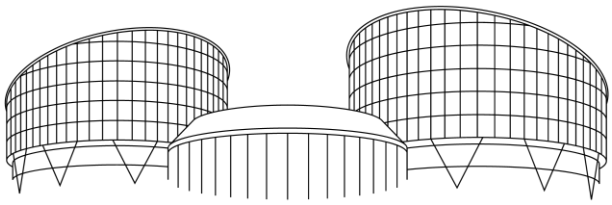

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF ŽIVALJEVIĆ v. MONTENEGRO

(Application no. 17229/04)

JUDGMENT

STRASBOURG

8 March 2011

FINAL

15/09/2011

This judgment has become final under Article 44 § 2 (c) of the Convention. It may be subject to editorial revision.

In the case of Živaljević v. Montenegro,

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

Nicolas Bratza, *President,*
Lech Garlicki,
Ljiljana Mijović,
Päivi Hirvelä,
Ledi Bianku,
Zdravka Kalaydjieva,
Nebojša Vučinić, *judges,*
and Lawrence Early, *Section Registrar,*

Having deliberated in private on 15 February 2011,

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

PROCEDURE

1. The case originated in an application (no. 17229/04) against Montenegro lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Montenegrin nationals, Mr Todor Živaljević and Mr Ljubiša Živaljević ("the applicants"), on 30 April 2004.

2. The applicants, who had been granted legal aid, were represented by Mr V. Hajduković, a lawyer practising in Podgorica. The Montenegrin Government ("the Government") were represented by their Agent, Mr Z. Pažin.

3. The applicants alleged, in particular, that the length of the administrative proceedings had been incompatible with the "reasonable time" requirement under Article 6 § 1 of the Convention.

4. On 26 October 2009 the President of the Fourth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1950 and 1953 respectively and live in Podgorica.

6. The facts of the case, as submitted by the parties, may be summarised as follows.

7. On 19 May 1995 the Public Construction Fund based in Podgorica ("the PCFP") requested the expropriation of a plot of land belonging to the applicants in order to build a road.

8. On 14 September 1995 the applicants requested that their house and the remainder of their land also be expropriated.

9. By the end of 1995 the planned road was built, passing through the plot in question.

10. On 11 October 1996 the Real Estate Office in Podgorica ("the REOP") expropriated only the plot specified by the PCFP, without considering the applicants' request.

11. On 29 October 1996 the applicants lodged an appeal, but by 11 December 1996 this appeal had been rejected.

12. On 5 February 1998 the Supreme Court (*Vrhovni sud*) quashed the above decisions.

13. By 3 March 2004, following eight remittals, the requests were still pending before the REOP.

14. Between 3 March 2004 and 28 March 2005 three hearings were adjourned, as either the municipality's representative or the court's expert witnesses had failed to appear.

15. On 18 February 2005 the applicants sought an "inspection" (*inspekcijski nadzor*) of the proceedings at issue. By 16 March 2005 the Ministry of Justice had "established irregularities" in the proceedings and ordered that they be rectified (*otklanjanje utvrđenih nepravilnosti*).

16. On 28 March 2005 the REOP accepted both expropriation requests and on 1 September 2005 this decision was confirmed on appeal.

17. On 6 June 2006 the Administrative Court (*Upravni sud*) quashed the latter decision.

18. On 3 October 2006 the Ministry of Finance ("the MOF") quashed the REOP's decision of 28 March 2005.

19. Since the REOP had failed to render a decision thereafter, on 11 June 2007 and 14 August 2007 respectively the applicants lodged complaints with the MOF.

20. On 30 August 2007 the applicants also initiated a dispute (*upravni spor*) before the Administrative Court.

21. On 7 September 2007 the MOF accepted the applicants' appeal and ordered the REOP to decide on the matter within thirty days.

22. On 24 October 2007 the Administrative Court stayed the administrative dispute.

23. On 3 November 2007 the REOP accepted both expropriation requests, but on 28 May 2008 the MOF quashed this decision on appeal.

24. On 16 December 2008 the applicants re-instituted their dispute before the Administrative Court.

25. As of 19 May 2010 the proceedings were still pending.

II. RELEVANT DOMESTIC LAW

A. The Constitution of Montenegro 2007 (Ustav Crne Gore; published in the Official Gazette of Montenegro - OGM - no. 1/07)

26. Article 149 of the Constitution provides that the Constitutional Court shall rule on a constitutional appeal lodged in respect of an alleged violation of a human right or freedom guaranteed by the Constitution, after all other effective legal remedies have been exhausted.

27. This Constitution entered into force on 22 October 2007.

B. The Montenegro Constitutional Court Act (Zakon o Ustavnom sudu Crne Gore; published in OGM no. 64/08)

28. Section 48 provides that a constitutional appeal can be filed against an individual decision of a state body, an administrative body, local self-government body or a legal person exercising public authority, for violations of human rights and freedoms guaranteed by the Constitution, after all other effective domestic remedies have been exhausted. Sections 49-59 provide additional details as regards the processing of constitutional appeals.

29. This Act entered into force in November 2008.

C. The Right to a Trial within a Reasonable Time Act (Zakon o zaštiti prava na suđenje u razumnom roku; published in OGM no. 11/07)

30. This Act provides, under certain circumstances, for the possibility to have lengthy proceedings expedited by means of request for review (*kontrolni zahtjev*), as well as an opportunity for the claimants to be awarded compensation therefor by means of an action for fair redress (*tužba za pravično zadovoljenje*).

31. Section 44, in particular, provides that this Act shall be applied retroactively to all proceedings from 3 March 2004, but that the duration of proceedings before that date shall also be taken into account.

32. This Act entered into force on 21 December 2007, but contained no reference to applications involving procedural delay already lodged with the Court.

D. The General Administrative Proceedings Act (Zakon o opštem upravnom postupku; published in the Official Gazette of the Republic of Montenegro - OG RM - no. 60/03)

33. Section 212 § 1 provides that in simple matters an administrative body is obliged to issue a decision within one month of a party's lodging a request. In all other cases, the administrative body is obliged to issue a decision within two months of the lodging of the request.

34. Section 212 § 2 enables a party whose request has not been decided within the periods established in the previous paragraph to lodge an appeal to the appellate body as if his request had been refused. If the appeal is not allowed, the applicant can directly initiate an administrative dispute before the court with jurisdiction.

E. The Administrative Disputes Act (Zakon o upravnom sporu; published in OG RM no. 60/03)

35. Section 18 provides that a party can institute administrative proceedings before the Administrative Court (administrative dispute) if the appellate body does not issue a decision within sixty days nor within an additional period of seven days; or if the first-instance body does not issue a decision and there is no right to an appeal.

36. Section 35 provides that the Administrative Court itself can rule on the merits if a decision has already been quashed in the same dispute and the relevant body has not acted fully in accordance with the Administrative Court's judgment or if it has not issued a new decision within thirty days. The Administrative Court can also rule on the merits if the appellate body, or the first-instance body where there is no right to an appeal, has not ruled within the envisaged time-limit.

F. The Expropriation Act 1981 (Zakon o eksproprijaciji; published in the Official Gazette of the Socialist Republic of Montenegro nos. 20/81, 34/86, 10/90, and OG RM no. 37/95)

37. Section 9 of this Act provided that if during the expropriation of a part of one's real estate it is established that the owner can no longer normally use the remaining property, has no economic interest in using it or if his very means of support is thereby jeopardised, the remaining property shall also be expropriated if he requests it.

G. The Inspection Act (Zakon o inspekcijskom nadzoru; published in OG RM nos. 39/03 and 76/09)

38. Section 10 provides that anybody can request an administrative inspection.

39. Sections 13-19 specify the rights and duties of inspectors, which, *inter alia*, include their right to identify irregularities and order that adequate measures be undertaken, as well as adequate fines imposed.

H. The relevant domestic case-law

40. Between 1 January 2008 and 30 September 2009 the courts in Montenegro considered one hundred and two requests for review pursuant to the Right to a Trial within a Reasonable Time Act. A further two requests were withdrawn and eight were still being examined. Of the one hundred and two requests that had been considered in eighty-four cases the applicants were notified that certain procedural measures would be undertaken within a specified period. There is no information in the documents provided as to whether these time-limits were complied with or not. Eighteen requests were rejected as ill-founded.

41. In the same period, twenty-two actions for fair redress were submitted, of which sixteen were dealt with and six were still being examined. In one case the courts awarded the plaintiff non-pecuniary damages for the length of civil proceedings. In 2010 an additional fourteen actions for fair redress were examined, in two of which the courts awarded damages.

I. The Obligations Act 1978 (Zakon o obligacionim odnosima; published in the Official Gazette of the Socialist Federal Republic of Yugoslavia, nos. 29/78, 39/85, 57/89 and 31/93)

42. Sections 185-192 contained details concerning the right of persons who had suffered damage as a result of the wrongful acts of third parties to be compensated.

J. The Obligations Act 2008 (Zakon o obligacionim odnosima; published in OGM no. 47/08)

43. This Act entered into force on 15 August 2008 thereby repealing the Obligations Act 1978. Sections 192-199, however, correspond to sections 185-192 of the previous Act.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

44. The applicants complained that the length of the proceedings had been incompatible with the "reasonable time" requirement laid down in Article 6 § 1 of the Convention, which reads as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal..."

A. Admissibility

1. Compatibility ratione materiae

45. The Government submitted that the applicants' request to have more property expropriated than the State had initially sought cannot be considered a "civil right and obligation" or a "dispute" within the meaning of Article 6.

46. The applicants contested this argument.

47. The Court reiterates that Article 6 § 1 secures to everyone the right to have a claim relating to his civil rights and obligations brought before a court, the guarantees of this provision extending only to rights which can be said, at least on arguable grounds, to be recognised under domestic law (see *Roche v. the United Kingdom* [GC], no. 32555/96, §§ 116-117, ECHR 2005-X).

48. As regards the present case, the Court notes that the expropriation of the plot in question was requested by the PCFP, and not by the applicants. The applicants, only in response to such a request, and in accordance with the relevant legislation (see paragraph 37 above), made a request for the remainder of their property to be also expropriated. The ensuing dispute was clearly based on the applicants' right under domestic law to request that the remainder of their property be expropriated, a right which was clearly "civil" in nature.

49. Since the applicants thus had a property-related right under domestic law, which was clearly arguable, the Court considers that their complaint falls within the scope of Article 6. The Government's objection in this regard must, therefore, be dismissed.

2. Exhaustion of domestic remedies

(a) Arguments of the parties

50. The Government submitted that the applicants had not exhausted all effective domestic remedies available to them. Primarily, they failed to "seek inspection" of the impugned proceedings. Further, they failed to lodge a request for review and an action for fair redress provided by the Right to a Trial within a Reasonable Time Act (see paragraph 30 above). In this respect the Government referred to *Grzinčič v. Slovenia*, no. 26867/02, ECHR 2007-V (extracts). Lastly, the applicants had not made use of a constitutional appeal (see paragraphs 26-29 above).

51. The applicants contested these submissions. They provided a copy of their request for inspection, as well as the reply thereto (see paragraph 15 above). They submitted that the remedies referred to by the Government had not existed when they lodged their application with this Court, and that therefore they had not been obliged to make use of them. They also submitted that in any event these remedies were not effective.

(b) Relevant principles

52. The Court reiterates that, according to its established case-law, the purpose of the domestic remedies rule in Article 35 § 1 of the Convention is to afford the Contracting States the opportunity of preventing or putting right the alleged violations before they are submitted to the Court.

53. However, the only remedies which the Convention requires to be exhausted are those which relate to the breaches alleged and at the same time are available and sufficient (see *Selmouni v. France* [GC], no. 25803/94, § 75, ECHR 1999 V, *McFarlane v. Ireland* [GC], no. 31333/06, § 107, ECHR 2010-...).

54. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied (see *Vernillo v. France*, 20 February 1991, § 27, Series A no. 198, and *Dalia v. France*, 19 February 1998, § 38, *Reports* 1998-I).

55. Once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government had in fact been used, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from that requirement (see *Dankevich v. Ukraine*, no. 40679/98, § 107, 29 April 2003).

56. The Court reiterates that the decisive question in assessing the effectiveness of a remedy concerning a complaint about the length of proceedings is whether or not it was possible for the applicant to be

provided with direct and speedy redress, rather than with indirect protection of the rights guaranteed under Article 6 (see *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 195, ECHR 2006, and *Sürmeli v. Germany* [GC], no. 75529/01, § 101, 8 June 2006). In particular, a remedy of this sort shall be "effective" if it can be used either to expedite a decision by the courts dealing with the case or to provide the litigant with adequate redress for delays which have already occurred (see *Kudła v. Poland* [GC], no. 30210/96, §§ 157-159, ECHR 2000-XI; *Mifsud v. France* (dec.), [GC], no. 57220/00, § 17, ECHR 2002-VIII; and *Sürmeli v. Germany* [GC], cited above, § 99).

57. Finally, the effectiveness of a particular remedy is normally assessed with reference to the date on which the application was lodged (see, for example, *Baumann v. France*, no. 33592/96, § 47, ECHR 2001-V (extracts)), this rule, however, being subject to exceptions which may be justified by the specific circumstances of each case (see *Nogolica v. Croatia* (dec.), no. 77784/01, ECHR 2002-VIII).

(c) The Court's assessment

(i) As regards the request for inspection

58. The Court notes that the applicants, in response to the Government's observations, submitted a copy of their request for inspection of 18 February 2005, as well as the Ministry of Justice's reply thereto of 16 March 2005. The Court further notes that while the inspection "established irregularities", it obviously did not expedite the proceedings, as in May 2010, more than five years later, they were still pending.

59. Therefore, the Government's objection in this regard must be dismissed.

(ii) As regards the request for review

60. The Court notes the Government's reference to *Grzinčič v. Slovenia* (cited above) where, as in some other cases, the Court departed from the general rule that the assessment of whether domestic remedies have been exhausted is carried out with reference to the date on which the application was lodged with it.

61. The Court observes that in these cases specific legislation as regards the length of proceedings was passed mainly in answer to a great number of applications already pending before this Court indicating a systemic problem in these States. These laws also contained transitional provisions bringing within the jurisdiction of domestic courts the cases already pending before this Court (see *Grzinčič v. Slovenia*, cited above, § 48, *Charzyński v. Poland* (dec.), no. 15212/03, § 20, ECHR 2005-V, and *Brusco v. Italy* (dec.), no. 69789/01, ECHR 2001-IX). Having regard to those considerations, the Court was of the opinion that these States should be

afforded an opportunity to prevent or put right the alleged violation themselves and therefore allowed for an exception to the above rule.

62. Further, when the Court allowed for such an exception the remedies referred to had been recently introduced and there was no established domestic case-law confirming the effectiveness of the remedy (see *Giacometti and Others v. Italy* (dec.), no. 34939/97, ECHR 2001-XII, *Ahlskog v. Finland* (dec.), no. 5238/07, § 73, 9 November 2010, *Nogolica v. Croatia* (dec.), no. 77784/01, ECHR 2002-VIII, *Grzinčič v. Slovenia*, cited above, § 108, *Andrášik and Others v. Slovakia* (dec.), nos. 57984/00, 60226/00, 60237/00, 60242/00, 60679/00, 60680/00 and 68563/01, ECHR 2002-IX). The Court had no reason to doubt the effectiveness of these remedies at such an early stage after their introduction.

63. Unlike in the above cases, the Right to a Trial within Reasonable Time Act has been in force for about three years. While the majority of the requests for review were dealt with by setting periods in which certain procedural measures were to be undertaken, the Government have provided no information as to whether these actions and time-limits were actually complied with and if the proceedings were indeed expedited and/or concluded (see paragraph 40 above).

64. Finally, unlike the Slovenian, Polish, and Italian laws which contained transitional provisions concerning cases already pending before the Court, this Act does not contain a provision which would explicitly bring within the jurisdiction of the national courts the applications already pending before the Court (see paragraph 32 above).

65. As the impugned proceedings have been pending domestically for more than eleven years and one month before the introduction of the legislation referred to above and are still not decided, and since no conclusions can be drawn from the Government's submissions about its effectiveness in the particular circumstances of a case like the applicants', the Court considers that it would be unreasonable to require the applicants to try this avenue of redress (see *Parizov v. "the former Yugoslav Republic of Macedonia",* no. 14258/03, §§ 45-46, 7 February 2008, and *Bijelić v. Montenegro and Serbia*, no. 11890/05, § 76, 28 April 2009).

66. Therefore, having regard to the particular circumstances of the instant case as set out above, the Government's objection in this regard must be dismissed. The Court might in future cases reconsider its view if the Government demonstrate, with reference to concrete cases, the efficacy of the remedy, with the consequence that applicants may be required to exhaust that remedy.

(iii) As regards the action for fair redress and constitutional appeal

67. The Court reiterates that it has already held that the action for fair redress is not capable of expediting proceedings while they are still pending,

which is clearly the applicants' main concern (see, *mutatis mutandis*, *Mijušković v. Montenegro*, no. 49337/07, §72, 21 September 2010).

68. Having regard to the fact that the Government have submitted no case-law to the contrary, the Court considers that a constitutional appeal cannot be considered an available remedy in respect of length of proceedings complaints due to there being no "individual decision" against which such an appeal could be lodged (see, *mutatis mutandis*, *Mijušković v. Montenegro*, cited above, § 74; and, *a contrario*, *Slaviček v. Croatia* (dec.), no. 20862/02, ECHR 2002-VII).

(iv) Conclusion

69. The Court considers that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and finds no other ground to declare it inadmissible. It must therefore be declared admissible.

B. Merits

1. Arguments of the parties

70. The Government submitted that expropriation proceedings are complex by their nature, the applicants' proceedings in particular requiring complicated expertise. They also submitted that the case itself did not require urgency.

71. The applicants contested these arguments and reaffirmed their complaint.

2. Relevant principles

72. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicants and the relevant authorities and what was at stake for the applicants in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

73. The Court also reiterates that, in order to determine the reasonableness of the delay at issue, regard must be had to the state of the case on the date of ratification (see, *mutatis mutandis*, *Styranowski v. Poland*, judgment of 30 October 1998, *Reports of Judgments and Decisions* 1998-VIII).

74. It must be further noted that repeated re-examination of a single case following remittal may in itself disclose a serious deficiency in a given State's judicial system (see *Pavlyulynets v. Ukraine*, no. 70767/01, § 51, 6 September 2005).

3. The Court's assessment

75. It is noted that the period to be taken into account began on 29 October 1996, the date on which the applicants lodged their appeal against the decision rendered at first instance (see, *mutatis mutandis*, *Počuča v. Croatia*, no. 38550/02, § 30, 29 June 2006). The Court observes that the proceedings are apparently still pending before the Administrative Court (see paragraph 25 above). Since the Convention entered into force in respect of Montenegro on 3 March 2004 (see *Bijelić v. Montenegro and Serbia*, no. 11890/05, § 69, 28 April 2009), the proceedings in question have thus been within the Court's competence *ratione temporis* for a period of more than six years and eleven months. In addition, they had already been pending for more than seven years and four months before that date.

76. The Court observes that the present case concerns expropriation of the applicants' house and land. While it can be accepted that some expropriation cases may be more complex than others, the Court does not consider the present one of such complexity as to justify proceedings of this length.

77. Further, the domestic legislation specifies periods within which administrative bodies need to give their decisions, these periods being one month or two months at one level of jurisdiction (see paragraphs 33-36 above). The Court notes that the special diligence requirement is of particular relevance in respect of States where the domestic law provides that cases must be terminated with particular urgency (see, *mutatis mutandis*, *Stevanović v. Serbia*, no. 26642/05, §§ 53 and 55, 9 October 2007). In the present case, the Court notes that, after the respondent State's ratification of the Convention on 3 March 2004, the first decision was given on 28 March 2005, which is more than a year after the ratification. After this decision had been quashed on 3 October 2006, it then took more than a year for another first-instance decision to be given, on 3 November 2007. Lastly, the case has been pending before the Administrative Court since 16 December 2008, that is for more than two years and one month. There is nothing in the case file to suggest that this has been caused by the conduct of the applicants, but rather by the failure of the authorities to act in accordance with the law and time-limits provided therein (see paragraphs 33-36 above).

78. In view of the criteria laid down in its jurisprudence and the relevant facts of the present case, the Court is of the opinion that the length of the proceedings complained of has failed to satisfy the reasonable time requirement. There has accordingly been a violation of Article 6 § 1 of the Convention.

II ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

79. In their observations the applicants also complained that their property rights had been violated, in that the road which had been built on their plot of land had caused damage to the remainder of their property.

80. The Government maintained that there had been no violation of Article 1 of Protocol No. 1.

81. The Court notes that both the Obligations Act 1978 and the Obligations Act 2008 provide for a possibility for the applicants to claim damages in proceedings before a court (see paragraphs 42-43 above). The applicants have failed to avail themselves of that remedy. Therefore, the applicants' complaint in this respect must be declared inadmissible for non-exhaustion of domestic remedies, pursuant to Article 35 §§ 1 and 4 of the Convention.

III APPLICATION OF ARTICLE 41 OF THE CONVENTION

82. 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

83. The applicants claimed 183,300 euros (EUR) in damages in compensation for the devastation of their property. They also claimed compensation for non-pecuniary damage, but left it to the Court to determine the amount.

84. The Government contested the claim for pecuniary damage, given that the proceedings concerning the said property are still pending before the domestic authorities. In any event, the Government submitted that the applicants had failed to show a causal link between the damages sought and the violation alleged.

85. The Court is of the view that it has not been duly substantiated that the applicants sustained pecuniary damage as a result of the violation of Article 6 § 1 on account of the length of the proceedings. However, the Court accepts that the applicants have suffered some non-pecuniary damage which cannot be sufficiently compensated by the sole finding of a violation. Making its assessment on an equitable basis, the Court therefore awards each of the applicants EUR 1,200 under this head.

B. Costs and expenses

86. The applicants claimed costs and expenses allegedly incurred before the domestic courts, the amount of which they left to the Court's discretion, and EUR 850 for costs and expenses incurred before the Court.

87. The Government contested the claim in respect of costs and expenses incurred before the domestic courts, and left the claim in respect of costs before the Court to the Court's discretion.

88. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum (see, for example, *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI).

89. In the present case, regard being had to the above criteria, as well as to the EUR 850 already granted to the applicants under the Council of Europe's legal aid scheme, the Court rejects the claims for costs for lack of substantiation.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Declares* by a majority the complaint concerning the excessive length of the proceedings admissible and, unanimously, the remainder of the application inadmissible;

2. *Holds* by five votes to two that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* by five votes to two
   (a) that the respondent State is to pay each of the applicants, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,200 (one thousand two hundred euros) in respect of non-pecuniary damage, plus any tax that may be chargeable;
   (b) that from the expiry of the above-mentioned three months until settlement, simple interest shall be payable on the above amount at a rate

equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 8 March 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early Registrar	Nicolas Bratza President

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

N.B.
T.L.E.

JOINT DISSENTING OPINION OF JUDGES MIJOVIĆ AND HIRVELA

We are unable to agree with the majority of the Chamber that the complaint concerning the excessive length of the proceedings was admissible and, consequently, that there has been a violation of Article 6 § 1.

As accepted in the judgment, the purpose of Article 35 of the Convention is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Convention institutions (see § 52 of the judgment).

Consequently, States are dispensed from answering for their acts before an international body before they have had an opportunity to put matters right through their own legal system. That rule is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity – that there is an effective remedy available in respect of the alleged breach in the domestic system (see the decision as to the admissibility of application no. 5238/07, *Ahlskog v. Finland*, 9 November 2010, § 68). In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (see the recapitulation of the relevant case-law in *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V). The remedies which Article 35 of the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain both in theory and in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied (see, for example, *Vernillo v. France*, 20 February 1991, § 27, Series A no. 198; and *Akdivar and Others v. Turkey*, 16 September 1996, § 66, *Reports of Judgments and Decisions* 1996-IV). On the other hand, and as correctly pointed out in the judgment (see § 55), once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government had in fact been used, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from that requirement. The decisive question when assessing the effectiveness of a remedy for a length of proceedings complaint is whether or not the applicant was afforded an opportunity to have the proceedings expedited or had a possibility to claim compensation for delays which have occurred (see *Kudla v. Poland* [GC], no. 30210/96 §§ 157-159, ECHR 2000-XI).

We do not consider that these principles were properly applied in the assessment of the effectiveness of the domestic remedies available to the applicants.

Firstly, the applicants in this case had had at their disposal two legal remedies - a request for review and an action for fair redress provided by the Right to a Trial within a Reasonable Time Act and a constitutional appeal. The applicants alleged that these remedies were not in existence when they lodged their application with the European Court and therefore they had not been obliged to use them. Additionally, they alleged that, in any event, the remedies were not effective.

The majority noted that the Right to a Trial within a Reasonable Time Act came into force on 21 December 2007, and that it contained a provision on its retroactive application. In the present case the question arises as to whether the applicants should be required to exhaust this remedy, given that they introduced their applications prior to the enactment of the above Act. In this connection, the majority reiterated that the assessment of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged with it. However, this rule is subject to exceptions which may be justified by the particular circumstances of each case (see *Baumann v. France*, no. 33592/96, § 47, ECHR 2001-V (extracts)). Thus, the Court has held that applicants in cases against Italy, for instance, which concerned length of proceedings and had not been declared admissible, should be required to have recourse to the remedy introduced by the "Pinto Act" notwithstanding that it was enacted after their applications had been filed with the Court (see, for example, *Giacometti and Others v. Italy* (dec.), no. 34939/97, ECHR 2001-XII; or *Brusco v. Italy* (dec.), no. 69789/01, ECHR 2001-IX). A similar decision was taken in respect of cases introduced against Croatia following the entry into force of a constitutional amendment permitting the Constitutional Court to provide redress of both a preventive and a compensatory nature to persons complaining about undue delays in judicial proceedings (see *Nogolica v. Croatia* (dec.), no. 77784/01, ECHR 2002-VIII). A similar approach was followed also in respect of Slovakia (see *Andrášik and Others v. Slovakia* (dec.), nos. 57984/00, 60237/00, 60242/00, 60679/00, 60680/00, 68563/01 and 60226/00, ECHR 2002-IX) and Poland (see *Charzyński v. Poland* (dec.), no. 15212/03, § 40, ECHR 2005-V; and *Michalak v. Poland* (dec.), no. 24549/03, § 41, 1 March 2005). We believe that the present case is similar, in substance, to the above Italian, Croatian, Slovak and Polish cases. As in those cases, the arguments of the applicants that they did not have the possibility to use this remedy and were not obliged to use it, should in our opinion and following the Court's case-law, have been rejected by the Court.

Additionally, the applicants alleged that this remedy, even if used, would not have been effective. The majority of the Chamber came to the same

conclusion and declared the application admissible. Bearing in mind the previously emphasised principles that the Court applies when dealing with the effectiveness issue, we would strongly disagree with the conclusion reached by the majority for the following reasons.

Since the Right to a Trial within a Reasonable Time Act came into force only on 21 December 2007, there is as yet no long-term established practice of the domestic courts. However, the wording of the Act clearly indicates that it is specifically designed to address the issue of excessive length of proceedings before the domestic courts. Furthermore, the relevant domestic case-law shows that between 1 January 2008 and 30 September 2009 the courts in Montenegro considered one hundred and two requests for review pursuant to this Act. In eighty-four cases the applicants were notified that certain procedural measures would be undertaken within a specified period. No information has been provided as to whether these time-limits were complied with or not. Eighteen requests were rejected as ill-founded. On the other hand, in the same period twenty-two actions for fair redress were submitted, of which sixteen were dealt with and six are still being examined. In one case the domestic courts awarded non-pecuniary damages for the length of civil proceedings. In 2010, an additional fourteen actions for fair redress were examined, in two of which the courts awarded damages.

In view of the above, we hesitate to decide that a complaint under the Right to a Trial within a Reasonable Time Act is an ineffective remedy in the sense that it is not capable of providing adequate redress for excessive length of proceedings, provided that the impugned proceedings are still pending.

Furthermore, taking into account the fact that the Convention mechanism is subsidiary to national systems for safeguarding human rights, and in view of the above considerations, we are of the opinion that the applicants should be required to use the remedy available to them under the Right to a Trial within a Reasonable Time Act. That is why we decided to vote against the admissibility of this case.

An additional point that has not been elaborated on in the judgment relates to the possible use of the constitutional appeal. According to the Constitution of Montenegro of 2007, the Constitutional Court shall rule on a constitutional appeal lodged in respect of an alleged violation of a human right or freedom guaranteed by the Constitution after all other effective legal remedies have been exhausted. The majority of the Chamber found that a constitutional appeal could not be considered an available remedy where there is no "individual decision" against which such an appeal could be lodged. For the majority, this implies that there should be an individual court decision. However the proper point of departure for considering this issue should be the Montenegro Constitutional Court Act that entered into force in November 2008 which stipulates that:

> *"[c]onstitutional complaints may be lodged against an individual* ***act*** *of state authority, local self-government authority or legal person vested with public powers, for the reason of violation of human rights and freedoms guaranteed by the Constitution, after all effective remedies have been exhausted."*[1]

We are of the opinion that the Chamber should have addressed this discrepancy (an individual decision dec. no. 13628/03, vs. an individual act). This is not a solely linguistic matter, but a significant and legally important issue clarifying the Constitutional Court's jurisdiction.

However, leaving aside that linguistic-legal issue, we are of the opinion that the approach taken by the majority regarding the effectiveness of the constitutional appeal in Montenegro appears to run counter to the European Court's case-law. As found in *Slaviček v. Croatia* (dec). no. 20862/02, ECHR 2002-VII) and *Nogolica v. Croatia* (cited above), a constitutional complaint was accepted by the Court as an effective remedy for length of proceedings cases which were still pending before the domestic courts in Croatia. The approach of the Court's case-law in respect of Bosnia and Herzegovina has been to the effect that when the applicant has neither used the constitutional complaint nor shown that it was for any reason inadequate or ineffective (and we consider that no such reason had been shown in this case), the case is to be declared inadmissible for reasons of non-exhaustion (see *Mirazović v. Bosnia and Herzegovina*, (dec.) no. 13628/03, 6 May 2006).

Even from a theoretical point of view, we are of the opinion that there is no reason why the applicants' length of proceedings complaint could not or should not have been lodged with the Constitutional Court, even if that court has exclusively appellate jurisdiction, i.e. even when there are no individual decisions that the applicants could have relied on as the basis of their appeal. The essence of the length of proceedings problem is precisely the lack of an individual decision and for that reason there is no reasonable explanation why a constitutional complaint could not have been lodged in this case either. The applicants decided not to test this avenue, alleging that it would not have been effective. However, there are no relevant statistics showing that that would have been the case. The European Court's case-law has already taken a stand on this issue, establishing that as regards legal systems which provide constitutional protection for fundamental rights, it is incumbent on the aggrieved individual to test the extent of that protection (see *Holland v. Ireland*, no. 24827/94, Commission decision of 14 April 1998, Decisions and Reports 93, p. 15 and *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland* (dec.), no. 55120/00, 19 June 2003; *Tokić and Others v. Bosnia and Herzegovina*, nos. 12455/04, 14140/05, 12906/06 and 26028/06, § 59, 8 July 2008). For

1. Cited Article 48 of the Montenegro Constitutional Court Act has been taken from the Constitutional Court's official web site in its official English translation version, and as such should have been properly used and cited by the Chamber in the judgment

us, neither good reasons nor special circumstances have been adduced which would justify a departure from this or any of the above-emphasised principles and so absolve the applicant from the obligation to use this legal remedy.