CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

CASE OF BIJELIĆ v. MONTENEGRO AND SERBIA

(Application no. 11890/05)

JUDGMENT

STRASBOURG

28 April 2009

FINAL

06/11/2009

This judgment may be subject to editorial revision.

In the case of Bijelić v. Montenegro and Serbia**,**

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

Françoise Tulkens, *President*,
Ireneu Cabral Barreto,
Vladimiro Zagrebelsky,
Danutė Jočienė,
Dragoljub Popović,
Nona Tsotsoria,
Nebojša Vučinić, *judges*,
and Sally Dollé, *Section Registrar*,

Having deliberated in private on 7 April 2009,

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

PROCEDURE

1. The case originated in an application (no. 11890/05) against the State Union of Serbia and Montenegro lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Ms Nadezda Bijelić ("the first applicant"), Ms Svetlana Bijelić ("the second applicant") and Ms Ljiljana Bijelić ("the third applicant"), all Serbian nationals, on 24 March 2005 and 31 January 2006, respectively.

2. The applicants complained, in particular, about the non-enforcement of a final eviction order and their consequent inability to live in the flat at issue.

3. On 28 November 2005, as regards the first applicant, and 7 February 2006, as regards the other two applicants, who were subsequently recognised as such, these complaints were communicated to the Government of the State Union of Serbia and Montenegro.

4. On 7 April 2006 the said Government submitted their written observations and on 22 May 2006 the applicants responded.

5. On 3 June 2006 Montenegro declared its independence.

6. On 27 June 2006 the Court decided to adjourn the consideration of the application pending clarification of the relevant issues (see paragraphs 53-56 below).

7. On 9 August 2007, in response to the Court's question, the applicants stated that they wished to proceed against both Montenegro and Serbia, as two independent States.

8. The applicants were represented by Mr M. Savatović, a lawyer practising in Belgrade. The Montenegrin Government were represented by

their Minister of Justice, Mr M. Radović, and the Serbian Government by their Agent, Mr S. Carić.

9. On 10 April 2008 the President of the Second Section decided to re-communicate the application, in its entirety, to the Governments of Montenegro and Serbia, respectively, informing them that, for reasons of clarity, no prior observations submitted by the parties would be taken into account. It was also decided that the merits of the application would be examined at the same time as its admissibility (Article 29 § 3). The parties replied in writing to each other's observations. In addition, third-party comments were received from the Venice Commission and the Human Rights Action, a non-governmental human rights organisation based in Montenegro, which had both been granted leave to intervene in accordance with Article 36 § 2 of the Convention and Rule 44 § 2 (a) of the Rules of Court. The parties replied to those comments (Rule 44 § 5).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The first, second and third applicants were born in 1950, 1973 and 1971, respectively, and currently live in Belgrade, Serbia.

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

A. The eviction suit

12. The first applicant, her husband and the other two applicants were holders of a specially protected tenancy concerning a flat in Podgorica (*nosioci odnosno korisnici stanarskog prava*), Montenegro, where they lived.

13. In 1989 the first applicant and her husband divorced and the former was granted custody of the other two applicants.

14. On 26 January 1994 the first applicant obtained a decision from the Court of First Instance (*Osnovni sud u Podgorici*) declaring her the sole holder of the specially protected tenancy on the family's flat. In addition, her former husband ("the respondent") was ordered to vacate the flat within fifteen days from the date when the decision became final.

15. On 27 April 1994 the decision of the Court of First Instance was upheld on appeal by the High Court (*Viši sud u Podgorici*) and thereby became final.

B. The enforcement proceedings

16. Given that the respondent did not comply with the court order to vacate the flat, on 31 May 1994 the first applicant instituted a formal judicial enforcement procedure before the Court of First Instance.

17. The enforcement order was issued on the same date.

18. On 8 July 1994 the bailiffs attempted to evict the respondent together with his new wife and minor children but the eviction was adjourned because he threatened to use force.

19. On 14 July 1994 they tried again, this time assisted by the police, but apparently the planned eviction was adjourned for the same reason.

20. On 15 July 1994 the first applicant bought the flat and became its owner.

21. On 26 October 1994 the bailiffs and the police once again failed to evict the respondent who kept threatening the first applicant in their presence and bore arms on his person. There also appear to have been additional weapons, ammunition and even a bomb in the flat at the time. The police took the respondent to their station but released him shortly afterwards without pressing charges.

22. On 28 November 1994 and 16 March 1995 another two scheduled evictions failed, the latter due to the "respondent's request for the provision of social assistance" in respect of his minor children.

23. On 23 October 1995 the first applicant gifted the flat to the second and third applicants.

24. On 3 June 1996 and 1 August 1996, respectively, another two scheduled evictions failed.

25. On 3 June 1998 the Ministry of Justice informed the first applicant that the Court of First Instance had committed to enforce the eviction order before the end of the month.

26. On 27 October 1998 and 1 November 1999 another two scheduled evictions failed.

27. In the meantime, on 13 August 1999, the Real Estate Directorate (*Direkcija za nekretnine*) issued a formal decision recognising the second and the third applicants as the new owners of the flat in question.

28. In March of 2004 another eviction was attempted but failed. In the presence of police officers, fire fighters, paramedics, bailiffs and the enforcement judge herself, as well as his wife and their children, the respondent threatened to blow up the entire flat. His neighbours also seem to have opposed the eviction, some of them apparently going so far as to physically confront the police.

29. Throughout the years the first applicant complained to numerous State bodies about the non-enforcement of the judgment rendered in her favour, but to no avail.

30. On 9 February 2006 another scheduled enforcement failed because the respondent had threatened to "spill blood" rather than be evicted.

31. On 5 May 2006 and 31 January 2007, respectively, the enforcement judge sent letters to the Ministry of Internal Affairs, seeking assistance.

32. On 15 February 2007 the enforcement judge was told, at a meeting with the police, that the eviction in question was too dangerous to be carried out, that the respondent could blow up the entire building by means of a remote control device, and that the officers themselves were not equipped to deal with a situation of this sort. The police therefore proposed that the applicants be provided with another flat instead of the one in question.

33. On 19 November 2007 the enforcement judge urged the Ministry of Justice to secure the kind of police assistance needed for the respondent's ultimate eviction.

C. Other relevant facts

34. On 26 March 2004 the second applicant, on her own behalf and on behalf of the third applicant, authorised the first applicant to sell the flat in question.

35. On 30 January 2006 the second and third applicants authorised the first applicant, *inter alia*, to represent them in the enforcement proceedings.

36. The applicants maintain that the gift contract of 1995 (see paragraph 23 above) and the said powers of attorney were submitted to the enforcement court. The first applicant was therefore the second and third applicants' legal representative in the enforcement proceedings.

II. RELEVANT DOMESTIC LAW

A. Constitutional Charter of the State Union of Serbia and Montenegro (Ustavna povelja državne zajednice Srbija i Crna Gora; published in the Official Gazette of Serbia and Montenegro - OG SCG - no. 1/03)

37. The relevant provisions of this Charter read as follows:

Article 9 §§ 1 and 3

"The Member States shall regulate, ensure and protect human and minority rights and civic freedoms in their respective territories.

...

[The State Union of] ... Serbia and Montenegro shall monitor the implementation of human and minority rights and civic freedoms and ensure their protection if such protection has not been provided in the Member States."

Article 60 §§ 4 and 5

"Should Montenegro break away from the State Union of Serbia and Montenegro, the international documents pertaining to the Federal Republic of Yugoslavia, particularly the United Nations Security Council Resolution 1244, would concern and apply ... to Serbia as the successor.

The Member State which ... [breaks away] ... shall not inherit the right to international legal personality, and any disputable issues shall be regulated separately between the successor State and the newly independent State."

B. Charter on Human and Minority Rights and Civic Freedoms of the State Union of Serbia and Montenegro (*Povelja o ljudskim i manjinskim pravima i građanskim slobodama državne zajednice Srbija i Crna Gora*; published in OG SCG no. 6/03)

38. The relevant provisions of this Charter read as follows:

Article 2 § 3

"The human and minority rights guaranteed under this Charter shall be directly regulated, secured and protected by the constitutions, laws and policies of the Member States."

C. Opinion issued by the Supreme Court of Montenegro on 26 June 2006 (Pravni stav Vrhovnog suda Republike Crne Gore; SU VI br. 38/2006)

39. The relevant part of this Opinion reads as follows:

"The domestic legal system offers no legal remedy against violations of the right to a hearing within a reasonable time, which is why the courts in the Republic of Montenegro have no jurisdiction to rule in respect of claims seeking non-pecuniary damages caused by a breach of this right. Any person who considers himself a victim of a violation of this right may therefore lodge an application with the European Court of Human Rights, within six months as of the adoption of the final judgment by the domestic courts.

[When asked to rule in respect of the compensation claims referred to above] ... the courts in the Republic of Montenegro must refuse jurisdiction ... and declare ... [them] ... inadmissible (pursuant to Article 19 para. 3 of the Civil Procedure Code)."

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

40. The relevant provisions of the Constitution read as follows:

Article 149

"The Constitutional Court shall ...

(3) ... [rule on a] ... constitutional appeal ... [filed 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 ..."

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

E. Constitutional Law on the Implementation of the Constitution of Montenegro (Ustavni zakon za sprovodjenje Ustava Crne Gore; published in OGM nos. 01/07, 9/08 and 4/09)

42. The relevant provisions of this Act read as follows:

Article 5

"Provisions of international treaties on human rights and freedoms, to which Montenegro acceded before 3 June 2006, shall be applied to legal relations which have arisen after their signature."

43. This Act also entered into force on 22 October 2007.

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

44. Articles 48-59 provide additional details as regards the processing of constitutional appeals.

45. This Act entered into force in November 2008.

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

46. This Act provides, under certain circumstances, for the possibility to have lengthy proceedings expedited, as well as an opportunity for the claimants to be awarded compensation therefor.

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

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

H. Police Act (Zakon o policiji; published in OGM no. 28/05)

49. Pursuant to Article 7 § 1 the police are obliged to assist other State bodies in the enforcement of their decisions if there is physical resistance or such resistance may reasonably be expected.

I. Enforcement Procedure Act (Zakon o izvršnom postupku; published in the Official Gazette of the Federal Republic of Yugoslavia - OG FRY - no. 28/00, 73/00 and 71/01)

50. Article 4 § 1 provides that the enforcement court is obliged to proceed urgently.

51. Under Article 47, if needed, the bailiff may request police assistance; should the police fail to provide such assistance, the enforcement court shall inform thereof the Minister of Internal Affairs, the Government, or the competent parliamentary body.

52. Finally, Article 23 § 1 states that enforcement proceedings shall also be carried out at the request of a person not specifically named as the creditor in the final court decision, providing he or she can prove, by means of an "official or another legally certified document", that the entitlement in question has subsequently been transferred to that individual from the original creditor.

III. THE CONVENTION STATUS OF THE FORMER STATE UNION OF SERBIA AND MONTENEGRO, AS WELL AS OF SERBIA AND OF MONTENEGRO, RESPECTIVELY, FOLLOWING THE LATTER'S DECLARATION OF INDEPENDENCE

53. On 3 March 2004 the Convention and Article 1 of Protocol No. 1 entered into force in respect of the State Union of Serbia and Montenegro.

54. On 3 June 2006 the Montenegrin Parliament adopted its Declaration of Independence.

55. On 14 June 2006 the Committee of Ministers of the Council of Europe, *inter alia*, noted that:

> "1. ... the Republic of Serbia will continue the membership of the Council of Europe hitherto exercised by the ... [State Union] ... of Serbia and Montenegro, and the obligations and commitments arising from it;
>
> 2. ... the Republic of Serbia is continuing the membership of [the State Union of] Serbia and Montenegro in the Council of Europe with effect from 3 June 2006; ...

> 4. ... the Republic of Serbia was either a signatory or a party to the Council of Europe conventions referred to in the appendix ... to which [the State Union of] Serbia and Montenegro had been a signatory or party [including the European Convention on Human Rights]; ..."

56. Finally, on 7 and 9 May 2007 the Committee of Ministers decided, *inter alia*, that:

> "2. ... a. ... the Republic of Montenegro is to be regarded as a Party to the European Convention on Human Rights and its Protocols No. 1, 4, 6, 7, 12, 13 and 14 thereto with effect from 6 June 2006; ..."

IV. STATUTE OF THE COUNCIL OF EUROPE

57. The relevant provisions of the Statute read as follows:

Article 4

> "Any European State which is deemed to be able and willing to fulfil the provisions of Article 3 may be invited to become a member of the Council of Europe by the Committee of Ministers. Any State so invited shall become a member on the deposit on its behalf with the Secretary General of an instrument of accession to the present Statute."

Article 16

> "The Committee of Ministers shall, subject to the provisions of Articles 24, 28, 30, 32, 33 and 35, relating to the powers of the Consultative Assembly, decide with binding effect all matters relating to the internal organisation and arrangements of the Council of Europe. For this purpose the Committee of Ministers shall adopt such financial and administrative arrangements as may be necessary."

V. UNITED NATIONS HUMAN RIGHTS COMMITTEE

58. The Human Rights Committee has made clear, in the context of obligations arising from the International Covenant on Civil and Political Rights, that fundamental rights protected by international treaties "belong to the people living in the territory of the State party" concerned. In particular, "once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession" (General Comment No. 26: Continuity of obligations: 08/12/97, CCPR/C/21/Rev.1/Add. 8/ Rev.1).

THE LAW

59. The applicants complained about the non-enforcement of the final decision issued by the Court of First Instance on 26 January 1994, as well as their consequent inability to live in the flat at issue in that litigation.

60. The Court communicated these complaints under Articles 6 § 1 and 8 of the Convention, as well as under Article 1 of Protocol No. 1, which, in their relevant parts, read as follows:

Article 6 § 1

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

Article 8

"Everyone has the right to respect for his ... home ...

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 1 of Protocol No. 1

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

I. THE COMPATIBILITY OF THE APPLICATION WITH THE CONVENTION

61. As noted above, following the Montenegrin declaration of independence, the applicants stated that they wished to proceed against both Montenegro and Serbia, as two independent States. The President of the Second Section, therefore, decided to re-communicate the application to both Governments. One of the questions put to them read as follows: "Which State, Montenegro or Serbia, could be held responsible for the impugned inaction of the authorities between 3 March 2004 and 5 June 2006?" (see paragraphs 53-56 above).

A. The parties' submissions

1. The Serbian Government

62. The Serbian Government firstly noted that each constituent republic of the State Union of Serbia and Montenegro had the obligation to protect human rights in its own territory (see paragraph 37, Article 9 above). Secondly, the impugned enforcement proceedings were themselves solely conducted by the competent Montenegrin authorities. Thirdly, although the sole successor of the State Union of Serbia and Montenegro (see paragraph 37, Article 60 above), Serbia cannot be deemed responsible for any violations of the Convention which might have occurred in Montenegro prior to its declaration of independence. Lastly, Serbia could not, within the meaning of Article 46 of the Convention, realistically be expected to implement any individual and/or general measures in the territory of another State. In view of the above, the Serbian Government concluded that the application as regards Serbia was incompatible *ratione personae* and maintained that, to hold otherwise, would be contrary to the universal principles of international law.

2. The Montenegrin Government

63. The Montenegrin Government "support[ed] the remarks presented to the Court" by the Serbian Government "relating to the issue of ... [succession as regards] ... the enforcement of the judgment ... [in question] ...". In addition, the Government referred to Article 5 of the Constitutional Act on the Implementation of the Constitution of the Republic of Montenegro (see paragraph 42 above).

3. The applicants

64. The applicants reaffirmed that both Montenegro and Serbia should be held responsible for the non-enforcement of the judgement in question. The former due to the fact that the enforcement proceedings had taken place before Montenegrin authorities, and the latter because Serbia was the sole successor of the State Union of Serbia and Montenegro.

4. The third-party interveners

(a) European Commission for Democracy through Law ("the Venice Commission")

65. In its written opinion (adopted by the 76th Plenary Session held on 17-18 October 2008, CDL-AD (2008) 021), the Venice Commission maintained that it would both further the protection of European human rights and be in accordance with the Court's earlier practice, if the Court

were now to hold Montenegro responsible for the breaches of the applicants' Convention rights which might have been caused by its authorities between 3 March 2004 and 5 June 2006. In the opinion of the Venice Commission, there are no difficulties of international or constitutional law which should lead the Court to a different conclusion. Accordingly, the Venice Commission did not consider it necessary for the Committee of Ministers of the Council of Europe to be requested to amend its decision of May 2007.

(b) The Human Rights Action

66. In their written submissions, the Human Rights Action argued that Montenegro should be deemed responsible for any and all violations of the Convention and/or its Protocols committed by its authorities as of 3 March 2004, which is when these instruments had entered into force in respect of the State Union of Serbia and Montenegro. In support of this argument they referred to practical considerations, the domestic and international context surrounding the Montenegrin declaration of independence, as well as the Court's own established practice regarding similar issues following the separation of the Czech and Slovak republics.

B. The Court's assessment

67. The Court notes at the outset that the Committee of Ministers has the power under Articles 4 and 16 of the Statute of the Council of Europe to invite a State to join the organisation as well as to decide "all matters relating to ... [the Council's] ... internal organisation and arrangements" (see paragraph 57 above). The Court, however, notwithstanding Article 54 of the Convention, has the sole competence under Article 32 thereof to determine all issues concerning "the interpretation and application of the Convention", including those involving its temporal jurisdiction and/or the compatibility of the applicants' complaints *ratione personae*.

68. With this in mind and in addition to the events detailed at paragraphs 53-56 above, the Court observes, as regards the present case, that:

(i) the only reasonable interpretation of Article 5 of the Constitutional Act on the Implementation of the Constitution of the Republic of Montenegro (see paragraph 42 above), the wording of Article 44 of the Montenegrin Right to a Trial within a Reasonable Time Act (see paragraphs 46-48 above), and indeed the Montenegrin Government's own observations, would all suggest that Montenegro should be considered bound by the Convention, as well as the Protocols thereto, as of 3 March 2004, that being the date when these instruments had entered into force in respect of the State Union of Serbia and Montenegro;

(ii) the Committee of Ministers had itself accepted, apparently because of the earlier ratification of the Convention by the State Union of Serbia and

Montenegro, that it was not necessary for Montenegro to deposit its own formal ratification of the Convention;

(iii) although the circumstances of the creation of the Czech and Slovak Republics as separate States were clearly not identical to the present case, the Court's response to this situation is relevant: namely, notwithstanding the fact that the Czech and Slovak Federal Republic had been a party to the Convention since 18 March 1992 and that on 30 June 1993 the Committee of Ministers had admitted the two new States to the Council of Europe and had decided that they would be regarded as having succeeded to the Convention retroactively with effect from their independence on 1 January 1993, the Court's practice has been to regard the operative date in cases of continuing violations which arose before the creation of the two separate States as being 18 March 1992 rather than 1 January 1993 (see, for example, *Konečný v. the Czech Republic*, nos. 47269/99, 64656/01 and 65002/01, § 62, 26 October 2004).

69. In view of the above, given the practical requirements of Article 46 of the Convention, as well as the principle that fundamental rights protected by international human rights treaties should indeed belong to individuals living in the territory of the State party concerned, notwithstanding its subsequent dissolution or succession (see, *mutatis mutandis*, paragraph 58 above), the Court considers that both the Convention and Protocol No. 1 should be deemed as having continuously been in force in respect of Montenegro as of 3 March 2004, between 3 March 2004 and 5 June 2006 as well as thereafter (see paragraphs 53-56 above).

70. Lastly, given the fact that the impugned proceedings have been solely within the competence of the Montenegrin authorities, the Court, without prejudging the merits of the case, finds the applicants' complaints in respect of Montenegro compatible *ratione personae* with the provisions of the Convention and Protocol No. 1 thereto. For the same reason, however, their complaints in respect of Serbia are incompatible *ratione personae*, within the meaning of Article 35 § 3, and must be rejected pursuant to Article 35 § 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1

A. Admissibility

1. As regards the first applicant

71. In the Court's view, although the Montenegrin Government have not raised an objection as to the Court's competence *ratione personae* in this respect, the first applicant's victim status nevertheless calls for its

consideration (see, *mutatis mutandis*, *Blečić v. Croatia* [GC], no. 59532/00, § 67, ECHR 2006-...). The Court, therefore, observes that on 23 October 1995 the first applicant had transferred ownership of the flat in question to the second and third applicants (see paragraph 23 above) and concludes that the first applicant's complaint in respect of Montenegro is incompatible *ratione personae* with the provisions of Article 1 of Protocol No. 1 (see, *mutatis mutandis*, *Kuljanin v. Croatia* (dec.), no. 77627/01, 3 June 2004).

2. As regards the second and third applicants

(a) Compatibility *ratione personae*

72. The Court further considers that it must also, of its own motion, examine the compatibility of the second and third applicants' complaints *ratione personae* and notes that the said two applicants have been the owners of the flat at issue since 23 October 1995, which is why, without prejudging the merits of the case, their complaints in respect of Montenegro are compatible *ratione personae* with Article 1 of Protocol No. 1 (see, *mutatis mutandis*, *Marčić and Others v. Serbia*, no. 17556/05, § 49, 30 October 2007).

(b) Exhaustion of domestic remedies

73. The Montenegrin Government submitted that the second and third applicants had not exhausted all effective domestic remedies. In particular, they had failed to lodge an appeal with the Constitutional Court (see paragraph 40 above), and make use of the newly adopted Right to a Trial within a Reasonable Time Act (see paragraphs 46-48 above).

74. The applicants contested the effectiveness of these remedies, particularly in view of the fact that they were introduced long after their application had been lodged.

75. The Court reiterates that, according to Article 35 § 1 of the Convention, it may only deal with a complaint after all domestic remedies have been exhausted and recalls that it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time (see, *inter alia*, *Vernillo v. France*, judgment of 20 February 1991, Series A no. 198, pp. 11–12, § 27, and *Dalia v. France*, judgment of 19 February 1998, *Reports* 1998-I, pp. 87-88, § 38).

76. In the present case, the impugned enforcement proceedings had already been pending domestically for more than thirteen years before the legislation referred to at paragraph 73 above had entered into force. Furthermore, these proceedings are currently still ongoing and the Montenegrin Government have failed to provide any case-law to the effect that the remedies in question can be deemed effective in a case such as the

one here at issue. The Court considers, therefore, that it would be disproportionate to now require the second and third applicants to try those avenues of redress (see, *mutatis mutandis*, *Parizov v. "the former Yugoslav Republic of Macedonia*", no. 14258/03, § 46, 7 February 2008).

77. It follows that the Montenegrin Government's objection must be dismissed.

(c) Conclusion

78. The Court notes that the first and second applicants' complaints in respect of Montenegro are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits as regards the second and third applicants

79. The applicants reaffirmed their complaints whilst the Montenegrin Government maintained that efforts were being made to have the judgment in question enforced.

80. Article 1 of Protocol No. 1 guarantees, *inter alia*, the right of property, which includes the right to enjoy one's property peacefully, as well as the right to dispose of it (see, among many other authorities, *Marckx v. Belgium*, 13 June 1979, § 63, Series A no. 31).

81. By virtue of Article 1 of the Convention, each Contracting Party "shall secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention". The discharge of this general duty may entail positive obligations inherent in ensuring the effective exercise of the rights guaranteed by the Convention.

82. In the context of Article 1 of Protocol No. 1, those positive obligations may require the State to take the measures necessary to protect the right of property (see, for example, *Broniowski v. Poland* [GC], no. 31443/96, § 143, ECHR 2004-V), particularly where there is a direct link between the measures which an applicant may legitimately expect the authorities to undertake and the effective enjoyment of his or her possessions (see *Öneryıldız v. Turkey* [GC], no. 48939/99, § 134, ECHR 2004-XII).

83. It is thus the State's responsibility to make use of all available legal means at its disposal in order to enforce a final court decision, notwithstanding the fact that it has been issued against a private party, as well as to make sure that all relevant domestic procedures are duly complied with (see, *mutatis mutandis*, *Marčić and Others v. Serbia*, cited above, § 56).

84. Turning to the present case, the Court firstly notes that the inability of the second and third applicants to have the respondent evicted from the

flat in question amounts to an interference with their property rights (see paragraph 80 above). Secondly, the judgment at issue had become final by 27 April 1994 (see paragraph 15 above), its enforcement had been sanctioned on 31 May 1994 (see paragraphs 16 and 17 above), and Protocol No. 1 had entered into force in respect of Montenegro on 3 March 2004 (see paragraph 69 above), meaning that the impugned non-enforcement has been within the Court's competence *ratione temporis* for a period of almost five years, another ten years having already elapsed before that date. Lastly, but most importantly, the police themselves conceded that they were unable to fulfil their duties under the law (see paragraphs 32, 49 and 51 above), which is what ultimately caused the delay in question.

85. In view of the foregoing, the Court finds that the Montenegrin authorities have failed to fulfil their positive obligation, within the meaning of Article 1 of Protocol No. 1, to enforce the judgment of 31 May 1994. There has, accordingly, been a violation of the said provision.

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

A. As regards the first applicant

86. The Court notes that, as of October 1995, the first applicant was neither the holder of the protected tenancy nor the owner of the flat in question (see paragraph 23 above). Further, on 30 January 2006 the second and third applicants authorised the first applicant to represent them in the impugned proceedings (see paragraph 35 above). Finally, this never became an issue before the enforcement court itself, which is why the second and third applicants may be deemed to have implicitly assumed the role of creditors in the first applicant's stead (see paragraph 52 above).

87. It follows that the first applicant's complaint in respect of Montenegro is incompatible *ratione personae* with the provisions of the Convention and must be rejected pursuant to Article 35 §§ 3 and 4 (see *Kuljanin v. Croatia* (dec.), cited above).

B. As regards the second and third applicants

88. Having regard to its findings in relation to Article 1 Protocol No. 1 and the fact that it was the non-enforcement which was at the heart of the applicants complaints, the Court considers that, whilst this complaint is admissible, it is not necessary to examine separately the merits of whether, in this case, there has also been a violation of Article 6 § 1 (see, *mutatis mutandis*, *Davidescu v. Romania*, no. 2252/02, § 57, 16 November 2006).

IV. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

89. The Court refers to its case-law concerning the notion of a home. In the case of *Gillow v. the United Kingdom* (judgment of 24 November 1986, Series A no. 109), the Court held that the applicants, who had owned but not lived in their house for nineteen years, could call it their "home" within the meaning of Article 8 of the Convention. This was because, despite the length of their absence, they had always intended to return and had retained sufficient continuing links with the property. Moreover, in the case of *Menteş and Others v. Turkey* (judgment of 28 November 1997, § 73, *Reports of Judgments and Decisions* 1997-VIII), it was clarified that there was also no need for the applicant to be the owner of the flat or even for his or her presence there to be permanent in order for it to be considered "home", provided that the individual had lived there "for significant periods on an annual basis" and had a "strong family connection" to the premises.

90. However, in the present case, the Court observes that on 26 March 2004 the second applicant, on her own behalf and on behalf of the third applicant, authorised the first applicant to sell the flat in question (see paragraph 34 above). It follows that from then on, at the latest, the applicants, who now all appear to be residents of Belgrade, clearly had no intention of returning to live in the flat. They thus cut the family's connection to the property. Accordingly, the Court finds that by the time the applicants lodged their case with the Court, that property could no longer be considered to have been their "home" for the purposes of Article 8. The Court therefore finds that the applicants' complaints in respect of Montenegro must be rejected as being incompatible *ratione materiae* with the Convention, pursuant to Article 35 §§ 3 and 4.

V. APPLICATION OF ARTICLES 41 AND 46 OF THE CONVENTION

91. Articles 41 and 46 read as follows:

Article 41

"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."

Article 46

"1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

A. Damage

92. The applicants claimed 97,200 euros (EUR) in respect of pecuniary and non-pecuniary damage.

93. The Montenegrin Government did not comment in this respect.

94. The Court considers that the second and third applicants in the present case have certainly suffered some non-pecuniary damage, in respect of which it awards them, jointly, the sum of EUR 4,500. In addition, the Montenegrin Government must secure, by appropriate means, the speedy enforcement of the final judgment adopted by the Court of First Instance on 26 January 1994 (see, *mutatis mutandis*, *Ilić v. Serbia*, no. 30132/04, § 112, 9 October 2007).

95. Should the Montenegrin Government fail to enforce the said domestic decision, within three months from the date on which the present judgment becomes final, that Government should pay the second and third applicants, jointly, the global sum of EUR 92,000, instead of the lesser award of EUR 4,500 made in the preceding paragraph (see, *mutatis mutandis*, *Papamichalopoulos and Others v. Greece* (Article 50), 31 October 1995, Series A no. 330-B). The Court has so decided on an equitable basis, in view of the very specific circumstances of the present case, and the fact that the Montenegrin Government have themselves not commented on the applicants' claim for damages (see, *mutatis mutandis*, *Jasar v. the former Yugoslav Republic of Macedonia*, no. 69908/01, § 71, 15 February 2007).

B. Costs and expenses

96. The applicants also claimed EUR 4,500 for the costs and expenses incurred before the Court.

97. The Montenegrin Government did not comment in this respect.

98. 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 were also reasonable as to their quantum (see, for example, *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI).

99. In the present case, regard being had to the documents in its possession and the above criteria, as well as the fact that the applicants have already been granted EUR 850 under the Council of Europe's legal aid scheme, the Court considers it reasonable to award the second and third applicant, jointly, the additional sum of EUR 700 for the proceedings before it.

C. Default interest

100. 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* unanimously admissible the second and third applicants' complaints in respect of Montenegro, considered under Article 1 of Protocol No. 1 and Article 6 § 1 of the Convention;

2. *Declares* unanimously the remainder of the application inadmissible;

3. *Holds* unanimously that there has been a violation of Article 1 of Protocol No. 1 by Montenegro;

4. *Holds* unanimously that it is not necessary to examine separately the complaint under Article 6 § 1 of the Convention;

5. *Holds* by 6 votes to 1

(a) that the Government of Montenegro shall ensure, by appropriate means, within three months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention, the enforcement of the final judgment adopted by the Court of First Instance on 26 January 1994;
(b) that the Government of Montenegro is to pay the second and third applicants, jointly, within the same three month period, the following sums:
(i) EUR 4,500 (four thousand five hundred euros), plus any tax that may be chargeable, for the non-pecuniary damage suffered, and
(ii) EUR 700 (seven hundred euros), plus any tax that may be chargeable to the said two applicants, for costs and expenses;
(c) that, failing the enforcement ordered under (a) above, the Government of Montenegro is to pay, within the same three month period, the second and third applicants, jointly, the global sum of EUR 92,000 (ninety-two thousand euros), plus any tax that may be chargeable (instead of the award of 4,500 under (b)(i) above) ;
(d) that from the expiry of the said time-limit 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;

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

Done in English, and notified in writing on 28 April 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé Registrar	Françoise Tulkens President