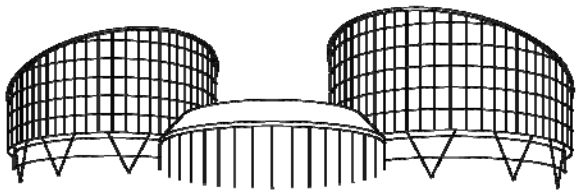

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF STANIMIROVIĆ v. SERBIA

(Application no. 26088/06)

JUDGMENT

STRASBOURG

18 October 2011

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 Stanimirović v. Serbia,

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

Françoise Tulkens, *President,*
Danutė Jočienė,
David Thór Björgvinsson,
Dragoljub Popović,
Giorgio Malinverni,
Işıl Karakaş,
Guido Raimondi, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 20 September 2011,

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

PROCEDURE

1. The case originated in an application (no. 26088/06) against the Republic of Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Serbian national, Mr Zoran Stanimirović ("the applicant"), on 22 May 2006.

2. The applicant was represented by Juris Consulta, a German law firm. The Serbian Government ("the Government") were represented by their Agent, Mr S. Carić.

3. The applicant alleged, in particular, that he had been tortured by the police and that his statements obtained through torture had been used in a criminal trial against him. He relied on various Articles of the Convention.

4. On 26 July 2010 the President of the Second 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 applicant was born in 1972. He is currently serving his sentence in Zabela Prison near Požarevac in Serbia.

6. On 9 February 2001 a couple were killed.

7. On 10 February 2001 at about 8 p.m. the applicant was arrested at his home in Grocka. He was taken to Smederevo police station and beaten up by police officers. He then confessed to having participated in the killing.

8. On 11 February 2001 the applicant was taken to Smederevo Prison.

9. On 13 February 2001 the applicant was taken to the investigating judge. He met his counsel there, who had meanwhile been appointed by the applicant's wife, but he was not given the opportunity to talk with him in private. While the applicant confirmed his earlier confession, he complained to the judge that he had been beaten up by the police. The applicant was then examined at Smederevo Hospital. According to the medical report, he had a broken rib and bruises on his chest.

10. On 14 February 2001 the applicant was taken to the investigating judge again. His counsel was not present. The applicant met his counsel in private for the first time later that day.

11. On 17 February 2001 the applicant was returned to Smederevo police station and beaten up again. After having collapsed, he was taken to Smederevo Hospital. According to the medical report, he was concussed and had bruises on his head. The investigating judge was informed of the incident.

12. On 19 February 2001 the applicant appeared before the investigating judge again. His counsel was not present.

13. When the applicant was taken to the investigating judge for the fourth time on 16 March 2001, his counsel was present and he retracted his confession.

14. Following a criminal complaint lodged by the applicant's counsel against unidentified criminal police officers, the public prosecutor obtained a report from Smederevo police station rejecting the applicant's allegations. The public prosecutor also obtained the medical reports of 13 and 17 February 2001. On 24 September 2001 the public prosecutor decided not to prosecute and informed the applicant's counsel of the possibility of starting a subsidiary prosecution within eight days. Counsel did not do so.

15. On 4 November 2002 the Smederevo District Court found the applicant and S.P. guilty of murder and sentenced each of them to forty years' imprisonment. On 9 July 2003 the Supreme Court of Serbia quashed that judgment and remitted the case to the first-instance court for a retrial. It instructed the first-instance court to establish whether the applicant had been ill-treated by the police and whether any of his statements were therefore inadmissible.

16. At a hearing held on 13 May 2004, the applicant described his ill-treatment in detail and named the alleged perpetrators for the first time. Counsel for S.P. then applied for the minutes of that hearing to be sent to the public prosecutor with a view to prosecuting the police officers named by the applicant. The public prosecutor, who was present at the hearing, raised an objection. She emphasised that a criminal complaint in that connection had been dismissed on 24 September 2001 and that her office had no intention of dealing with the same case again. Counsel for S.P. then applied for that prosecutor to be excluded from the proceedings. On 17 May 2004 the Smederevo District Chief Public Prosecutor rejected that application, but confirmed that the 2001 decision might be reconsidered in view of the new facts, notably the names of the alleged perpetrators.

17. On 27 December 2004 the Smederevo District Court found the applicant guilty of murder and S.P. of incitement to murder and sentenced each of them to forty years' imprisonment. It held that the applicant had indeed been beaten at Smederevo police station. The applicant's statements made there on 10 and 17 February 2001 were thus declared inadmissible. However, it regarded the statements which the applicant had made before the investigating judge on 13, 14 and 19 February as admissible. The court relied in that regard on an expert report prepared by a team of psychiatrists, stating that the applicant's fear must have receded by the date of his appearance before the investigating judge.

18. The applicant appealed against the judgment of 27 December 2004. He maintained, among other grounds of appeal, that the admission of the statements which he had made before the investigating judge in February 2001 should have also been barred. On 13 May 2005 the Supreme Court of Serbia upheld the first-instance judgment.

19. The applicant appealed against the judgment of 13 May 2005. He repeated that the admission of the statements which he had made before the investigating judge in February 2001 should have also been barred. On 14 April 2006 the Supreme Court of Serbia, in a different formation, upheld the second-instance judgment.

20. On 3 November 2006 the applicant lodged a criminal complaint with the public prosecutor against six police officers in relation to the events of February 2001. On 18 January 2007 the public prosecutor decided not to prosecute. The reasons for that decision are unknown because the applicant was not informed thereof and the entire file was allegedly destroyed in early 2010 (that is, three years after the decision not to prosecute).

21. In March 2011 both the applicant and his counsel applied for the reopening of the criminal proceedings described above. On 17 March 2011 the Smederevo Higher Court rejected both applications. On 29 April 2011 the Belgrade Court of Appeal upheld the decision of 17 March 2011.

II. RELEVANT DOMESTIC LAW

22. The Criminal Code 1977 (Official Gazette of the Socialist Republic of Serbia nos. 26/77, 28/77, 43/77, 20/79, 24/84, 39/86, 51/87, 6/89, 42/89, and Official Gazette of the Republic of Serbia nos. 16/90, 21/90, 26/91, 75/91, 9/92, 49/92, 51/92, 23/93, 67/93, 47/94, 17/95, 44/98, 10/02, 11/02, 80/02, 39/03 and 67/03) was in force until 31 December 2005. The relevant Articles read as follows:

Article 65 (Extortion of Confession)

"(1) Any person acting in an official capacity who uses force or threat ... in order to extort a confession or another statement from an accused, a witness, or another person, shall be punished with imprisonment of between three months and five years.

(2) If extortion is aggravated by serious violence or results in particularly serious consequences for an accused in criminal proceedings, the offender shall be punished with imprisonment of at least three years."

Article 66 (Ill-treatment)

"Any person acting in an official capacity who ill-treats, insults or humiliates another, shall be punished with imprisonment of between three months and three years."

23. The Code of Criminal Procedure 2001 (Official Gazette of the Federal Republic of Yugoslavia nos. 70/01 and 68/02 and Official Gazette of the Republic of Serbia nos. 58/04, 85/05, 115/05, 49/07, 20/09 and 72/09) entered into force on 28 March 2002. Most criminal offences (including those mentioned above) are subject to public prosecution, but some minor offences are only subject to private prosecution. Pursuant to Article 20 of the Code, the public prosecutor must prosecute when there is sufficient evidence that a certain individual has committed a criminal offence which is subject to public prosecution. Article 61 of the Code provides that when the public prosecutor decides not to prosecute such an offence because of lack of evidence, the victim of the offence may nevertheless start a subsidiary prosecution within eight days from the notification of that decision.

The Code of Criminal Procedure 1977, which was in force until 28 March 2002, contained similar provisions (see Articles 18 and 60 thereof).

24. In accordance with Article 414 of the Code of Criminal Procedure 2001, as amended in September 2009, the reopening of a criminal trial may be sought where the Constitutional Court or an international court has found that the convicted person's rights have been breached in the trial.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

25. The applicant complained that he had been beaten with a baseball bat, punched repeatedly, given electric shocks to his genitals and subjected to death threats and asphyxiation with a plastic bag during his police questioning on 10 and 17 February 2001. He also complained of a lack of an effective investigation into his ill-treatment. Article 3 reads as follows:

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

A. Admissibility

26. The Government argued that this complaint was either incompatible *ratione temporis* or out of time or inadmissible on non-exhaustion grounds (given the applicant's failure to start a subsidiary prosecution following the decision of 24 September 2001 not to prosecute). The applicant disagreed.

1. Temporal jurisdiction

27. Pursuant to the general rules of international law (notably, Article 28 of the Vienna Convention on the Law of Treaties), the Convention does not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before its entry into force with respect to that Party (see *Blečić v. Croatia* [GC], no. 59532/00, § 70, ECHR 2006-III). In view of the fact that the alleged ill-treatment occurred in February 2001, whereas the Convention entered into force in respect of Serbia on 3 March 2004, the Court lacks temporal jurisdiction to deal with the substantive part of this complaint.

28. However, it is clear from the Court's case-law concerning Article 2 that the procedural obligation to investigate has evolved into a separate and autonomous duty, capable of binding the State even when the death took place before ratification (see *Šilih v. Slovenia* [GC], no. 71463/01, § 159, 9 April 2009). Given the principle of legal certainty, the Court's temporal jurisdiction in this regard is nevertheless not open-ended (ibid, § 161). Where the death occurred before ratification, only procedural acts or omissions occurring after that date can fall within the Court's temporal jurisdiction (ibid, § 162). Furthermore, there must be a genuine connection between the death and the entry into force of the Convention in respect of that State for the procedural obligation to come into effect. In practice, this means that a significant proportion of the procedural steps required by this provision have been, or should have been, carried out after ratification. The Court has also held that circumstances may emerge which cast doubt on the effectiveness of the original investigation and an obligation may arise for further investigations to be pursued (see *Hackett v. the United Kingdom* (dec.), no. 34698/04, 10 May 2005). While it cannot be the case that any assertion can trigger a fresh obligation, where there is a new credible allegation, piece of evidence or item of information relevant to the identification, prosecution or punishment of the perpetrator of an unlawful killing, the authorities are under an obligation to take further investigative measures (see *Brecknell v. the United Kingdom*, no. 32457/04, § 71, 27 November 2007). The principles regarding the procedural obligation to investigate under Article 2, outlined above, apply similarly to the procedural obligation to investigate under Article 3 (see *Tuna v. Turkey*, no. 22339/03, §§ 58-63, 19 January 2010).

29. In the present case, in 2001 the Serbian authorities discontinued the investigation into the applicant's ill-treatment at Smederevo police station which had occurred earlier that year, without having questioned either the applicant or any witnesses. The applicant was questioned for the first time

about that incident in May 2004, in the context of the criminal trial against him, when he identified the alleged perpetrators. The criminal court then established in December 2004 that the applicant had indeed been ill-treated at Smederevo police station. The Court is of the opinion that this called into question the effectiveness of the original investigation and the obligation to investigate was revived (contrast *Çakir and Others v. Cyprus* (dec.), no. 7864/06, 29 April 2010, in which the names of those allegedly responsible provided in 2005 were already known in 1974). In order to demonstrate that there was no relevant new information after ratification, the Government maintained that the names of the alleged perpetrators could have easily been established already in 2001. However, this argument reinforces the doubts about the effectiveness of the original investigation, more than anything else. The Court therefore dismisses the Government's objection.

2. Six-month time-limit

30. The purpose of the six-month rule is to promote security of the law (see *P.M. v. the United Kingdom* (dec.), no. 6638/03, 24 August 2004). It should ensure that it is possible to ascertain the facts of a case before that possibility fades away, making a fair examination of the question in issue next to impossible (see *Pavlenko v. Russia*, no. 42371/02, § 69, 1 April 2010).

31. The six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. That being said, where it is clear from the outset that no effective remedy is available to the applicant, the period runs from the date of the act in issue, or from the date of knowledge of that act or its effect on or prejudice to the applicant (see *Dennis and Others v. the United Kingdom* (dec.), no. 76573/01, 2 July 2002). Nor can Article 35 § 1 be interpreted in a manner which would require an applicant to seize the Court of his complaint before his position in connection with the matter has been finally settled at the domestic level. Where, therefore, an applicant avails himself of an apparently existing remedy and only subsequently becomes aware of circumstances which render the remedy ineffective, it may be appropriate for the purposes of Article 35 § 1 to take the start of the six-month period from the date when the applicant first became or ought to have become aware of those circumstances (see *Paul and Audrey Edwards v. the United Kingdom* (dec.), no. 46477/99, 7 June 2001).

32. The Court has held in cases concerning the obligation to investigate under Article 2 of the Convention that where a death has occurred, applicant relatives are expected to keep track of the progress of the investigation and to lodge their applications with due expedition once they are, or should have become, aware of the lack of any effective investigation (see *Bulut and Yavuz v. Turkey* (dec.), no. 73065/01, 28 May 2002; *Bayram and Yıldırım v. Turkey* (dec.), no. 38587/97, ECHR 2002-III; and *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 158, 18 September 2009).

The Court considers that the same principle applies, by analogy, to cases concerning the obligation to investigate under Article 3 of the Convention

33. Turning to the case at hand, it has been established in paragraph **Error! Reference source not found.** above that the obligation to investigate was revived after ratification. In May 2004 a senior public prosecutor confirmed that a 2001 decision not to prosecute might be reconsidered (see paragraph **Error! Reference source not found.** above). What is more, in December 2004 the criminal court found that the applicant had indeed been a victim of police brutality (see paragraph **Error! Reference source not found.** above). It is striking that the prosecutor nevertheless failed to take any action in that regard. It is true that with the passage of time the applicant must have become aware of the lack of an effective investigation; this is shown by the fact that he lodged a new criminal complaint in November 2006 (see paragraph **Error! Reference source not found.** above). That being said, the relatively short period involved is not sufficient for the Court to conclude that the applicant should already have been aware more than six months before he lodged the application in May 2006 of the ineffectiveness of the investigation. It follows that this complaint is not out of time for the purposes of Article 35 § 1 of the Convention. This objection is therefore also to be dismissed.

3. Exhaustion of domestic remedies

34. The general principles in this connection were restated in *Vinčić and Others v. Serbia*, nos. 44698/06, 44700/06, 44722/06, 44725/06, 49388/06, 50034/06, 694/07, 757/07, 758/07, 3326/07, 3330/07, 5062/07, 8130/07, 9143/07, 9262/07, 9986/07, 11197/07, 11711/07, 13995/07, 14022/07, 20378/07, 20379/07, 20380/07, 20515/07, 23971/07, 50608/07, 50617/07, 4022/08, 4021/08, 29758/07 and 45249/07, §§ 48-49, 1 December 2009).

35. Given that the obligation to investigate was revived after ratification (paragraph **Error! Reference source not found.** above), any procedural omissions caused by the applicant beforehand, such as his failure to start a subsidiary prosecution following the 2001 decision not to prosecute, are irrelevant. With regard to the period thereafter, the Court notes that in May 2004 a senior prosecutor confirmed that the 2001 decision might be reconsidered, but no action has been taken in this regard. Moreover, following the applicant's new criminal complaint of November 2006, the relevant prosecutor again decided not to prosecute in January 2007, but the applicant was not notified of that decision and could therefore not start a subsidiary prosecution. Having regard to the foregoing, this complaint cannot be declared inadmissible on non-exhaustion grounds (*Jašar v. the former Yugoslav Republic of Macedonia* (dec.), no. 69908/01, 11 April 2006) and this objection must also be dismissed.

4. Conclusion

36. The Court notes that the complaint concerning the procedural aspect of Article 3 is not manifestly ill-founded within the meaning of Article 35

§ 3 (a) of the Convention and that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

37. The applicant criticised in very general terms the manner in which the official investigation into his ill-treatment was conducted.

38. The Government did not submit any observations as to the merits of this complaint.

39. The Court reiterates that where a person makes a credible assertion, as in this case, that he has suffered treatment contrary to Article 3 at the hands of State agents, that provision, read in conjunction with the general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation (see, among many authorities, *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV). Whatever the method of investigation, the authorities must act as soon as an official complaint has been lodged. Even when strictly speaking no complaint has been made, an investigation must be started if there are sufficiently clear indications that ill-treatment has been used. The authorities must take into account the particularly vulnerable situation of victims and the fact that people who have been subjected to serious ill-treatment will often be less ready or willing to make a complaint (see *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, § 133, ECHR 2004-IV, and the authorities cited therein).

40. The Court has also held that the investigation should be capable of leading to the identification and punishment of those responsible. If not, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for State agents to abuse the rights of those within their control with virtual impunity (see *Labita*, cited above, § 131). The investigation must also be thorough: the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions. Furthermore, the investigation must be prompt and independent. The investigation lacked independence where members of the same unit as those implicated in the alleged ill-treatment were undertaking the investigation (*Mikheyev v. Russia*, no. 77617/01, §§ 108-110, 26 January 2006). Lastly, the investigation must afford a sufficient element of public scrutiny to secure accountability. While the degree of public scrutiny required may vary, the complainant must be afforded effective access to the investigatory procedure in all cases (*Batı and Others*, cited above, § 137).

41. In the present case, notwithstanding the fact that it was established at the applicant's criminal trial that he had been ill-treated in February 2001 and the potential perpetrators were identified, no criminal investigation has been conducted. It is thus clear that the aforementioned standards have not

been satisfied. Accordingly, there has been a violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

42. The applicant complained under Article 5 § 3 about the length of his pre-trial detention. This provision reads as follows:

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

43. The applicant's pre-trial detention began when he was arrested on 10 February 2001. He was detained for the purposes of Article 5 § 3 until his conviction by the Smederevo District Court on 4 November 2002. From that date until 9 July 2003, when the Supreme Court quashed the first-instance decision, he was detained "after conviction by a competent court", within the meaning of Article 5 § 1 (a) and therefore that period of his detention falls outside the scope of Article 5 § 3 (see *Solmaz v. Turkey*, no. 27561/02, § 34, ECHR 2007-II). From 9 July 2003 until his fresh conviction by the Smederevo District Court on 27 December 2004, the applicant was again in pre-trial detention for the purposes of Article 5 § 3 of the Convention. Since the applicant did not use any domestic remedies in this regard, the six-month time-limit runs from 27 December 2004 (the principles concerning the six-month rule are set out in paragraphs **Error! Reference source not found.-Error! Reference source not found.** above). This complaint is therefore also out of time for the purposes Article 35 § 1 of the Convention and must be rejected pursuant to Article 35 § 4.

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

44. The applicant complained under Article 6 § 1 about the admission at his criminal trial of statements which he had made before the investigating judge on 13, 14 and 19 February 2001. This provision, in so far as relevant, reads as follows:

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

A. Admissibility

45. The Government maintained that this complaint was out of time. The applicant disagreed.

46. In accordance with the principles outlined above (paragraphs **Error! Reference source not found.-Error! Reference source not found.** above), the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. The criminal trial against the applicant

finally ended on 14 April 2006 (see paragraph **Error! Reference source not found.** above), whereas he lodged this complaint with the Court on 22 May 2006. The Government's objection must therefore be dismissed.

47. As this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and it is not inadmissible on any other grounds, it must be declared admissible.

B. Merits

48. The applicant claimed that he had made his confession before the investigating judge on 13, 14 and 19 February 2001 as a consequence of his ill-treatment at Smederevo police station on 10 and 17 February and that the use of that confession at his criminal trial should have thus been barred.

49. Without calling into question that the applicant had indeed been ill-treated by the police and that his statements made before the investigating judge had indeed been used at his criminal trial, the Government argued that this did not amount to a breach of Article 6 as those statements had not been the only evidence against the applicant.

50. The Court agrees with the Government that it is not its function to deal with errors of fact or law allegedly committed by national courts unless and in so far as they may have infringed rights protected by the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (*Schenk v. Switzerland*, 12 July 1988, §§ 45-46, Series A no. 140; *Teixeira de Castro v. Portugal*, 9 June 1998, § 34, *Reports of Judgments and Decisions* 1998-IV; and *Heglas v. the Czech Republic*, no. 5935/02, § 84, 1 March 2007). It is, therefore, not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the unlawfulness in question and, where the violation of another Convention right is concerned, the nature of the violation found (see *Khan v. the United Kingdom*, no. 35394/97, § 34, ECHR 2000-V; *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 76, ECHR 2001-IX; and *Allan v. the United Kingdom*, no. 48539/99, § 42, ECHR 2002-IX).

51. However, particular considerations apply in respect of the use in criminal proceedings of evidence obtained in breach of Article 3. The Court has held that the admission of statements obtained as a result of torture or other ill-treatment as evidence to establish the relevant facts in criminal proceedings renders the proceedings as a whole unfair. This finding applies irrespective of the probative value of the statements and irrespective of whether their use has been decisive in securing a conviction (see *Gäfgen v. Germany* [GC], no. 22978/05, § 166, 1 June 2010).

52. In the present case, the Court observes that the domestic courts held that the applicant had been ill-treated at Smederevo police station and did

not admit in evidence the statements which he had made there on 10 and 17 February 2001. However, they refused to bar the admission of the statements which the applicant had made before the investigating judge on 13, 14 and 19 February 2001. It is further noted that the medical reports confirmed that the applicant had indeed been brutally beaten up (his injuries included a broken rib) and that the Government did not contest the veracity of the applicant's allegation that he had also received electric shocks and been subjected to death threats and asphyxiation. In view of the seriousness of this ill-treatment as well as its proximity to the confession made before the investigating judge, the Court sees no reason to doubt that the applicant did indeed make that confession in fear of further ill-treatment by the police and therefore as a result of his ill-treatment at Smederevo police station. The fact that the police were able to secure the applicant's return to police custody and continue with his ill-treatment even after the applicant had been committed to a remand prison proves that his fears were reasonable (compare *Harutyunyan v. Armenia*, no. 36549/03, § 65, ECHR 2007-VIII). Furthermore, the applicant was not able to consult properly (notably, in private) with his lawyer prior to making the confession before the investigating judge on 13 February 2001 and made statements before the investigating judge on 14 and 19 February 2001 in the absence of his lawyer (compare *Hacı Özen v. Turkey*, no. 46286/99, § 102, 12 April 2007). In these circumstances, the Court concludes that regardless of the impact those statements had on the outcome of the criminal trial, their use rendered the trial as a whole unfair. There has accordingly been a breach of Article 6 § 1 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

53. The applicant further complained about certain statements given by the investigating judge on 31 October 2001. He relied on Article 6 § 2 of the Convention, which reads as follows:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

54. In view of the fact that the Convention entered into force in respect of Serbia on 3 March 2004, this complaint is incompatible *ratione temporis* for the purposes of Article 35 § 3 (a) (the principles concerning the Court's temporal jurisdiction are outlined in paragraphs **Error! Reference source not found.-Error! Reference source not found.** above). It must hence be rejected pursuant to Article 35 § 4 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 7 § 1 OF THE CONVENTION

55. Lastly, the applicant complained that a heavier penalty had been imposed on him than the one that was applicable at the time the criminal offence was committed. He relied on Article 7 § 1, which reads as follows:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

56. The Court notes that the applicant's criminal trial ended on 14 April 2006 (see paragraph **Error! Reference source not found.** above), whereas the applicant lodged this complaint with the Court in his observations of 19 January 2011. This complaint is thus out of time for the purposes of Article 35 § 1 of the Convention and must be rejected pursuant to Article 35 § 4.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

57. 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

58. The applicant claimed 100,900 euros (EUR) in respect of pecuniary damage (the cost of the items seized during his arrest, lost earnings in the amount of EUR 500 per month spent in prison, the value of the packages sent to the applicant by his parents and the cash transfers made by them) and EUR 1,500,000 in respect of non-pecuniary damage. The Government considered the amounts claimed to be excessive.

59. The Court does not discern any causal link between the breaches found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, it is clear that the applicant sustained some non-pecuniary loss arising from the breaches found, for which he should be compensated. Making its assessment on an equitable basis, as required by Article 41 of the Convention, it awards the applicant EUR 13,000 in this respect, plus any tax that may be chargeable. It is further noted that the Serbian Code of Criminal Procedure allows applicants to seek the reopening of their trial where the Court has found that the convicted person's rights have been breached in the trial, as in the present case (see paragraph **Error! Reference source not found.** above).

B. Costs and expenses

60. The applicant also claimed the following amounts for the costs and expenses incurred before the domestic courts and the Court: EUR 20,000 claimed by Mr N. Vještica; EUR 3,000 claimed by Mr A. Petronijević; EUR 2,500 claimed by Ms B. Đukić; EUR 2,000 claimed by Mr V. Bukić; EUR 1,500 claimed by Mr M. Ružojčić; EUR 3,000 claimed by Mr J. Simić; EUR 36,400 claimed by Mr G. Petronijević; EUR 3,415 claimed by Mr D. Kostić; EUR 1,000 claimed by Ms D. Đokić; and EUR 4,500 claimed by

Juris Consulta (a German law firm representing the applicant before this Court), together with disbursements such as medical examinations and family visits.

61. The Government considered the amounts claimed to be excessive.

62. 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. That is, the applicant must have paid them, or be bound to pay them, pursuant to a legal or contractual obligation, and they must have been unavoidable in order to prevent the violation found or to obtain redress. The Court requires itemised bills and invoices that are sufficiently detailed to enable it to determine to what extent the above requirements have been met. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 5,000, plus any tax that may be chargeable to the applicant, covering costs under all heads.

C. Default interest

63. 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 procedural aspect of Article 3 of the Convention admissible;

2. *Declares* unanimously the complaint under Article 6 § 1 of the Convention admissible;

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

4. *Holds* by five votes to two that there has been a violation of Article 3 of the Convention;

5. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention;

6. *Holds* by five votes to two
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 13,000 (thirteen thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage and EUR 5,000 (five thousand euros), plus any tax that may be

chargeable to the applicant, in respect of costs and expenses, to be converted into Serbian dinars at the rate applicable at the date of settlement;
(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;

7. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 18 October 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Françoise Tulkens
President

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

F.T.
S.H.N.

JOINT CONCURRING OPINION OF JUDGES JOČIENE AND POPOVIĆ

We respectfully disagree with the majority of colleagues on the Article 3 issue in this case, for the following reasons.

1. It is clear from the facts of the case that the applicant failed to properly raise the Article 3 complaint at the domestic level, because he did not exhaust domestic remedies, as is rightly mentioned in paragraph 14 of the judgment.

2. We agree with the majority that the effectiveness of the original investigation can be questioned and that the State's obligation to investigate was subsequently revived (see *Çakir and Others v. Cyprus* (dec.), no. 7864/06, 29 April 2010, in which the names of those allegedly responsible provided in 2005 were already known in 1974).

3. The respondent Government raised the question whether the applicant had complied with the six-month rule in this respect. The purpose of that rule is to promote security of the law (see *P.M. v. the United Kingdom* (dec.), no. 6638/03, 24 August 2004). It should ensure that it is possible to ascertain the facts of a case before that possibility fades away, making a fair examination of the question in issue next to impossible (see *Pavlenko v. Russia*, no. 42371/02, § 69, 1 April 2010).

In principle, the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. However, where it is clear from the outset that no effective remedy is available to the applicant, the period runs from the date of the act at issue, or from the date of knowledge of that act or its effect on or prejudice to the applicant (see *Dennis and Others v. the United Kingdom* (dec.), no. 76573/01, 2 July 2002). Article 35 § 1 cannot be interpreted in a manner which would require an applicant to seize the Court of his complaint before his position in connection with the matter has been finally settled at the domestic level. Where, therefore, an applicant avails himself of an apparently existing remedy and only subsequently becomes aware of circumstances which render the remedy ineffective, it may be appropriate for the purposes of Article 35 § 1 to take the start of the six-month period as the date when the applicant first became or ought to have become aware of those circumstances (see *Paul and Audrey Edwards v. the United Kingdom* (dec.), no. 46477/99, 7 June 2001).

4. The Court has held in cases concerning the obligation to investigate under Article 2 of the Convention that where a death has occurred, the victim's relatives are expected to keep track of the progress of the investigation and to lodge their application with due expedition once they are, or should have become, aware of the lack of any effective investigation (see *Bulut and Yavuz v. Turkey* (dec.), no. 73065/01, 28 May 2002; *Bayram*

and Yıldırım v. Turkey (dec.), no. 38587/97, ECHR 2002-III; and *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 158, 18 September 2009).

We agree with the majority that the same rule applies to cases concerning the obligation to investigate under Article 3 of the Convention where the applicants themselves are the victims of the alleged ill-treatment.

5. In the present case it has been established that the obligation to investigate was revived after the ratification of the Convention by Serbia. This occurred with the ruling of the criminal court of 27 December 2004. We consider the six month period to have started running on that date. Therefore, the applicant must have become aware of the lack of any effective criminal investigation a lot more than six months before he lodged his application with the Court on 22 May 2006. It was due to the applicant's lack of diligence, which consisted in his own negligence, that he showed no initiative in informing himself about the progress made in the investigation after December 2004, until after lodging his application with the Court in May 2006. This complaint is therefore out of time for the purposes of Article 35 § 1 of the Convention and must be rejected pursuant to Article 35 § 4.

6. We hold that legal certainty requires that an applicant obey the six month rule when filing a complaint with the Court. He also has to be diligent in pursuing his rights under the Convention. The applicant in this case has neither been diligent nor has he complied with the six-month rule.

7. These are the reasons which lead us to conclude that the Court could not find a procedural violation of Article 3 in the present case. This finding guided us to vote against the sum of money awarded to the applicant in just satisfaction, for given our finding that there was only one violation in this case we consider that the applicant should be awarded a smaller amount.