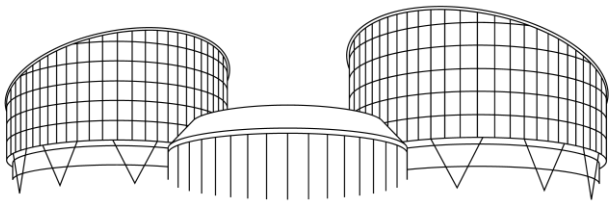

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF HADŽIĆ AND SULJIĆ v. BOSNIA AND HERZEGOVINA

(Applications nos. 39446/06 and 33849/08)

JUDGMENT

STRASBOURG

7 June 2011

FINAL

07/09/2011

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

In the case of Hadžić and Suljić v. Bosnia and Herzegovina**,**

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

Nicolas Bratza, *President,*
Lech Garlicki,
Ljiljana Mijović,
Sverre Erik Jebens,
Zdravka Kalaydjieva,
Nebojša Vučinić,
Vincent A. De Gaetano, *judges,*

and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 17 May 2011,

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

PROCEDURE

1. The case originated in two applications (nos. 39446/06 and 33849/08) against Bosnia and Herzegovina lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two citizens of Bosnia and Herzegovina, Mr Fikret Hadžić and Mr Nagib Suljić ("the applicants"), on 6 January 2006 and 30 June 2008, respectively.

2. The applicants, who had been granted legal aid, were represented by Mr N. Omerović, a lawyer practising in Lukavac. The Government of Bosnia and Herzegovina ("the Government") were represented by their Deputy Agent, Ms Z. Ibrahimović.

3. The applicants complained that their detention in Zenica Prison Forensic Psychiatric Annex ("the Psychiatric Annex") was unlawful under Article 5 § 1 of the Convention. They further relied on Article 5 § 4 of the Convention, but did not develop this aspect of their case.

4. On 17 March 2010 the President of the Fourth Section decided to give notice of the applications to the Government. It was also decided to rule on the admissibility and merits of the applications at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The facts concerning Mr Hadžić

5. The applicant was born in 1959. He is currently serving a prison sentence in Zenica Prison.

6. On 1 May 2002 the applicant killed three people. He was remanded in custody on the same day.

7. On 23 September 2002 the Tuzla Cantonal Court found the applicant guilty of manslaughter, as well as of possessing a firearm without a licence, and sentenced him to twenty-one years' imprisonment. In view of the applicant's diminished responsibility at the time the offences were committed, it imposed a concurrent hospital order, pursuant to Article 63 of the Criminal Code 1998 (*obavezno psihijatrijsko liječenje i čuvanje u zdravstvenoj ustanovi)*.

8. On 21 February 2003 the applicant was placed in the Psychiatric Annex.

9. On 30 April 2003 the Supreme Court of the Federation of Bosnia and Herzegovina increased the prison sentence from twenty-one to twenty-four years and upheld the remainder of the first-instance judgment of 23 September 2002.

10. On 17 March 2004 the applicant lodged his first application with this Court, complaining, among other things, that his detention in the Psychiatric Annex was unlawful. On 11 October 2005 the Court struck it out of its list of cases following a friendly settlement between the parties (see *Hadžić v. Bosnia and Herzegovina* (dec.), no. 11123/04, 11 October 2005). The Government undertook as part of that settlement to move all patients held in the Psychiatric Annex (including the applicant) to an adequate facility by 31 December 2005 and to pay *ex gratia* 9,000 euros (EUR) to the applicant. The applicant, in return, waived any further claims against Bosnia and Herzegovina in respect of the matters giving rise to that application. On 27 February 2006 the Government paid the amount due, but the applicant continued to be detained in the Psychiatric Annex despite the Government's undertaking mentioned above.

11. On 21 December 2006 the Constitutional Court of Bosnia and Herzegovina found a breach of Article 5 §§ 1 and 4 of the Convention in the applicant's case. It held, among other things, that the Psychiatric Annex was not an appropriate institution for the detention of mental health patients. It ordered certain general measures, such as the establishment without further delay of an adequate health care institution. Furthermore, it held that those

who complained that their detention in the Psychiatric Annex was unlawful did not have an effective remedy at their disposal after 1 August 2003 other than an appeal to the Constitutional Court itself. The applicant was not awarded any compensation.

12. On 20 August 2007 the applicant instituted civil proceedings seeking damages from the State for a breach of the right to liberty and security under the Civil Obligations Act 1978. He referred to the Constitutional Court decision of 21 December 2006 mentioned above. It would appear that the case is pending before the Tuzla Cantonal Court. On 21 August 2007 the applicant instituted similar proceedings against the Federation of Bosnia and Herzegovina. It would appear that the case is pending before the Sarajevo Cantonal Court.

13. Pursuant to a proposal of the Psychiatric Annex, on 31 March 2008 the Tuzla Cantonal Court established, on the basis of a report prepared by the Sarajevo Psychiatric Hospital, that the applicant's mental condition no longer required his confinement in that Annex. It relied on Article 63 § 2 of the Criminal Code 1998 and Article 480 § 2 of the Code of Criminal Procedure 1998 (although they were no longer in force). The applicant failed to appeal in due time. On 13 August 2008 he was transferred from the Psychiatric Annex to the general section of Zenica Prison pursuant to that decision.

B. The facts concerning Mr Suljić

14. The applicant was born in 1956.

15. On 23 November 2002 the applicant killed his girlfriend. He was remanded in custody on the same day.

16. On 20 January 2003 the Tuzla Cantonal Court found the applicant guilty of manslaughter and sentenced him to eight years' imprisonment. In view of the applicant's diminished responsibility at the time of committing the offence, it imposed a concurrent hospital order, pursuant to Article 63 of the Criminal Code 1998 (*obavezno psihijatrijsko liječenje i čuvanje u zdravstvenoj ustanovi*).

17. On 16 April 2003 the Supreme Court of the Federation of Bosnia and Herzegovina upheld the first-instance judgment of 20 January 2003.

18. On 5 May 2003 the applicant was placed in the Psychiatric Annex.

19. At the request of the Psychiatric Annex, on 4 July 2008 the Tuzla Cantonal Court established, on the basis of a report prepared by the Sarajevo Psychiatric Hospital, that the applicant's mental condition no longer required his confinement in that Annex. It relied on Article 63 § 2 of the Criminal Code 1998 and Article 480 § 2 of the Code of Criminal Procedure 1998 (although they were no longer in force). The applicant did not appeal. On 21 July 2008 he was transferred from the Psychiatric Annex to the general section of Zenica Prison in accordance with that decision.

20. On 28 April 2010 the Constitutional Court of Bosnia and Herzegovina found a breach of Article 5 §§ 1 and 4 of the Convention in the applicant's case. It held, among other things, that the Psychiatric Annex was not an appropriate institution for the detention of mental health patients. The applicant was awarded compensation of 2,000 convertible marks (BAM, approximately EUR 1,000).

II. RELEVANT DOMESTIC LAW AND PRACTICE

21. There are two legal regimes applicable to psychiatric detention.

22. First of all, the relevant civil court can order the compulsory confinement of a mental health patient in a psychiatric hospital if it is satisfied on the evidence of a psychiatrist that this is necessary in order to protect the patient concerned and/or the public from serious harm (see sections 22(1), 29(1) and 31(1) of the Mental Health Act 2001, *Zakon o zaštiti osoba sa duševnim smetnjama*, published in the Official Gazette of the Federation of Bosnia and Herzegovina ("OG FBH") no. 37/01 of 15 August 2001, amendments published in OG FBH no. 40/02 of 21 August 2002).

23. Secondly, the relevant criminal court can impose a hospital order (*obavezno psihijatrijsko liječenje i čuvanje u zdravstvenoj ustanovi*) on an offender who, at the time of committing a criminal offence, was suffering from a mental disorder affecting his or her mental responsibility, if it is satisfied on the evidence of a psychiatrist that this is necessary in order to prevent the offender from committing another criminal offence. However, there is an important difference in this regard between the old and new criminal legislation (the latter entered into force on 1 August 2003). While a hospital order can still be imposed on those who have been found guilty although suffering from diminished responsibility (such as the present applicants), it can no longer be imposed against those who have been found not guilty by reason of insanity (see Article 74 § 1 of the Criminal Code 2003, *Krivični zakon Federacije Bosne i Hercegovine*, published in OG FBH no. 36/03 of 29 July 2003, amendments published in OG FBH nos. 37/03 of 31 July 2003, 21/04 of 17 April 2004, 69/04 of 7 December 2004, 18/05 of 23 March 2005 and 42/10 of 21 July 2010). If a hospital order has indeed been imposed on an offender with diminished responsibility, he or she can now apply once a year to have the application of the hospital order discontinued under Article 427 of the Code of Criminal Procedure 2003 (*Zakon o krivičnom postupku Federacije Bosne i Hercegovine*, published in OG FBH no. 35/03 of 28 July 2003, amendments published in OG FBH nos. 37/03 of 31 July 2003, 56/03 of 14 November 2003, 78/04 of 31 December 2004, 28/05 of 11 May 2005, 55/06 of 20 September 2006, 27/07 of 18 April 2007, 53/07 of 8 August 2007, 9/09 of 11 February 2009 and 12/10 of 15 March 2010).

24. The law of tort is regulated by the Civil Obligations Act 1978 (*Zakon o obligacionim odnosima*, published in Official Gazette of the Socialist Federal Republic of Yugoslavia ("OG SFRY") no. 29/78, amendments published in OG SFRY nos. 39/85, 45/89 and 57/89, Official Gazette of the Republic of Bosnia and Herzegovina nos. 2/92 of 11 April 1992, 13/93 of 7 June 1993 and 13/94 of 9 June 1994, and OG FBH no. 29/03 of 30 June 2003). The main remedy for a tort is an action for damages, but in some cases permanent injunction can be obtained to prevent repetition of the injury (see sections 157, 199 and 200 of this Act). Section 172 of this Act prescribes, among other things, that a legal person should be liable for the torts committed *vis-à-vis* a third party by its organs in the course of, or in connection with, the exercise of their functions.

III. RELEVANT INTERNATIONAL LAW AND PRACTICE

25. The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment provides non-judicial preventive machinery for the protection of individuals deprived of their liberty. It is based on a system of visits by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT"). The CPT periodically draws up reports on individual States, which are strictly confidential. Nevertheless, if a State fails to cooperate or refuses to improve the situation in the light of the CPT's recommendations, the CPT may decide to make a public statement. The State itself may at any time request publication of the CPT's report, together with its comments.

26. The relevant part of the report on the visit to Bosnia and Herzegovina carried out from 27 April to 9 May 2003 reads as follows:

> "84. Zenica Prison Forensic Psychiatric Annexe opened as a temporary accommodation for forensic psychiatric patients in 1996. It is the only closed forensic psychiatric unit on the territory of the Federation. With an official capacity of 64 beds, it is located on the first floor of Pavilion IV; at the time of the visit, it was accommodating 69 patients.
>
> All patients were admitted to the Annexe following a court order for 'mandatory psychiatric treatment and placement in an institution of a closed type' and had been diagnosed as suffering from chronic psychosis, acute psychotic episodes, alcohol psychoses, epilepsy or organic psycho-syndromes. Most of them had committed homicides/attempted homicides and would stay in the Annexe for 4 to 5 years (on average).
>
> 85. According to the Prison Director, himself a doctor and psychiatrist, the Forensic Psychiatric Annexe is 'a huge problem which remains unsolved since 1996'. The Director explained that 'this temporary facility offered conditions which are worse than the conditions for the ordinary prisoners in the other parts of the establishment', a situation that he described as 'absurd'. He stated that, 'on principle, the Forensic Psychiatric Annexe should not be located within a high security prison'.

...

96. The delegation was informed that there was unanimous agreement within the psychiatric and prison system, as well as at a political level, that 'this group of forensic psychiatric patients required hospital conditions and that the treatment and conditions in the Zenica Prison Forensic Psychiatric Annexe were not acceptable'. The delegation was further informed that the Ministry of Justice of the Federation had allocated 3,000,000 convertible marks in 2002 to allow relocation of the forensic psychiatric annexe and provision of proper facilities. However, this decision was not implemented, as no municipalities within the Federation were ready to accept such a facility on their territory. At the time of the visit, the situation was still unresolved.

97. At the final talks held in Sarajevo in May 2003, the delegation clearly indicated that 'placing mentally disordered patients in 30-bed, overcrowded dormitories in an essentially custodial environment can no longer be tolerated' and expressed its support for the initiative taken by the authorities in 2002 to finance the renovation and relocation programme aimed at remedying the situation, and involving the health authorities to a much greater extent. The delegation asked to receive within three months further information on this issue, including realistically achievable objectives to resolve this urgent matter.

98. On 1 October 2003, the authorities provided the following information to the CPT.

After the CPT's visit, an expert team was set up under the Ministry of Health, which carried out an inspection at Zenica Prison Forensic Psychiatric Annexe. Its findings fully confirm the observations of the CPT's delegation (overcrowded dormitories and lack of space in general, lack of nursing staff, no adequate treatment for the patients, very poor hygiene and deficient heating, etc.). The expert team came to the conclusion that 'conditions for patients [were] extremely inhuman and untenable' and that measures had to be taken urgently to remedy the situation.

In response to this report, the Ministry of Justice and the Ministry of Health of the Federation decided to implement the following urgent measures until a new place is found to relocate the forensic psychiatric institution: improvement of hygiene; reduction of the number of beds in the dormitories; drafting of specific house rules for the Annexe; setting up a register on cases of use of force/restraint; 'self-defence' training for staff.

99. The CPT welcomes the efforts made by the authorities to solve, on an urgent basis, some serious deficiencies observed during the visit of its delegation and would like to receive updated information on the progress made in this domain.

However, as the authorities themselves acknowledge, this state of affairs cannot be prolonged further. The Committee therefore recommends that the authorities provide within three months a workable strategy to facilitate the relocation of the Forensic Psychiatric Annexe to a site which could offer the potential to remedy the numerous shortcomings observed by the CPT's delegation.

..."

27. In preliminary observations on a visit to Bosnia and Herzegovina carried out from 19 to 30 March 2007, the CPT noted that although the

Psychiatric Annex was less crowded than during previous visits, the physical conditions had continued to deteriorate and remained wholly unacceptable for a health care institution.

THE LAW

I. JOINDER OF THE APPLICATIONS

28. Given their common factual and legal background, the Court decides that these two applications should be joined pursuant to Rule 42 § 1 of the Rules of Court.

II. ALLEGED VIOLATION OF ARTICLE 5 (1)

29. The applicants complained that their detention was unlawful because the Psychiatric Annex was not an appropriate institution for the detention of mental health patients. They relied on Article 5 § 1 (e) of the Convention, the relevant part of which reads as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (e) the lawful detention of persons ... of unsound mind ...".

A. ADMISSIBILITY

1. Exhaustion of domestic remedies

30. The Government submitted that the applicants had failed to use all available domestic remedies. In particular, they indicated that the compensation proceedings initiated by the first applicant were still pending and that the second applicant should have used the same remedy. The applicants disagreed.

31. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention requires applicants first to use the remedies provided by the national legal system, thus dispensing States from answering before the European Court for their acts before they have had an opportunity to put matters right through their own legal system.

The rule is based on the assumption that the domestic system provides an effective remedy in respect of the alleged breach. The burden of proof is on the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available in theory and in practice at the relevant time; that is to say, that the remedy was accessible, capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, 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 the requirement (see, amongst other authorities, *T. v. the United Kingdom* [GC], no. 24724/94, § 55, 16 December 1999).

32. The Court notes that the Government did not demonstrate that either at the time when the applicants lodged their applications with the Court (in 2006 and 2008) or thereafter there existed a consolidated, consistent and established practice of the civil courts in respect of compensation claims for unlawful detention under the Civil Obligations Act 1978 (contrast *Łatak v. Poland* (dec.), no. 52070/08, §§ 80-82, 12 October 2010, and *Łominski v. Poland* (dec.), no. 33502/09, §§ 71-73, 12 October 2010). Moreover, no decision has so far been given in the compensation proceedings initiated by the first applicant despite the fact that they have already been pending for almost four years. In these circumstances, neither the first application can be considered to be premature nor can the second application be considered to be inadmissible on non-exhaustion grounds. The Government's objection must therefore be dismissed.

2. Victim status

33. Although the Government did not raise any objection as to the Court's competence *ratione personae*, the issue calls for consideration by the Court of its own motion (see *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, § 27, 22 December 2009).

34. The Court reiterates that where national authorities have acknowledged, at least in substance, a breach of the Convention and their decision constitutes appropriate and sufficient redress, the applicant concerned can no longer claim to be a victim within the meaning of Article 34 of the Convention (see *Višnjevac v. Bosnia and Herzegovina* (dec.), no. 2333/04, 24 October 2006). In the present case, it has not been disputed that the Constitutional Court expressly acknowledged the alleged breach of the Convention in respect of both applicants. However, the first applicant was not awarded any compensation, although from the documents submitted to the Court it would appear that he had claimed it (contrast *Alibašić v. Bosnia and Herzegovina* (dec.), no. 18478/08, 29 March 2011). The second

applicant was awarded EUR 1,000, which is substantially lower than the amount which the Court itself would have awarded in a similar situation (see *Tokić and Others v. Bosnia and Herzegovina*, nos. 12455/04, 14140/05, 12906/06 and 26028/06, § 73, 8 July 2008).

35. In these circumstances, the Court considers that the applicants were not afforded sufficient redress and can therefore still claim to be victims of the alleged breach within the meaning of Article 34 of the Convention (compare *Ciorap v. Moldova* (no. 2), no. 7481/06, §§ 22-25, 20 July 2010).

3. Conclusion

36. Since this complaint raises questions of fact and law which are sufficiently serious for its determination to depend on an examination of the merits, and since no other grounds for declaring it inadmissible have been established, the Court declares it admissible. In accordance with the decision to apply Article 29 § 1 of the Convention (see paragraph 4 above), the Court will immediately consider its merits.

B. MERITS

37. The applicants submitted that their detention was unlawful because the Psychiatric Annex was not an appropriate institution for the detention of mental health patients.

38. The Government contested that argument. They maintained that the applicants had received adequate treatment, as a result of which their mental health had sufficiently improved to warrant their transfer to the general section of Zenica Prison. The Government added that the situation had significantly improved since 2009, when the Psychiatric Annex was relocated to one of the renovated facilities in Zenica Prison, which contains seven three-bed dormitories.

39. The Court observes that the present case should be distinguished from *Tokić and Others* (cited above) and *Halilović v. Bosnia and Herzegovina* (no. 23968/05, 24 November 2009), because unlike the applicants in those cases (who were found not guilty by reason of insanity and could therefore no longer be held in psychiatric detention after 1 September 2003 unless it had been so decided by the relevant civil court), the present applicants were found guilty (a hospital order was imposed on them, concurrently with a prison sentence, because of their diminished responsibility at the time they committed the offences). Accordingly, their detention in the Psychiatric Annex imposed by a hospital order of the relevant criminal court was lawful under the new criminal legislation. The main issue in the present case is whether the Psychiatric Annex is an appropriate institution for the detention of mental health patients.

40. The general principles in relation to the unlawfulness of detention were restated in *Tokić and Others* (cited above, §§ 63-65). Notably, there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. In principle, the "detention" of a person as a mental health patient will only be "lawful" for the purposes of sub-paragraph (e) of paragraph 1 if effected in a hospital, clinic or other appropriate institution (see also *Ashingdane v. the United Kingdom*, 28 May 1985, § 44, Series A no. 93; *Aerts v. Belgium*, 30 July 1998, § 46, *Reports of Judgments and Decisions* 1998-V; and *Hutchison Reid v. the United Kingdom*, no. 50272/99, § 49, ECHR 2003-IV).

41. Turning to the present case, the Court notes that the Constitutional Court and the CPT have established that the Psychiatric Annex is not an appropriate institution for the detention of mental health patients and that it was an interim solution which has become permanent only because of lack of resources (see paragraphs 11, 20, 26 and 27 above). The Court does not see any reason to depart from these findings.

It should be emphasised that the Court is not called upon to decide in this case whether the Psychiatric Annex has been an appropriate institution for the detention of mental health patients since 2009, because the present applicants were released from that Annex in 2008.

42. Since the first applicant continued to be detained in an inappropriate institution for almost three more years after the settlement of his first case before the Court (see paragraph 10 above), and the second applicant was detained in the same institution for more than five years, there has been a violation of Article 5 § 1 of the Convention.

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

43. The applicants further relied on Article 5 § 4 of the Convention, but did not develop this aspect of their case. This Article reads as follows:

> "4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

44. The Government pleaded that there was no breach of Article 5 § 4 of the Convention without going into any details.

45. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

46. Having regard to its above finding under Article 5 § 1, the Court considers that it is not necessary to examine separately whether, in this case, there has also been a violation of Article 5 § 4 of the Convention (see *Tokić and Others*, cited above, § 70).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

47. 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

48. The applicants claimed EUR 25,000 each in respect of non-pecuniary damage. The Government considered that amount to be excessive.

49. The Court accepts that the applicants suffered considerable distress as a result of the breach found, which justifies an award in respect of non-pecuniary damage. Having regard to the duration of each applicant's unlawful detention and the amounts awarded in *Tokić and Others* and *Halilović* (cited above), the Court awards Mr Hadžić EUR 15,000 and Mr Suljić EUR 25,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

50. The Court notes that the applicants were granted legal aid under the Court's legal aid scheme in the total amount of EUR 1,700. They did not claim any additional costs or expenses.

C. Default interest

51. 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 UNANIMOUSLY

1. *Decides* to join the applications;

2. *Declares* the applications admissible;

3. *Holds* that there has been a violation of Article 5 § 1 of the Convention in respect of both applicants;

4. *Holds* that there is no need to examine separately the applicants' complaint under Article 5 § 4 of the Convention;

5. *Holds*
(a) that the respondent State is to pay, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 15,000 (fifteen thousand euros) to Mr Hadžić and EUR 25,000 (twenty five thousand euros) to Mr Suljić, plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into convertible marks at the rate applicable on 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;

6. *Dismisses* the remainder of the first applicant's claim for just satisfaction.

Done in English, and notified in writing on 7 June 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Nicolas Bratza
President