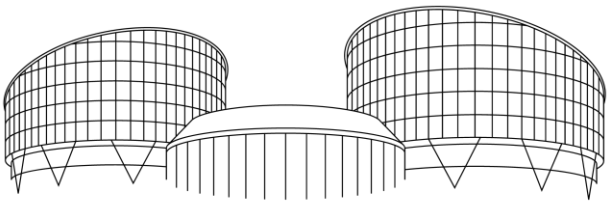

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

FIRST SECTION

CASE OF PREŽEC v. CROATIA

(Application no. 48185/07)

JUDGMENT

STRASBOURG

15 October 2009

FINAL

15/01/2010

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 Prežec v. Croatia**,**

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

Christos Rozakis, *President,*
Nina Vajić,
Khanlar Hajiyev,
Dean Spielmann,
Sverre Erik Jebens,
Giorgio Malinverni,
George Nicolaou, *judges,*

and André Wampach, *Deputy Section Registrar*,

Having deliberated in private on 24 September 2009,

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

PROCEDURE

1. The case originated in an application (no. 48185/07) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Croatian national, Mr Zlatko Prežec ("the applicant"), on 11 July 2007.

2. The Croatian Government ("the Government") were represented by their Agent, Mrs Š. Stažnik.

3. On 25 November 2008 the President of the First Section decided to communicate the complaint concerning the applicant's right to free legal assistance under Article 6 §§ 1 and 3(c) of the Convention to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1972.

5. Following a criminal conviction for murder, the applicant was sent to Lepoglava State Prison on 15 December 1997 to serve a twelve-year prison sentence. Since that date he has served his sentence in various prisons in Croatia.

6. On 3 December 2003, while the applicant was serving his prison term in Pula Prison, the Pula Municipal State Attorney's Office indicted him on a

charge of threatening a prison employee on 21 May 2003. Criminal proceedings were instituted against the applicant before the Pula Municipal Court (*Općinski sud u Puli*). A hearing scheduled for 18 December 2003 was adjourned because the applicant had not been duly summoned. A further hearing scheduled for 2 March 2004 was also adjourned because at that time the applicant was undergoing treatment in Zagreb Prison Hospital. At a hearing held on 25 May 2004 the applicant stated that he had neither understood the content of the indictment against him nor the warning given to him by the presiding judge. The court then ordered a psychiatric examination of the applicant and adjourned the hearing.

7. On 28 June 2004 the applicant lodged a written request for a legal aid counsel. The request was received at the Pula Municipal Court on 30 June 2004 and enclosed in the case file on 15 July 2004. No written decision was made in respect of his request at that stage of the proceedings.

8. The applicant was examined by a psychiatrist in Vrapče Psychiatric Hospital (*Psihijatrijska bolnica Vrapče*) from 23 to 29 June 2004. The report, drawn up on 6 July 2004, shows that the applicant was treated in the Psychiatric Ward of the Zagreb Prison Hospital during the following periods:

- 12 to 17 February 1999 for depression;
- 26 February to 15 March 1999 for a suicide attempt;
- 1 to 6 April 1999 for allegedly falling out of bed and hurting his head;
- 3 December 1999 to 10 January 2000 for depression and anxiety;
- 17 February to 6 March 2000 for self-injury;
- 21 December 2000 to 31 January 2001 for a suicide threat;
- 12 to 24 April 2001 for personality disorder;
- 6 to 25 November 2002 for personality and behavioural disorder;
- 17 December until 2 January 2003 for a suicide attempt;
- 3 to 22 April 2003;
- 28 July to 20 August 2003 for a suicide attempt;
- 21 to 22 August 2003 for refusal to drink water;
- 22 August to 22 September 2003 for a suicide attempt;
- 24 September to 27 November 2003 for a suicide attempt;
- 20 February to 18 March 2004 for a suicide attempt;
- 8 to 14 April 2004 for swallowing batteries;

The conclusions of the report read as follows:

> "1. Zlatko Prežec is a person suffering from serious and permanent personality disorder with a prevalence of paranoia [paranoid personality disorder], schizophrenic disorder and a pronounced narcissistic pathology, as well as a strong tendency towards destructive and self-destructive behaviour.
>
> 2. The patient's mental disorders do not fall into the category of a temporary or permanent mental illness, insufficient mental development or a mental illness with physical causes.

3. During psychiatric examination no elements indicating alcohol dependency or dependency on any psychoactive substance were found.

4. Bearing in mind the gravity and nature of the patient's personality disorders and their close link with the offences with which he has been charged, we consider that his ability to understand and control his own actions was diminished when the offences in question were committed.

5. Bearing in mind the serious and genuine risk [that the patient] might commit further criminal offences, we recommend that he undergo compulsory psychiatric treatment.

6. The patient maintains the capacity to participate in the proceedings against him for the time being."

On 12 July 2004 the report was submitted to the Pula Municipal Court.

9. At a hearing held on 13 July 2004 the applicant stated that he was going to defend himself in person although he was of the opinion that his constitutional rights were thus violated. At the same time he also stated that he did not understand anything. The relevant part of the written transcript of the hearing reads:

"The defendant is informed, under Article 5 of the Code of Criminal Procedure, that he has the right to defend himself in person or with assistance of a defence counsel.

The defendant states: 'I do not understand anything.'

The judge again informs the defendant of his rights under Article 5 of the Code of Criminal Procedure.

The defendant states:

'I will defend myself in person although I think that my constitutional rights have thus been violated.'

The defendant then states that he has not understood anything."

During the trial the applicant remained silent. On 13 July 2004 the Pula Municipal Court (*Općinski sud u Puli*) found the applicant guilty as charged and sentenced him to five months' imprisonment. In addition, it ordered the applicant to undergo compulsory psychiatric treatment because he had been diagnosed as suffering from a mental disorder. With regard to the applicant's mental state, the judgment stated:

"... the defendant ... is a person suffering from serious and permanent [chronic] personality disorders with a prevalence of paranoia [paranoid personality disorder], schizophrenic disorder and a pronounced narcissistic pathology, as well as a strong tendency towards destructive and self-destructive behaviour."

10. On 24 August 2004 the applicant lodged an appeal against the first-instance judgment alleging, *inter alia*, that his defence rights had been violated in that his request to have a defence counsel appointed in the

proceedings before the first-instance court had been ignored. The case file was sent to the Pula County Court (*Županijski sud u Puli*) sitting as an appeal court. On 3 August 2005 the appeal court returned the case file to the Pula Municipal Court because it had failed to decide upon the applicant's further, written request of 28 June 2004 to have a defence counsel appointed to him.

11. On 6 September 2005 the Pula Municipal Court heard the applicant in connection with his request for a legal aid lawyer. In a decision of 22 September 2005 the Pula Municipal Court appointed a lawyer practising in Pula as the applicant's defence counsel. In the operative part of the decision a lawyer T.S. was appointed, while in the reasoning another lawyer, T.B., is named as the officially appointed defence counsel. The relevant part of this decision reads as follows:

> "This court has ... established that the defendant's financial situation ... does not allow him to engage the services of a defence counsel and that reasons of fairness require that a defence counsel be officially assigned to him."

12. On 30 September 2005 the appointed counsel, T.S., also lodged an appeal against the first-instance judgment.

13. On 20 April 2006 the Pula County Court dismissed both appeals. As regards the lack of legal representation for the applicant during the trial before the first-instance court, it held:

> "The defendant ... maintains that the first-instance court took no heed of the fact that he suffers from mental illness and that therefore a defence counsel should have been assigned to him ...
>
> This appeal court finds, however, that no procedural error was made which could have affected the defendant's defence rights. The record of the hearing held on 25 May 2004 shows that the defendant stated that he did not feel capable of defending himself, after which the first-instance court adjourned the hearing and ordered a psychiatric examination of the defendant ... The report showed that the nature and intensity of the defendant's mental illness did not put in question his ability to defend himself. The [first-instance court] held a hearing on 13 July 2004 at which the defendant, although expressly advised in accordance with Article 5 of the Code of Criminal Procedure that he could defend himself in person or with the assistance of a defence counsel, stated 'that he is going to defend himself in person although his constitutional rights are thus infringed'. It follows that the defendant, who had been found capable of defending himself in person, that is to say that he understood his role in the trial and the information about his rights, expressly stated that he was going to defend himself in person."

14. In his subsequent constitutional complaint of 26 June 2006 the applicant complained that he had no means to pay for legal assistance since he had been serving a prison term since 1997. Furthermore, owing to his mental state, the interests of justice required that he be granted such assistance. He alleged that he had asked the presiding judge on several occasions, both orally and in writing, to be granted legal assistance. However, she had completely ignored his requests until the appeal court

remitted the case file to her in order to decide on his request for legal assistance. A decision of the President of the Pula Municipal Court of 22 September 2005 appointing two defence counsel had been served on the applicant in prison but it did not contain the address or telephone number of either of the appointed counsel. Neither of them had contacted the applicant.

15. On 13 November 2008 the Constitutional Court dismissed the applicant's complaint.

II. RELEVANT DOMESTIC LAW

16. The relevant part of the Code of Criminal Procedure (*Zakon o kaznenom postupku*, Official Gazette nos. 110/1997, 27/1998, 58/1999, 112/1999, 58/2002, 143/2002 and 62/2003) provides as follows:

Article 5

"(1) A defendant has the right to defend himself in person or with the assistance of a defence counsel of his own choosing from among the members of the Bar. Where prescribed by this Code, and in order to ensure [that the rights of] defence [are respected], a defence counsel shall be assigned to a defendant who has not appointed a defence counsel of his own choice.

(2) Under the conditions prescribed by this Code, a legal aid lawyer shall be appointed, on the request of the defendant, to a defendant who has no means to pay for legal assistance.

(3) A court or other State body participating in the criminal proceedings shall inform the defendant of his right to a defence counsel when he or she is first questioned.

(4) The defendant shall be afforded adequate time and facilities for the preparation of his or her defence."

17. Pursuant to Article 430 of the Code of Criminal Procedure, where the defendant requests an amendment of a final judgment following a finding by the European Court of Human Rights of a violation of, *inter alia*, the right to a fair trial, the rules governing a retrial shall apply.

18. The relevant part of the 1999 Constitutional Act on the Constitutional Court of the Republic of Croatia (*Ustavni zakon o Ustavnom sudu Republike Hrvatske*, Official Gazette no. 99/1999 of 29 September 1999 – "the Constitutional Court Act"), as amended by the 2002 Amendments (*Ustavni zakon o izmjenama i dopunama Ustavnog zakona o Ustavnom sudu Republike Hrvatske*, Official Gazette no. 29/2002 of 22 March 2002), which entered into force on 15 March 2002, reads as follows:

Section 62

"1. Everyone may lodge a constitutional complaint with the Constitutional Court if he or she deems that the decision of a state authority, local or regional self-government, or a legal person invested with public authority, on his or her rights or obligations, or about suspicion or accusation of his or her having committed a criminal offence, has violated his or her human rights or fundamental freedoms, or right to local or regional self-government, guaranteed by the Constitution (hereinafter: constitutional rights)...

2. If another legal remedy is allowed against the violation of the constitutional rights [complained of], the constitutional complaint may be lodged only after this remedy has been exhausted.

3. In matters in which an administrative action or, in civil and non-contentious proceedings, an appeal on points of law [*revizija*] are allowed, remedies shall be considered exhausted only after the decision on these legal remedies has been given."

Section 63

"(1) The Constitutional Court shall examine a constitutional complaint whether or not all legal remedies have been exhausted if the competent court fails to decide a claim concerning the individual's rights and obligations or a criminal charge against him or her within a reasonable time ...

(2) If a constitutional complaint ... under paragraph 1 of this section is upheld, the Constitutional Court shall set a time-limit within which the competent court must decide the case on the merits...

(3) In a decision issued under paragraph 2 of this section, the Constitutional Court shall assess appropriate compensation for the applicant for the violation of his or her constitutional rights ... The compensation shall be paid out of the State budget within three months from the date a request for payment is lodged."

19. The relevant part of the Courts Act (*Zakon o sudovima*, Official Gazette nos. 150/05 and 16/07), which entered into force on 29 December 2005, reads as follows:

III. PROTECTION OF THE RIGHT TO A HEARING WITHIN A REASONABLE TIME

Section 27

"(1) A party to court proceedings who considers that the competent court failed to decide within a reasonable time on his or her rights or obligations or a criminal charge against him or her, may lodge a request for the protection of the right to a hearing within a reasonable time with the immediately higher court.

(2) If the request concerns proceedings pending before the High Commercial Court of the Republic of Croatia, the High Petty Offences Court of the Republic of Croatia

or the Administrative Court of the Republic of Croatia, the request shall be decided by the Supreme Court of the Republic of Croatia.

(3) The proceedings for deciding the request referred to in paragraph 1 of this section shall be urgent."

Section 28

"(1) If the court referred to in section 27 of this Act finds the request well founded, it shall set a time-limit within which the court before which the proceedings are pending must decide on a right or obligation of, or a criminal charge against, the person who lodged the request, and shall award him or her appropriate compensation for the violation of his or her right to a hearing within a reasonable time.

(2) The compensation shall be paid out of the State budget within three months from the date the party's request for payment is lodged.

(3) An appeal, to be lodged within fifteen days with the Supreme Court, lies against a decision on the request for the protection of the right to a hearing within a reasonable time. No appeal lies against the Supreme Court's decision but one may lodge a constitutional complaint."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3(c) OF THE CONVENTION

20. The applicant complained that he had not been granted free legal assistance at the trial stage in the criminal proceedings against him and that the counsel assigned to him at the appeal stage had not contacted him. He relied on Article 6 §§ 1 and 3(c) of the Convention, the relevant part of which reads:

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

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

..."

21. The Government contested that argument.

A. Admissibility

22. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

The parties' submissions

23. The applicant argued that, owing to his mental state, he should have been legally represented throughout the criminal proceedings against him. Since he had had no means to pay for legal representation, the interests of justice required that a legal aid lawyer be assigned to him right at the beginning of his trial. Although he had made such a request orally before the presiding judge of the trial court, it had not been recorded in the transcript. His further written request had not been answered. It had not been until he had already lodged an appeal against the first-instance judgment that the appeal court had remitted the case to the first-instance court and a legal aid counsel had been assigned to him – at a very late stage in the proceedings. However, the officially assigned counsel had never attempted to contact the applicant and had not provided him with an address or telephone number at which to contact him.

24. The Government argued that the relevant provisions of the Code of Criminal Procedure did not require the applicant to be defended by a lawyer in the criminal proceedings at issue. They maintained, further, that at the hearing held on 13 July 2004 before the Pula Municipal Court the applicant had been informed of his right to be legally represented but had chosen to represent himself in person. The report of the applicant's psychiatric examination showed that the applicant maintained the capacity to participate in the proceedings against him. Finally, his request for a legal aid lawyer had been complied with at the appeal stage.

The Court's assessment

25. Bearing in mind that the requirements of paragraph 3 (b) and (c) of Article 6 of the Convention amount to specific elements of the right to a fair trial guaranteed under paragraph 1, the Court will examine all the complaints under both provisions taken together (see, in particular, *Van Geyseghem v. Belgium* [GC], no. 26103/95, § 27, ECHR 1999-I, and *G.B. v. France*, no. 44069/98, § 57, ECHR 2001-X).

26. As to the Government's contention that the applicant had decided to defend himself in person and not to engage the services of a lawyer, the Court reiterates that neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, entitlement to the guarantees of a fair trial. However, such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner; it must not run counter to any important public interest (see *Sejdovic v. Italy* [GC], no. 56581/00, § 86, ECHR 2006-...), and it must be attended by minimum safeguards commensurate with its importance (see *Poitrimol v. France*, 23 November 1993, § 31, Series A no. 277-A).

27. As to the present case, the Court notes that the applicant argued that he had orally requested the presiding judge to assign him a legal aid lawyer during the first-instance proceedings but that his request had not been properly recorded. It is undisputed between the parties that on 28 June 2004, during the proceedings before the trial court, the applicant submitted his written request for a legal aid lawyer. However, this request, despite having been received at the Pula Municipal Court on 30 June 2004, was not enclosed in the case file until 15 July 2004, while the final hearing was held on 13 July 2004. At that hearing the applicant expressly stated that he would defend himself in person although in his opinion his constitutional rights were thus violated. He stated several times that he did not understand anything. In view of the applicant's mental state (see paragraph 8 above) and his express request to have a legal aid lawyer appointed during the trial proceedings, the Court concludes that it cannot be accepted that the applicant waived his right to be represented by a lawyer during the trial proceedings.

28. The Court reiterates that although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial (see *Poitrimol*, cited above, § 34, and *Demebukov v. Bulgaria*, no. 68020/01, § 50, 28 February 2008). Article 6 § 3 (c) does not specify the manner of exercising this right. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial (see *Imbrioscia*

v. Switzerland, 24 November 1993, § 38, Series A no. 275, and *Salduz v. Turkey* [GC], no. 36391/02, § 51, 27 November 2008).

29. Sub-paragraph (c) of Article 6 § 3 attaches two conditions to this right. The first condition – lack of sufficient means to pay for legal assistance – is not in dispute in the present case, as it was accepted by the national courts when they assigned a legal aid counsel to the applicant in the appeal proceedings. What must be determined is whether the interests of justice required that the applicant be granted such assistance. In this connection the Court notes firstly that the Pula Municipal Court ordered the applicant to undergo compulsory psychiatric treatment because he had been diagnosed as suffering from a severe mental illness. Secondly, the Court notes that in the criminal proceedings in question the applicant was charged with an offence committed against an employee at Pula Prison, where he was serving a prison term at the time. In the Court's view, the applicant's mental state and the fact that as a convicted prisoner he was charged with an offence against a prison employee warranted his legal representation in the proceedings at issue. Furthermore, the Court's case-law is clear on the principle that where deprivation of liberty is at stake, the interests of justice in principle call for legal representation (see *Quaranta v. Switzerland*, 24 May 1991, § 34; *Benham v. the United Kingdom*, 10 June 1996, § 61, *Reports of Judgments and Decisions* 1996-III; and *Talat Tunç v. Turkey*, no. 32432/96, § 56, 27 March 2007). The Court is also mindful of the fact that in a decision of 22 September 2005 the Pula Municipal Court stated that considerations of fairness required the assignment of a legal-aid lawyer to the applicant. However, the defence counsel assigned could have acted for the applicant only in the appeal proceedings since at that point the trial stage had already been completed. In the Court's view, however, the "considerations of fairness", as expressed by the national courts, made legal representation of the applicant an even more stringent requirement at the trial stage, given the paramount importance of the nature of criminal proceedings before a trial court, where all the evidence is usually presented and the defendant has probably his or her only chance to be heard in person by a court.

30. As regards the applicant's representation in the appeal proceedings, the Court reiterates that a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes or chosen by the accused. It follows from the independence of the legal profession from the State that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or privately financed (see *Cuscani v. the United Kingdom*, no. 32771/96, § 39, 24 September 2002). The competent national authorities are required under Article 6 § 3 (c) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way (see *Kamasinski*

v. Austria, 19 December 1989, Series A no. 168, § 65, and *Daud v. Portugal*, 21 April 1998, *Reports* 1998-II, § 38).

31. In the instant case, the Pula Municipal Court assigned a legal aid lawyer to the applicant. Two different lawyers were named in the operative part of the decision and its reasoning respectively. Although this decision was served on the applicant, he was not provided with either a telephone number or address of either of the two lawyers and was thus prevented from contacting them. Neither of the lawyers mentioned had visited the applicant in prison or made any other contact with him. In this respect, it must be remembered that the Convention is designed to "guarantee not rights that are theoretical or illusory but rights that are practical and effective" and that assigning counsel does not in itself ensure the effectiveness of the assistance he may afford an accused (see *Artico v. Italy*, 13 May 1980, Series A no. 37, § 33). The fact that a lawyer, T.S., lodged an appeal on behalf of the applicant could not have remedied the above shortcomings since he could hardly have been acquainted with the applicant's version of events in view of the fact that the applicant had remained silent during the trial.

32. The foregoing considerations are sufficient to enable the Court to conclude that in the circumstance of the present case the interests of justice required the applicant to be legally represented by a legal aid lawyer in the criminal proceedings against him. However, at the trial stage of the proceedings he had no such representation, and the representation of a legal aid lawyer during the appeal proceedings did not satisfy the requirements of a fair trial.

Accordingly, there has been a violation of Article 6 §§ 1 and 3(c) of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION ON ACCOUNT OF THE LENGTH OF THE PROCEEDINGS

33. The applicant complained of the length of proceedings, and in particular those before the Constitutional Court. He relied on Article 6 § 1 of the Convention, the relevant part of which reads:

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

34. The Court reiterates that since 22 March 2002 a constitutional complaint under section 63 of the Constitutional Court Act has been considered an effective remedy in respect of length of proceedings still pending in Croatia (see *Slaviček v. Croatia* (dec.), no. 20862/02, ECHR 2002-VII). In that case the Court established that a constitutional complaint was a means designed both to accelerate the proceedings and to obtain compensation. On 29 December 2005 a new remedy came into effect (see paragraph 19 above), again offering the applicant a possibility of obtaining

both compensation for excessive length of proceedings and to have the proceedings accelerated.

35. In the instant case, the applicant did not file a constitutional complaint prior to 29 December 2005 although the criminal proceedings against him had up to that point been pending for over two years. He neither used the new remedy, a request for the protection of the right to a hearing within a reasonable time with the immediately higher court, after that date, though the criminal proceedings at issue continued for some further four months. Instead, he lodged his application with the Court at the stage of domestic proceedings when these were pending before the Constitutional Court.

36. The Court has already held that where an applicant had means at his or her disposal to use a remedy which would speed up the proceedings, but failed to use them, a complaint about the length of proceedings is inadmissible under Article 35 § 1 for non-exhaustion of domestic remedies and that it had to be rejected pursuant to Article 35 § 4 of the Convention (see *Sirc v. Slovenia* (dec.), no. 44580/98, 16 May 2002, and, *mutatis mutandis*, *Štajcar v. Croatia* (dec.), no. 46279/99, 20 January 2000; *Bašić v. Austria*, no. 29800/96, §§ 34-40, ECHR 2001-I and *Pallanich v. Austria*, no. 30160/96, §§ 27-33, 30 January 2001).

37. The Court sees no reason to exonerate the applicant in the present case from such an obligation. He should have made use of the domestic remedies mentioned above, specifically designed to address the length of pending proceedings, by which he could have not only obtained compensation but also have the proceedings accelerated. However, he did not do so at any stage of the proceedings and has therefore failed to give the domestic authorities the opportunity intended to be afforded to Contracting States by Article 35 § 1 of the Convention, namely, the opportunity of preventing or putting right the alleged violation (see *Cardot v. France*, judgment of 19 March 1991, Series A no. 200, p. 19, § 36).

38. The Court has already addressed the same situation in a case against Croatia (see *Cerin v. Croatia* (dec.), no. 45043/05, 26 June 2008) where it, in so far as relevant for the present analysis, held:

> "It follows that in the period between 15 March 2002 and 28 September 2005, that is, while the impugned proceedings were pending before the ordinary courts, the applicant could have lodged a constitutional complaint about their length. However, he did not do so.
>
> The length of the proceedings in their part before the Constitutional Court following the applicant's regular constitutional complaint of 20 December 2005, amounting to some four months, cannot in itself be considered unreasonable.
>
> It follows that this complaint is inadmissible under Article 35 §§ 1 and 3 for non-exhaustion of domestic remedies and as manifestly ill-founded, respectively, and that it must be rejected pursuant to Article 35 § 4 of the Convention."

39. Against this background the Court shall examine the length of proceedings before the Constitutional Court. While normally the Court would be called upon to examine overall length of proceedings where the Constitutional Court proceedings are "extension of proceedings in ordinary courts" (see *Süßmann v. Germany*, 16 September 1996, § 40, *Reports of Judgments and Decisions* 1996-IV) and form a part of these proceedings, in this case, for the reasons explained above, the Court shall concentrate its assessment on the length of the Constitutional Court proceedings. In this connection the Court reiterates that the reasonableness of the length of the proceedings is to be assessed in the light of the particular circumstances of the case, regard being had to the criteria laid down in the Court's case-law, in particular the complexity of the case, the applicant's conduct and that of the competent authorities, and the importance of what was at stake for the applicants in the litigation (see *Süßmann*, cited above, § 48, and *Pammel and Probstmeier v. Germany*, 1 July 1997, *Reports* 1997-IV, § 60).

40. The Court firstly observes that the proceedings before the Constitutional Court concerned an individual complaint about the alleged violation of the applicant's defence rights in the criminal proceedings against him. Although the proceedings before the Constitutional Court did not involve determination of any constitutional issues of broader importance, they are nevertheless to be distinguished from regular appeal proceedings. While the appellate courts normally address the questions such as procedural or factual errors in the proceedings before the lower courts, the Constitutional Court in Croatia addresses issues of the conformity of the proceedings and the decisions taken thereof with the Constitution and the Convention, which is directly applicable.

41. The Court has already held that the length of proceedings before a Constitutional Court upon an individual constitutional complaint, comparable with the length in the present case, had not fallen short of the reasonable time requirement. Thus, there was no violation of Article 6 § 1 of the Convention as regards the length of proceedings before the Constitutional Court that lasted two years and two months (see *D.I.S. v. Slovenia* (dec.), no. 35274/97, 4 March 1998) or three and a half years (*Posedel-Jelinović v. Croatia*, no. 35915/02, § 26, 24 November 2005).

42. In the case at issue the proceedings before the Constitutional Court lasted from 26 June 2006 to 13 November 2008, that is to say, two years, four months and seventeen days. In view of the special role of the Constitutional Court as the highest court in Croatia and the criteria set down in the above-cited Court's case-law and the fact that the criminal proceedings against the applicant before the ordinary courts lasted two years, four months and seventeen days at two levels of jurisdiction, the Court considers that the period in question did not exceed the reasonable-time requirement.

43. It follows that this complaint is inadmissible under Article 35 §§ 1 and 3 for non-exhaustion of domestic remedies and as manifestly ill-founded, respectively, and that it must be rejected pursuant to Article 35 § 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. 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

45. The applicant claimed 15,000 euros (EUR) in respect of non-pecuniary damage and the costs of the proceedings before the Court.

46. The Government deemed the amount claimed unfounded and excessive.

47. The Court considers that the finding of a violation of Article 6 §§ 1 and 3(c) of the Convention together with the possibility open to the applicant under national law to seek a fresh trial (Article 430 of the Croatian Code of Criminal Procedure) constitutes in itself sufficient just satisfaction in the circumstances of the present case.

B. Costs and expenses

48. The applicant claimed EUR 15,000 both for the costs and expenses incurred before the Court and in respect of non-pecuniary damage.

49. The Government deemed the amount claimed excessive.

50. 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 reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the applicant, who was not legally represented, the sum of EUR 100 for the proceedings before the Court.

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

1. *Declares* unanimously the complaint concerning the applicant's right to a fair trial admissible;

2. *Declares* by six votes to one the remainder of the application inadmissible;

3. *Holds* unanimously that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention;

4. *Holds* by five votes to two
   (a) that the finding of a violation constitutes sufficient just satisfaction;
   (b) 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 100 (one hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement;
   (c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* by five votes to two the applicant's claim for just satisfaction.

Done in English, and notified in writing on 15 October 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach
Deputy Registrar

Christos Rozakis
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Judges Spielmann and Malinverni is annexed to this judgment.

C.L.R.
A.M.W.

PARTLY DISSENTING OPINION OF JUDGES SPIELMANN AND MALINVERNI

(Translation)

1. We agree in all respects with the Court's conclusions as to the violation of Article 6 §§ 1 and 3(c) of the Convention on account of the lack of legal assistance in the criminal proceedings against the applicant (§ 32).

2. We cannot follow the majority, however, when they affirm that "the finding of a violation of Article 6 § 1 of the Convention together with the possibility open to the applicant under national law to seek a fresh trial (Article 430 of the Croatian Code of Criminal Procedure) constitutes in itself sufficient just satisfaction in the circumstances of the present case" (§ 47).

3. It is true that the Court has always held that when an applicant has been convicted despite an infringement of his rights as guaranteed by Article 6 of the Convention he should, as far as possible, be put in the position in which he would have been had the requirements of the provision not been disregarded, and that the most appropriate form of redress would, in principle, be trial *de novo* or the reopening of the proceedings if requested.

4. However, given its importance, we would have liked the content of § 47 to have been included in the operative part of the judgment as well, for the reasons we have explained in detail in our joint concurring opinion in the case of *Vladimir Romanov v. Russia* (no. 41461/02, 24 July 2008).

5. In our view, it is indeed essential that in its judgments the Court should not merely give as precise a description as possible of the nature of the Convention violation found but should also, in the operative provisions, indicate to the State concerned the measures it considers most appropriate to redress the violation.

6. For that reason, point 3(a) of the operative part of the judgment, which states only that "the finding of a violation constitutes sufficient just satisfaction", seems insufficient to repair the damage suffered by the applicant.

7. Generally speaking and independently of the above considerations, one wonders whether the mere finding of a violation of a right – no matter which – protected by the Convention is capable of repairing the harm done to the victim.

8. It is true that Article 41 of the Convention stipulates that the Court shall afford just satisfaction only if necessary. The case-law reveals that the Court has adopted this solution mainly when the victim had the

possibility of obtaining satisfaction at the domestic level, when the violation found was of little significance, when the national authorities clearly expressed the will to reform the legislation or practice at the origin of the violation or when, as in this case, the victim had the possibility of requesting the reopening of the domestic proceedings or obtaining satisfaction at the domestic level.

9. But can one really consider that the mere finding of a violation of a fundamental right can possibly afford redress (see *Aquilina v. Malta* [GC] judgment, 29 April 1999, 1999-III, pp. 280-81, dissenting opinion of Judge Bonello)?

10. In the present case the applicant was sentenced to five months' imprisonment (§ 9). He must have felt anxiety, distress, confusion and frustration at the authorities' refusal to appoint a lawyer to assist him. That raises the question whether, in such a case as this, the finding of a violation alone constitutes just satisfaction.

11. To conclude, we should like to point out once more that in cases similar to this one the Court has awarded victims just satisfaction. In the case of *Artico v. Italy* (13 May 1980, Series A, vol. 37), where the Court also found a violation of Article 6 § 3(c) of the Convention because the applicant's officially appointed lawyer had failed to defend him effectively and also on account of the Court of Cassation's inaction, the applicant was awarded three million lira in respect of non-pecuniary damage. In *Goddi v. Italy* (9 April 1984, Series A, vol. 76) the applicant, who had been charged and placed in detention, had not been effectively defended by an officially appointed lawyer because of the inaction of the Bologna Court of Appeal. The Court awarded him five million lira. In *Quaranta v. Switzerland* (24 May 1991, Series A, vol. 205) the refusal of the president of the Vaud canton Criminal Court to appoint a lawyer to assist the accused during the investigation and at the trial hearing gave rise to a finding of a violation of Article 6 § 3 (c). The respondent State had to pay the victim 3,000 Swiss francs. Lastly, in *Granger v. the United Kingdom* (28 March 1990, Series A, vol. 174), the Court awarded the applicant 1,000 pounds in compensation for the isolation and confusion he must have felt because he had been refused the assistance of an officially appointed lawyer.