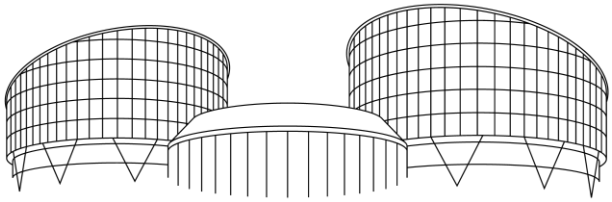

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF KOPRIVICA v. MONTENEGRO

(Application no. 41158/09)

JUDGMENT
(Merits)

STRASBOURG

22 November 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 Koprivica v. Montenegro,

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

Nicolas Bratza, *President,*
Lech Garlicki,
David Thór Björgvinsson,
Päivi Hirvelä,
Zdravka Kalaydjieva,
Nebojša Vučinić,
Vincent A. De Gaetano, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 3 November 2011,

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

PROCEDURE

1. The case originated in an application (no. 41158/09) against Montenegro lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Montenegrin national, Mr Veseljko Koprivica ("the applicant"), on 31 July 2009.

2. The applicant was represented by Mr R. Prelević, a lawyer practising in Podgorica. The Montenegrin Government ("the Government") were represented by their Agent, Mr Z. Pažin.

3. The applicant complained under Article 10 of the Convention that the final civil court judgment rendered against him breached his right to freedom of expression.

4. On 10 May 2010 the President of the Fourth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1948 and lives in Podgorica.

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

A. The article and ensuing civil proceedings

7. On 24 September 1994 an article, entitled "16", was published in a Montenegrin weekly magazine, the *Liberal,* in circulation at the time, which was opposed to the Government. The article, which appeared to have been written by a special correspondent from The Hague, reported that many journalists from the former Yugoslavia were going to be tried for incitement to war before the International Criminal Tribunal for the former Yugoslavia ("the ICTY"), including sixteen journalists from Montenegro. The article named the two ICTY officials who had allegedly prepared the file and then went on to list the names of the sixteen journalists in question. The applicant in the present case was the editor-in-chief of the *Liberal* and its founder was a prominent opposition party at the time.

8. On 27 October 1995 one of the sixteen journalists whose name had appeared in the article ("the plaintiff"), and who had himself been an editor of a major State-owned media outlet, filed a compensation claim against the applicant and the magazine's founder. The plaintiff claimed that the assertions contained in the article, which were later repeated through other media both within the country and abroad, were untrue and that they were harmful to his honour and reputation. He enclosed a copy of a Serbian daily newspaper, the *Politika*, published on 27 September 1994, in support of his claim that the assertions had been transmitted by other media.

9. On 29 May 2002 the ICTY informed the Court of First Instance (*Osnovni sud*) in Podgorica that it had no information whatsoever concerning the plaintiff.

10. In the course of the civil proceedings, the applicant maintained that he had relied on the information provided by the magazine's special correspondent. Commenting on the ICTY's statement, however, the applicant said:

> "I'm not interested in there being no proceedings against [the plaintiff], the contents of the ICTY ... letter, or whether [the plaintiff] is on that list. I have personally witnessed [his] work as the editor-in-chief of the [media outlet in question] during the reporting on the Dubrovnik operation ....".

11. On 17 May 2004 the Court of First Instance ruled partly in favour of the plaintiff, ordering the applicant and the magazine's founder, jointly, to pay him the sum of 5,000 euros ("EUR") for the non-pecuniary damage suffered. On the basis of the ICTY's statement, the court found that the published assertions had not been true and, in particular, that the applicant had not been interested in their veracity. The court refused to hear the author of the article, considering it unnecessary in the light of the information provided by the ICTY. It considered that the applicant's proposal that the author be heard was also aimed at delaying the proceedings as the applicant did not know his exact address. In any event, the author had not mentioned in his text the number of the case file, dates or any other data which would

in a convincing manner support the veracity of the information. The court held that the applicant should not have allowed the publishing of untrue information, as it represented a misuse of freedom of expression, and that he should have attempted to check its accuracy first instead of trusting his correspondent unreservedly. The court further held that personal beliefs and convictions could not justify the publishing of such information and concluded that the assertions in question had harmed the honour and the reputation of the plaintiff.

12. Both the plaintiff and the applicant appealed against the judgment. The plaintiff, in particular, complained that the compensation awarded was too low. The applicant, for his part, disputed that he, as the editor-in-chief, should be held responsible for the publishing of information of dubious veracity. He submitted that the information was of particular importance to the public and proposed additional evidence, namely that the court hear a colleague of his as an additional witness, as he was present when the fax with the impugned information was received and whom he consulted on whether to publish the information or not, as well as to see a documentary film broadcast in 2004 by the same media outlet whose editor-in-chief in the early 1990s had been the plaintiff himself, and which allegedly contained an unfavourable reference to the plaintiff and his work at the time. The applicant concluded that, in any event, the damages awarded were too high.

13. On 14 March 2008 the High Court (*Viši sud*) in Podgorica increased the amount of damages to EUR 10,000 and assessed the litigation costs at EUR 5,505. In so doing, it endorsed the reasoning of the Court of First Instance, adding that the applicant should have focused on the accuracy of the information in question rather than having it published as soon as possible. The court took the view that the veracity of the assertions could not be established by the applicant consulting the article's author or another colleague but only by reliable evidence, which was lacking in this case. It further held that, according to the legislation in force at the time the article was published, the editor-in-chief, *inter alia*, could also be held responsible for publishing untrue information (see paragraph 32 below). The court made no reference to the documentary film referred to by the applicant.

14. On 6 November 2008 the Supreme Court (*Vrhovni sud*) in Podgorica amended the High Court's judgment, reducing the damages and costs awarded to EUR 5,000 and EUR 2,677.50, respectively.

B. Enforcement proceedings

15. On 5 June 2009 the Court of First Instance ordered the payment of the amounts awarded by the High Court.

16. On 17 November 2009 the Court of First Instance issued a further order, specifying that payment should be made by regular transfers of one

half of the applicant's salary (*zarada*) which he was earning in another magazine.

17. On 17 November 2010, following a request by the applicant, the Court of First Instance terminated (*obustavio*) the enforcement of the High Court's judgment. At the same time, it confirmed that the amount owed was the one awarded by the Supreme Court, to be paid by regular transfers of one half of the applicant's salary to the plaintiff.

18. By 14 October 2011 the applicant had paid to the plaintiff EUR 852.99 in total.

C. Other relevant facts

19. It would appear that as of March 2005 the founder of the magazine ceased to exist, leaving the applicant as the only remaining debtor.

20. The applicant's pension between 2004 and 2008 ranged between EUR 170 and EUR 300 per month.

21. The average monthly income in Montenegro when the relevant domestic decisions were rendered was EUR 195 in 2004 and EUR 416 in 2008. Financial brokers had the highest incomes, these being on average EUR 345 in 2004 and EUR 854 in 2008.[1]

22. There are no copies of any articles relating to the impugned information published by other media in the case file except for a copy of part of the article published in the *Politika* (see paragraph 8 above).

23. On an unspecified date after the impugned article had been published another journalist from the list of the sixteen lodged a private criminal action (*privatna krivična tužba*) against the applicant for defamation (*kleveta*). On 20 September 1995 the Court of First Instance found the applicant guilty and ordered him to pay a fine of 800 dinars (YUD) and costs in the amount of YUD 100. On 23 November 1999 the High Court rejected the criminal action as the prosecution had become time-barred in the meantime. There is no information in the case file whether other journalists whose names appeared in the article instituted proceedings, either civil or criminal, against the applicant.

[1] The data are taken from the website of the Statistics Agency of Montenegro on 21 July 2011 http://www.monstat.org/cg/page.php?id=24&pageid=24 .

II. RELEVANT DOMESTIC LAW AND PRACTICE

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

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

Article 47

"Everyone is entitled to freedom of expression ....

Freedom of expression can be limited only by the right of others to dignity, reputation and honour ...."

Article 147 §§ 1 and 2

An Act ... cannot have a retroactive effect.

Exceptionally, certain provisions of an Act can have retroactive effect, if required by the public interest ....

Article 149

"The Constitutional Court shall ...

(3) ... [rule on a] ... constitutional appeal ... [lodged in respect of an alleged] ... violation of a human right or freedom guaranteed by the Constitution, after all other effective legal remedies have been exhausted ..."

25. The Constitution entered into force on 22 October 2007.

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

26. Section 34 provides, *inter alia*, that while decisions upon a constitutional appeal may be published in the Official Gazette, they must be published on the website of the Constitutional Court.

27. Sections 48 to 59 provide additional details as regards the processing of constitutional appeals. In particular, section 56 provides that when the Constitutional Court finds a violation of a human right or freedom, it shall quash the impugned decision, entirely or partially, and order that the case be re-examined by the same body which rendered the quashed decision.

28. This Act entered into force in November 2008.

C. Rules of the Constitutional Court of Montenegro (*Poslovnik Ustavnog suda Crne Gore*; published in OGM no. 33/09)

29. Rule 93(2) provides that public access to the work of the court is to be ensured, *inter alia*, by publishing its decisions in the Official Gazette of Montenegro and on the website of the court.

D. Obligations Act (*Zakon o obligacionim odnosima*; published in the Official Gazette of the Socialist Federal Republic of Yugoslavia - OG SFRY - nos. 29/78, 39/85, 45/89, 57/89 and the Official Gazette of the Federal Republic of Yugoslavia - OG FRY - no. 31/93)

30. Section 198 regulated responsibility for pecuniary damage caused by an individual's harming another person's reputation or asserting or disseminating untrue allegations where that individual knew or should have known that these allegations were untrue.

31. Under sections 199 and 200, *inter alia*, anyone who had suffered mental anguish as a consequence of damage to his honour or reputation could, depending on its duration and intensity, sue for financial compensation before the civil courts and, in addition, request other forms of redress "which might be capable" of affording adequate non-pecuniary compensation.

E. Public Information Act (*Zakon o javnom informisanju*; published in the Official Gazette of the Republic of Montenegro no. 56/93)

32. Section 62 provided that if untrue information, which harmed another's honour or reputation, was published in the media (*javno glasilo*), an interested person would be entitled to sue the relevant author, editor-in-chief, founder and publisher for financial compensation.

F. Media Act (*Zakon o medijima*; published in OGRM nos. 51/02 and 62/02 and OGM no. 46/10)

33. Section 20 of the Act provides that if a person's honour or integrity is harmed by information published in the media, that person may file a compensation claim against the author and the founder of the particular medium in question.

34. This Act entered into force in 2002.

G. The relevant domestic case-law[1]

35. As of 21 July 2011 a total of 705 constitutional appeals would appear to have been examined by the Constitutional Court: 351 of them were rejected on procedural grounds (*odbačene*), 333 were rejected on the merits (*odbijene*), in three cases the proceedings were terminated (*obustava postupka*), and in four cases examination was adjourned. By the same date, fourteen constitutional appeals had been accepted, the first one having been accepted on 8 July 2010; this decision was published in the Official Gazette on 26 November 2010.

36. A single document containing 77 decisions rendered in 2009 was posted on the website of the Constitutional Court on an unspecified date in 2010. Another single document containing 205 decisions, out of 337 rendered in 2010, was posted on the website on an unspecified date after 17 May 2011. By 21 July 2011 none of 291 decisions rendered in 2011 has been made public on the Constitutional Court's website.

37. By the same date thirteen decisions had been published in the Official Gazettes and in these thirteen constitutional appeals were accepted.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

38. The applicant complained, under Article 10 of the Convention, that his right to freedom of expression had been breached as a result of the final civil court judgment rendered against him.

39. Article 10 reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others...."

[1] The data are based on the Bulletins and Statements (*Saopštenja*) published by the Constitutional Court on its website by 21 July 2011 (http://www.ustavnisudcg.co.me/aktuelnosti.htm) and the Official Gazettes.

A. Admissibility

1. The parties' submissions

40. The Government maintained that the applicant had failed to exhaust all effective domestic remedies. In particular, he had failed to lodge a constitutional appeal.

41. The applicant asserted that a constitutional appeal was not an effective domestic remedy. He maintained that proceedings following a constitutional appeal lasted too long, two years on average. He further contended that even if such an appeal were to be upheld, the Constitutional Court could only quash the impugned decision and order that the case be re-examined, while he would have to institute another set of proceedings in order to obtain just satisfaction for any damage caused by the decision held to run counter to constitutional provisions.

2. Relevant principles

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

43. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was 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 was in fact exhausted 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, *Akdivar and Others v. Turkey*, 16 September 1996, § 65, *Reports of Judgments and Decisions* 1996-IV).

44. The Court notes that the application of this rule must make due allowance for the context. Accordingly, it has recognised that Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism (see *Akdivar and Others*, cited above, § 69).

3. The Court's assessment

45. The Court notes that following their introduction in October 2007, constitutional appeals had been systematically rejected or dismissed until July 2010, when the first decision upholding such an appeal was rendered, which decision was published more than four months later.

46. The Court further notes that by 31 July 2009, the date on which the applicant lodged his complaint with this Court, no constitutional appeal had been upheld, nor had any decision rendered thereupon been made available to the public, even though the constitutional appeal had already existed for roughly one year and nine months. Such a situation continued until an unspecified date in 2010, with the majority of decisions not having been made public even afterwards. As the applicant had filed his application with the Court before any decision of the Constitutional Court was published and because the issue of whether domestic remedies have been exhausted is normally determined by reference to the date when the application was lodged, the Court considers that the applicant was not obliged to exhaust this particular avenue of redress before turning to Strasbourg (see, *mutatis mutandis*, *Vinčić and Others v. Serbia*, no. 44698/06 et seq. § 51, 1 December 2009, as well as *Cvetković v. Serbia*, no. 17271/04, § 41, 10 June 2008). Therefore, the Government's objection in this regard must be dismissed. The Court might in future cases reconsider its view if the Government demonstrate, with reference to concrete published decisions, the efficacy of the remedy, with the consequence that applicants may be required first to exhaust that remedy before making an application to the Court (see, *mutatis mutandis*, *Burden v. the United Kingdom* [GC], no. 13378/05, §§ 43-44, 29 April 2008).

47. The Court notes that the applicant's 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

1. The parties' submissions

(a) The applicant's submissions

48. The applicant maintained that the domestic courts' judgments were not in accordance with the law, as the courts should have applied the Media Act of 2002, which did not provide for the responsibility of the editor-in-chief, as well as sections 198 and 199 of the Obligations Act, which provided other forms of redress (see paragraphs 30, 31, 33 and 34 above).

49. The applicant reiterated that the domestic courts had rejected all the evidence proposed by him in order to establish whether he had acted in good faith, and whether any public interest had been served in publishing the article in question. In particular, they had refused to hear the witnesses he had proposed or to view the documentary film (see paragraph 13 above).

50. He further submitted that, at the time, there had been no official contacts between the ICTY and the then Federal Republic of Yugoslavia (FRY), of which Montenegro had been a part; nor had there been any Internet connection available in Montenegro. In view of this, he had entirely depended on the special correspondent and his own sound judgment of his opponent's editorial policy. Furthermore, the plaintiff himself had made no attempt whatsoever to deny the information in issue.

51. He maintained that his statement as cited in the judgment of the Court of First Instance (see paragraph 10 above) was rather the domestic judge's interpretation of what he had said at a hearing when he had not been represented by a professional lawyer. What he had meant was that anyone who had observed the plaintiff's editorial policy at the relevant time could have easily believed that the ICTY was investigating his role.

52. Finally, the applicant submitted that the compensation awarded was disproportionate, having regard to his modest income at the time (see paragraph 20 above).

(b) The Government's submissions

53. The Government submitted that the domestic decisions were in accordance with the law, as the Constitution prohibited retroactive implementation of legislation, and there was no legal ground for the implementation of the legislation passed in 2002 (see paragraph 24 above).

54. They reiterated that freedom of expression was not an absolute right but was limited to a significant extent, including in the interest of the protection of the honour and reputation of others.

55. The Government maintained that Article 10 provided not only for the freedom of the media to inform the public but also for the right of the public to be properly informed, this being particularly important with regard to the ICTY and war crimes proceedings, being issues of the broadest public interest. They agreed that while a public debate about issues important for society, including editorial policy, in particular during the war, was fully legitimate in a democratic society, it was nevertheless unacceptable to misinform the public by publishing assertions that international criminal proceedings were pending against someone when that was not the case.

56. They maintained that the information in question was clearly a statement of fact, which had proved to be absolutely inaccurate (see paragraph 9 above), and that its aim was to discredit the plaintiff. The domestic courts had reliably established that the applicant had not been acting in good faith, as the information was nothing more than an undated typed list of names containing no explanation which might lead to the conclusion that the ICTY was in any way interested in the listed journalists.

57. They pointed to the unprofessional attitude of the applicant in his failure to check the veracity of the information, in particular his lack of interest in its accuracy (see paragraph 10 above). The domestic courts had

legitimately refused to hear the witnesses proposed by him, and had duly explained why. In the Government's opinion, the applicant had not proved in the domestic proceedings that the correspondent had indeed had such a status in the *Liberal* or that he was the author of the article.

58. They contested the assertion that the applicant's statement had not been quoted correctly, as he had never before made any objections to the court's record, even though he had been legally represented.

59. Lastly, they doubted that a pension was the applicant's only income.

60. The Government concluded that the interference of the domestic courts with the applicant's right to freedom of expression in this particular case had pursued a legitimate aim and that the compensation awarded was proportionate to this aim, in particular in view of the fact that the information in question had been further transmitted by news agencies throughout the former Yugoslavia, as well as Radio Free Europe, and thus made available to a large number of people.

2. The relevant principles

61. The Court emphasises the essential function fulfilled by the press in a democratic society. Although the press must not overstep certain bounds, particularly in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see *Dalban v. Romania* [GC], no. 28114/95, § 49, ECHR 1999-VI).

62. It is in the first place for the national authorities to assess whether there is a "pressing social need" for a restriction on freedom of expression and, in making that assessment, they enjoy a certain margin of appreciation (see *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 45, ECHR 2007-...). In cases concerning the press, the State's margin of appreciation is circumscribed by the interest of a democratic society in ensuring and maintaining a free press. The Court's task in exercising its supervisory function is to look at the interference complained of in the light of the case as a whole and to determine whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" and whether the measure taken was proportionate to the legitimate aim pursued (see *Vogt v. Germany*, 26 September 1995, § 52, Series A no. 323; and *Jerusalem v. Austria*, no. 26958/95, § 33, ECHR 2001-II).

63. A careful distinction needs also to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof (see *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 98, ECHR 2004-XI, and *Kasabova v. Bulgaria*, no. 22385/03, § 58 *in limine*, 19 April 2011).

64. Article 10 of the Convention does not, however, guarantee wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern. Under the terms of paragraph 2 of the Article the exercise of this freedom carries with it "duties and responsibilities", which also apply to the press. These "duties and responsibilities" are liable to assume significance when there is a question, as in the instant case, of attacking the reputation of named individuals and undermining the "rights of others". By reason of the "duties and responsibilities" inherent in the exercise of the freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (see, *mutatis mutandis*, *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 65, ECHR 1999-III; as well as *Rumyana Ivanova v. Bulgaria*, no. 36207/03, § 61, 14 February 2008, and *Kasabova v. Bulgaria*, cited above, § 63).

65. Finally, the amount of compensation awarded must "bear a reasonable relationship of proportionality to the ... [moral] ... injury ... suffered" by the plaintiff in question (see *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, § 49 Series A no. 316-B; *Steel and Morris v. the United Kingdom*, no. 68416/01, § 96, ECHR 2005 - II, where the Court held that the damages "awarded ... although relatively moderate by contemporary standards ... [were] ... very substantial when compared to the modest incomes and resources of the ... applicants ..." and, as such, in breach of the Convention; see also *Lepojić v. Serbia*, no. 13909/05, § 77 *in fine*, 6 November 2007, where the reasoning of the domestic courts was found to be insufficient given, *inter alia*, the amount of compensation and costs awarded equivalent to approximately eight average monthly salaries).

3. The Court's assessment

66. Turning to the present case, the Court considers that the final civil court judgment undoubtedly constituted an interference with the applicant's right to freedom of expression. In view of the relevant provisions of the Obligations Act and the prohibition on retroactive implementation of Acts under the Montenegrin Constitution, the Court is satisfied that the interference was "prescribed by law" within the meaning of Article 10 § 2 of the Convention (see paragraphs 24, 30 and 31 above). The Court does not consider that section 198 of the Obligations Act, invoked by the applicant (see paragraph 30 above), was applicable in the present case, as it concerned compensation for pecuniary damage. The Court further accepts that the impugned judgment was adopted in pursuit of a legitimate aim, namely "for the protection of the reputation" of another. What remains to be resolved, therefore, is whether the interference was "necessary in a democratic society".

67. In this latter connection, the Court considers that the impugned article was clearly based on an allegation of fact and as such susceptible to proof. It must therefore be examined whether there were any special grounds in the particular circumstances of the present case for requiring the applicant as the editor-in-chief of the magazine to verify whether the information, which was allegedly defamatory of the plaintiff, had a basis in fact. The Court notes in this connection that the information amounted to a serious accusation against the plaintiff, the more so given the sensitivity of the regional context at the material time. On that account, the Court considers that particular diligence was required before transmitting the information to the public. Furthermore, the situation must be examined as it presented itself to the applicant at the material time, rather than with the benefit of hindsight on the basis of the information contained in the ICTY letter obtained in the course of the domestic proceedings a long time thereafter (see paragraph 9 above, see also *Bladet Tromsø and Stensaas v. Norway*, cited above, § 66 *in fine*).

68. The Court observes that the inaccuracy of the information published was, in substance, the main reason why the domestic courts awarded damages. The applicant, for his part, submitted that it was impossible for him to check the accuracy of the special correspondent's dispatch, as there was no Internet connection or official contacts between the FRY and the ICTY at the relevant time. The domestic courts themselves established only in 2002 that the information was untrue, namely six years and seven months after the domestic proceedings had been instituted. However, it is unclear whether this was due to the domestic courts' inactivity in this regard or because it had been impossible to establish the veracity of the information earlier.

69. The Court considers that, in the absence of official contacts and Internet, there was no reason for the applicant not to try at least to contact the ICTY himself by other means (telephone, fax, mail) in order to double-check the existence of a factual basis for the allegation. The Court is aware that news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest (see, *inter alia*, *Bozhkov v. Bulgaria*, no. 3316/04, § 48, 19 April 2011, and the authorities cited therein). However, in the present case, the article was not published in a daily newspaper, but in a weekly magazine, which gave the applicant more time for double-checking. In addition, the applicant's statement made during the domestic proceedings clearly implies that he was not concerned with verifying the truth or reliability of the information before publishing it (see paragraph 10 above).

70. While the Government expressed a doubt that the correspondent was the author of the article, the Court observes that the applicant proposed in the course of the domestic proceedings that the courts hear both the correspondent as well as another journalist who was present on the

magazine's premises when the impugned information was received by fax (see paragraphs 57, 11, 12 and 13 above, in that order). However, the courts refused to hear the witnesses proposed.

71. Even though it can be argued that in the particular circumstances of the instant case the applicant should have personally taken steps to verify the accuracy of the impugned information, the Court considers that the person best placed to check the accuracy was the special correspondent. It is significant that at all times the applicant maintained that he had confidence in the professionalism of the magazine's special correspondent and, on that account, requested the domestic courts to hear the special correspondent. The courts refused to do so (see paragraphs 11 and 49 above). The applicant was thus denied an opportunity to attempt to clarify the situation. The Court recalls that it is not, in principle, incompatible with Article 10 to place on the defendant in libel proceedings the burden of proving to the civil standard the truth of defamatory statements. However, this is subject to the proviso that the defendant must be allowed a realistic opportunity to do so (see *Kasabova v. Bulgaria*, cited above, § 58 *in limine*, and the relevant autorities cited therein).

72. While noting the above considerations, the Court is prepared to accept that the applicant failed to take adequate steps to verify the impugned information, while also acknowledging that the domestic courts, for their part, took a rather restricted approach to the matter by refusing the applicant's proposals to hear relevant witnesses. However, the Court does not consider it necessary to take a firm stance on these matters, because it is in any event of the view that the damages awarded against the applicant were disproportionate (see, *mutatis mutandis*, *Kasabova v. Bulgaria*, cited above, § 68).

73. In particular, the Court finds that the damages and costs awarded were very substantial when compared to the applicant's income at the time, being roughly twenty-five times greater than the applicant's pension (see paragraphs 14 and 20 above; see also *Tolstoy Miloslavsky v. the United Kingdom*, cited above; and *Lepojić v. Serbia*, cited above, § 77 *in fine*). While the Government contested that the applicant's pension was his only income, they failed to submit any evidence to the contrary (see paragraph 59 above). The Court notes that the enforcement order of 17 November 2009 implies that the applicant at that time worked for another magazine (see paragraph 16 above). However, there is no information in the case file that he was also working at the time when the domestic judgments were rendered. In any event, the Court considers that the damages and costs he was ordered to pay to the plaintiff were very substantial even when compared to the highest incomes in the respondent State in general (see paragraph 21 above, see also, *mutatis mutandis*, *Sorguç v. Turkey*, no. 17089/03, § 37, ECHR 2009-... (extracts)).

74. In conclusion, the Court finds that the award of damages and costs in the present case were disproportionate to the legitimate aim served (see, *mutatis mutandis*, *Steel and Morris v. the United Kingdom*, cited above, § 97). It follows that the interference with the applicant's right to freedom of expression was not "necessary in a democratic society".

75. There has therefore been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

76. The relevant provision of this Article reads as follows:

Article 41

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

77. The applicant claimed EUR 7,667.50 in respect of pecuniary damage, this amount corresponding to damages and legal costs awarded against him in the domestic proceedings, and EUR 5,000 in respect of non-pecuniary damage. He also claimed EUR 593 for the costs and expenses incurred before the Court.

78. The Government contested the claim in respect of pecuniary and non-pecuniary damage. In particular, they maintained that there was no causal link between the damage and the possible violation of Article 10. Finally, the domestic judgment had not been enforced yet and the applicant had not paid the amounts awarded. The Government left the applicant's claim in respect of the costs and expenses to the assessment of the Court.

79. The Court considers that this question is not ready for decision. Accordingly, it shall be reserved and the subsequent procedure fixed having regard to any agreement which might be reached between the parties (Rule 75 § 1 of the Rules of Court).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds* that the question of the application of Article 41 of the Convention is not ready for decision and accordingly
   (i) *reserves* the said question in whole;

(ii) *invites* the parties to submit, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
(iii) *reserves* the further procedure and *delegates* to the President of the Chamber the power to fix the same if need be.

Done in English, and notified in writing on 22 November 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Nicolas Bratza
President